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THE
AMERICAN AND ENGLISH
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JOHN HOUSTON MERRILL,

Late Editor of the American and English Railroad Cases and the American and English Corporation Cases.

VOLUME XI.



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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

INJURY—(See DAMNUM ABSQUE INJURIA; INTENT; MALICIOUS MISCHIEF; TORTS; WRONG).—A wrong for which the law provides a remedy.¹

INLAND.—See note 2.

1. "An injury, legally speaking, consists of a wrong done to a person, or in other words, a violation of his rights—an injury . . . necessarily imports damage, there can be no such thing as an injury without damage. An injury is a wrong, and for the redress of every wrong there is a remedy." *Parker v. Griswold*, 17 Conn. 302. "We understand the word 'injury' (or injured) as used in the constitution, to mean such a legal wrong as would be the subject of an action for damages at common law." *Pa. R. R. Co. v. Marchant*, 119 Pa. St. 541; s. c., 21 W. N. C. (Pa.) 300; 13 Atl. Rep., 698.

"By *injuria* is meant a tortious act, it need not be wilful and malicious; for though it be accidental, if it be tortious an action will lie." *Winsmore v. Greenbank*, Willes 581; *Wright v. C. & N. R. Co.*, 7 Bradw. (Ill.) 446.

Injury means in general "any wrong or damage done to a man's person, rights, reputation or goods." Webster quoted in *N. Ry. of France v. Carpentier*, 13 How. Pr. 222; s. c., 3 Ab Pr. 259.

An intent to injure is a general guilty intent. *United States v. Taintor*, 11 Blatchf. (U. S.) 374; *United States v. Harper*, 33 Fed. Rep. 481; *People v. Carmichael*, 5 Mich. 10; *People v. Adwards*, 5 Mich. 21.

In an act providing that the party injured shall be a competent witness in

criminal actions, "by injured party is meant the person who is the immediate and direct sufferer from the offense committed." *People v. Howard*, 17 Cal. 83.

"Injuriously affected," in the Land Clauses act, does not mean wrongfully or unlawfully, but damnously. "The consequential right to compensation is the creature of the statutes to be ascertained and measured by the positive language of the enactments, and not by analogy to actions of tort or trespass." Lord Westbury in *Ricket v. Metropolitan R. Co.*, L. R., 2 H. L. 202; and see *Reg. v. Essex*, 55 L. J., Q. B. 315.

2. **Inland Navigation**.—Within the meaning of the Act of Congress of March 3rd, 1851. The act of congress, passed March 3rd, 1851, which enacts that the owner of any vessel shall not be liable for the loss of freight by fire happening to or on board the vessel, unless the fire is caused by the design or negligence of such owner, contains a provision that the exemption from liability given by the act "shall not apply to the owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." Goods were put upon a vessel at Buffalo for transportation to Detroit; on the next day they took fire, and the vessel and goods were entirely destroyed. The vessel, a steam propeller, was of more than twenty tons

INLET.—See note 1.

INMATE.—See note 2.

burden, and was enrolled and licenced for the coasting trade, and engaged in navigation and commerce as a common carrier, between ports and places in different states upon the great lakes, and navigable waters connecting the same. It was *held*, that the vessel was not a "vessel used in inland navigation" within the meaning of the above exception. Said the court: "They (the great lakes) form a boundary between a foreign country and the United States for a distance of some twelve hundred miles The aggregate length of these lakes is over fifteen hundred miles, and the area covered by their waters is said to be some ninety thousand square miles. The commerce upon them corresponds with their magnitude The vessels (engaged in commerce on the lakes) are duly licenced for the foreign trade, as well as for that carried on coastwise. This commerce, from its magnitude, and the well known perils incident to the lake navigation, deserves to be placed on the footing of commerce on the ocean; and we think, in view of it, congress could not have classed it with the business upon the rivers, or inland navigation, in the sense in which we understand these terms The policy and justice of the limitation of the liability of the owners, under this act of 1851, are as applicable to this navigation as to that of the ocean. The act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe." *Moore v. American Trans. Co.*, 24 How. (U. S.) 1; *S. C. in State Court*, 5 Mich. 368.

The War Eagle was a steamer of more than twenty tons burden, duly enrolled and licenced for the coasting trade, and plying on the Mississippi river between the ports of Dubuque, Iowa, and St. Paul, Minnesota, touching at intermediate points. While making one of her regular trips she was burned with her cargo. It was *held*, that she was a vessel engaged in "inland navigation," within the meaning of the act. *The War Eagle*, 6 Biss. (U. S.) 364.

Navigation on Currituck Sound in South Carolina, is "inland navigation," within the meaning of the act. *Woodhouse v. Cain*, 95 N. C. 113.

Inland Waters.—The act of congress of July 2nd, 1864, ch. 225, § 7, provides "that no property seized or taken on any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize." Said the court in construing this section: "The term 'inland' as here used was evidently intended to apply to all waters of the United States upon which a naval force could go, other than bays and harbors on the sea coast. In most instances property of the enemy on them could be taken, if at all, by an armed force without the aid of vessels of war." *Porter v. United States*, 106 U. S. 607; *The Cotton Plant*, 10 Wall. (U. S.) 577.

1. A statute incorporating a railroad company which was to construct its road along the shore of the Hudson river enacted that bridges of a certain kind should be built over "Duyvel Creek and other navigable streams or inlet," and bays crossed. It was said by the court in construing this statute: "The word 'inlet' seems to be used by the statute to denote the indentation in the shore, at the mouth or outlet of a navigable stream falling into the Hudson river, and the word 'bay' to describe an indentation or curve where there is no such stream." *Tillotson v. Hudson River R. R.*, 9 N. Y. 580.

2. "By the St. 31 El. 7, no inmate, or more families than one, shall dwell in any cottage, on pain that the owner of such cottage, placing or suffering such inmate, etc., shall forfeit to the lord of the leet 10s. per mensem A man is accounted an inmate, who not having sufficient to live of himself by his land, art or trade, dwells in part of another's house. As, if common breakers of hedges, or other idle or suspicious persons dwell in a house with another; Or, if a poor laborer dwells with another, and both go by the same door into the high street. Or, if a man, not of ability, take certain rooms in an house. But if a man demise parcel of the house where he dwells, and severs it from the other part, and makes separate doors to the high street, the lessee is not an inmate; for they are two houses. Or, if a man take another *ad mensem*, or to sojourn with him, and he has certain rooms, he is not an inmate. Or, if a man take his married daughter

INNOCENT CONVEYANCES.—A technical term used to signify those conveyances made by a tenant of his leasehold which do not occasion a forfeiture; these are conveyances by lease and release, bargain and sale, and a covenant to stand seized by a tenant for life.¹

INNS AND INN KEEPERS—(Including Boarding-House Keepers).

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with her husband, according to agreement, and suffer them to have certain rooms in his house, or, if he suffer a gentleman to have certain rooms in his house, who does not table with him, but goes to a victualler's for his sustenance. *Kit. 456*". *Comyn's Dig., tit. Jus. of Peace, B. 85.*

By the English Public Health act, 1848, § 69, if any street not being a highway, be not sewered, levelled, paved, etc., to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting such parts as may require to be sewered, etc., require them to sewer,

etc., the same within a time to be specified in such notice; and if such notice be not complied with, the local board may execute the works, and the expenses shall be paid by the owners in default. By section 150 it is provided that in all cases in which any notice is required to be given to the owner or occupier of any premises, the notice shall be served either personally or by delivering the same to some "inmate" of the owner's or occupier's "place of abode." It seems that a place of business is a "place of abode," and a clerk an "inmate," within the meaning of the 150th section. *Mason v. Bibby*, 2 Hurl. & Colt. 881.

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1. Inns in General—Definition of Inn.—An inn is a public house of entertainment for all who choose to visit it.¹ More precisely it is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and are, while there, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, supplied at a reasonable charge with their meals, their lodging, and such ser-

1. *Wintermute v. Clark*, 5 Sandf. (N. Y.) 242, 247, states this to be the true definition of an inn. In *The People v. Jones*, 54 Barb. (N. Y.) 311, 316, an "inn" is said to be "a house for the lodging and entertainment of travellers." To like effect, see *Lewis v. Hitchcock* (N. Y.), 10 Fed. Rep. 4, 6.

Liquors and Care of Animals.—In *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 660, RHODES, J., says: "The definition of an inn, given by MR. JUSTICE BAILEY in *Thompson v. Lacey*, 3 Barn. & Ald. 286, as a house where a traveller is furnished with everything which he has occasion for while on his way," is comprehensive enough to include every description of an inn, but a house that does not fill the full measure of this definition may be an inn. It probably would not be regarded as essential to an inn that wine or spirituous or malt liquors should be provided for the guests. At an inn of the greatest completeness entertainment is furnished for the traveller's horse as well as for the traveller, but it has long since been held that this was not essential to give character to the house as an inn. 2 Kent's Com. 595; 1 Smith's Lead. Cas., 8th

ed.; notes to *Coggs v. Bernard*; Story on Bailments, § 475; *Kister v. Hildebrand*, 9 B. Mon. (Ky.) 74; s. c., 48 Am. Dec. 416."

Parties Accommodated.—In *Carter v. Hobbs*, 12 Mich. 52; s. c., 83 Am. Dec. 762, 764, the court through CHRISTIANCY, J., said: "By the original writ, specially framed for enforcing the liability of inn keepers, as well as by the cases generally, an inn would seem to be a house kept for the accommodation and entertainment of travellers and wayfaring men, and not for those residing in the same neighborhood who may visit or others who may remain at the house for some special purpose not connected with passage or travel. See *Calye's Case*, 8 Coke 63, and note to same; 1 Smith's Lead. Cas. *131; *Coggs v. Bernard*, Ld. Raym. 909; s. c., 1 Smith's Lead. Cas. *199." As it is stated in the same opinion, "in *Calye's Case*, 8 Co. 63; [s. c., Smith's Lead. Cas. *131, 132], it is said: 'Common inns are instituted for passengers and wayfaring men, and therefore if a neighbor, who is no traveller, as a friend, at the request of the inn holder, lodges there and his goods be stolen, etc., he shall not have an action, for the writ is *ad hospitandos hom-*

vices and attention as are necessarily incident to the use of the house as a temporary home.¹

Definition of Tavern.—A tavern is a house licenced to sell liquors in small quantities, to be drunk on the spot, and denotes a house for the entertainment of travellers, as well as for the sale of liquors.²

Definition of Hotel.—A hotel, in this country, is what in France was known as a *hotellerie*, and in England, as a common inn of that superior class usually found in cities and large towns.³

ines, etc., transeuntes et in eisdem hospitantes, etc. Carter v. Hobbs, 12 Mich. 52; s. c., 83 Am. Dec. 762, 765." But a different view is developed in Walling v. Potter, 35 Conn. 183, 185.

1. Cromwell v. Stephens, 2 Daly (N. Y.) 15, 24, holding this to be exactly what is understood in this country by a hotel. For English statutory definitions of terms "inn" and "inn keeper" see act 26 and 27 Vict., ch. 41, § 4; Schouler on Bailments (2nd ed.), § 277, note on p. 286. For discussion of various definitions of terms "inn" and "guest" see Walling v. Potter, 35 Conn. 183, 185.

Not Mere Eating Place.—An inn has been judicially defined to be "a house where the traveller is furnished with everything which he has occasion for whilst on his way." But a mere coffee house or eating room or boarding house is not an inn. The Civil Rights bill, 1 Hughes (U. S.) 541, 543. See 2 Pars. Contr. (7th ed.) *145. In Bonner v. Wellborn, 7 Ga. 296, 307, the leading ideas which pervade all the authorities are said to be "that inns are houses for the entertainment of travellers—wayfarers, as they are called in Calye's Case, 8 Co. 32—for the entertainment of all travellers, at all times and seasons, who may properly apply and behave with decency; and that as guests for a brief period, and not as lodgers or boarders by contract for a season." A house of reception and entertainment for all comers, but especially for emigrants, is an inn. Willard v. Reinhardt, 2 E. D. Smith (N. Y.) 148, 149.

2. State v. Chambliss, Cheves (S. Car.) 220. s. c., 34 Am. Dec. 593, 596, reaching this conclusion after a full discussion of the meaning of the term, as merely synonymous with inns. On statutory scope of term, see Bonner v. Wellborn, 7 Ga. 296; St. Louis v. Seigrist, 46 Mo. 593.

3. Cromwell v. Stephens, 2 Daly (N.

Y.) 15, 21, fully discussing the origin of the term, and holding that a house kept for letting lodging rooms without any arrangements to provide board or meals in connection therewith, does not constitute a "hotel" or become liable to pay a water tax imposed by ordinance upon "hotels." On English scope of term, see Smith v. Scott, 9 Bing. 14, 17. It is treated as settled in Taylor v. Monnot, 4 Duer (N. Y.) 116, 117, upon the authority of Wintermute v. Clark, 5 Sandf. (N. Y.) 242, that a hotel in a city which receives transient persons as guests is a common inn.

European Plan.—A public house designated as a "hotel," where all comers register their names and are furnished with rooms for an uncertain period, and under no express engagement, and where meals are furnished on the "European plan," the only variation from ordinary hotels being that a refectory is kept on the same premises at which guests take their meals, if they please, paying for them then and there, is an inn and the proprietor an inn keeper with all the responsibilities attaching to such a character as respects guests who lodge in the house. Krohn v. Sweeney, 2 Daly (N. Y.) 200, 202. To like effect see Bernstein v. Sweeney, 33 N. Y. Super. Ct. 271, 274. Compare also Pinkerton v. Woodward, 33 Cal. 557; s. c., 91 Am. Dec. 657.

In Hancock v. Rand, 94 N. Y., 1; s. c., 46 Am. Rep. 112, 116; the view was taken that a general in the United States army and his family, who were guests at the restaurant of a hotel at the time when the loss of some of their valuables by theft occurred, and paid as such for each meal, were not boarders because their lodgings were in the hotel, or in rooms connected therewith, especially as the proof did not establish a contract for any fixed time. MILLER, J., said: "Hotels in modern days are differently conducted from what they were in

Synonymous Use of Terms "Inn," "Tavern," and "Hotel."—These terms are often used in American statutes as synonymous.¹

Distinguished from Similar Establishments.—But a distinction is made between an inn or equivalent establishment, and a mere boarding house, lodging house, etc.²

times gone by. Furnishing rooms at a fixed price, and meals at prices depending upon the orders given, at the usual hotel rates, constitutes a material difference in the system of keeping hotels from that which formerly existed."

1. Thus the terms "inn, tavern or hotel," employed in an act restricting the granting of licences to sell intoxicating liquors, are considered to be "used synonymously to designate what is ordinarily and popularly known as an inn or tavern, or place for the entertainment of travellers, and where all their wants can be supplied." *People v. Jones*, 54 Barb. (N. Y.), 311, 316.

In *St. Louis v. Siegrist*, 46 Mo. 593, 594, WAGNER, J., said: "'Tavern,' 'hotel' and 'public house' are, in this country, used synonymously, and while they entertain the travelling public, and keep guests, and receive compensation therefor, they do not lose their character, though they may not have the privilege of selling liquors;" and it was accordingly held that the word "tavern" includes a hotel within powers granted by a city charter to licence; etc., so as to sustain an ordinance requiring a license from keepers of a hotel or boarding house. "Tavern or house of entertainment" are deemed synonymous terms, within a law requiring a licence, in *Bonner v. Welborn*, 7 Ga. 296, 304. Throughout a statute regulating taverns and groceries, the terms "inn" and "tavern," and "inn holder" and "tavern keeper," are considered to be used synonymously, in *Overseers etc. v. Warner*, 3 Hill (N. Y.) 150, 156.

On the synonymous scope of "hotel" and "inn" see *Cromwell v. Stephens*, 2 Daly (N. Y.) 15, 25. But a different view is taken under an English statute in *Smith v. Scott*, 9 Bing. 14, 17. See also *In re Jones*, Law Rep., 3 Ch.D. 457. So a distinction has been made in that country between a tavern and an inn, in a case where there was a refreshment bar within a hotel, on the ground that in such a place no one had a right to be served more than in any other shop. *The Queen v. Rymer*, Law Rep., 3 Ch. D. 136, 140.

2. **Boarding House.** "The distinction

between a boarding house and an inn," says DALY, J., in *Willard v. Reinhardt*, 2 E. D. Smith (N. Y.) 148, 149, "is this: In a boarding house the guest is under an express contract, at a certain rate for a certain period of time; but in an inn there is no express engagement, the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract." See *Cromwell v. Stephens*, 2 Daly (N. Y.) 15, 24. Reference is made to city houses of entertainment, in which the guest or traveller pays so much per day for his room and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal as he takes it; and where the restaurant forms a part of the establishment, and the house is kept under one general management for the reception of all travellers or guests that may come, it is said to be an inn, and to differ from a boarding house, "for the reason that all who come are received, and because the guest engages for no specific period, but pays only for the time he is there."

In *Cady v. McDowell*, 1 Lans. (N. Y.) 484, 486, JOHNSON, J., delivering the opinion of the court, says: "A boarding house is not, in common parlance or in legal meaning, every private house where one or more boarders are kept occasionally only, and upon special considerations. But it is a *quasi* public house, where boarders are generally and habitually kept, and which is held out and well known as a place of entertainment of that kind." He further remarked: "A boarding house is as well known and as distinguishable from other houses, in every city and village in the country, as an inn or a tavern. It is a house where the business of keeping boarders generally is carried on, and which is held out by the owner or keeper as a place where boarders are kept." So in *Commonwealth v. Cuncannon*, 3 Brewst. (Pa.) 344, 347, in passing upon the question whether a person residing in a boarding house, whose lower story was occupied as a tavern, was entitled to registration as "a private resident,

2. Inn Keepers in General—Definition of Inn Keeper.—A common inn keeper is defined to be "a person who makes it his business to entertain travellers and passengers, and provide lodging and necessities for them, and their horses and attendants."¹

actually residing with a private house-keeper," it was said: "The true distinction is perfectly understood. The public house is for the entertainment of all who come lawfully and pay regularly. The boarding house is for the accommodation of those who are accepted as guests by the proprietor. Such an establishment is as much a private house as if there were no boarders."

Restaurant.—A restaurant, to which a person resorts for the mere temporary purpose of obtaining a meal, is not an inn. *Carpenter v. Taylor*, 1 Hilt. (N. Y.) 193, 195. In this case *INGRAHAM, J.*, said: "It cannot now be held that restaurants are to be deemed inns, subjecting the keepers thereof to all the responsibilities of an inn keeper. On the contrary, as the customs of society change, and the modes of living are altered, the law, as established under different circumstances, must yield and be accommodated to such changes. A mere eating house for meals cannot now be considered an inn, nor can the liabilities attaching to inn keepers be extended to the proprietors of such establishments. They are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided for travellers; and, although the defendant may carry on in another part of his premises the business of an inn keeper, it does not follow that the liability for that part of his premises is to be extended to the whole."

In *Lewis v. Hitchcock* (N. Y.) 10, Fed. Rep. 4, the court, after stating that the term "restaurant" has no definite legal meaning, said: "As currently understood it doubtless means only or chiefly an eating house. But not unfrequently a bar forms a part of it; sometimes lodgings in addition; and it is just as currently understood that in numerous resorts termed restaurants some lodgings for travellers are provided, or alleged to be provided, so as to obtain a licence for the sale of liquors, which is allowed under the excise laws of New York to hotels, taverns or inns only. Sess. Laws N. Y. 1857, ch. 628, §§ 2, 8, 13; *Behan v. People*, 17 N. Y. 516; *Schwab v. People*, 4

Hun (N. Y.) 520. However this may be, it is sufficient to say that the term "restaurant" has no such fixed and definite legal meaning as necessarily to exclude its being an inn in the legal sense. It may be an inn or it may not be, according to its real character. The name by which it goes is of little or no account. *Carpenter v. Taylor*, 1 Hilt. (N. Y.) 195. And the court cannot say judicially that the place in question, though described under a *videlicet* as a restaurant, may not also be an inn, as previously averred."

Lodging House.—A mere lodging house, in which no provision is made for supplying the lodgers with their meals, wants one of the essential requisites of an inn. *Cromwell v. Stephens*, 2 Daly (N. Y.) 15, 24.

1. *Bacon's Abr., Inns and Innkeepers*, B; *Story Bailm.*, § 475. The Civil Rights Bill, 1 Hughes (U. S.) 541, 542. This definition is thus quoted and supported in *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; s. c., 48 Am. Dec. 416, 418, where it is further remarked: "But it has been decided that a man may be an inn keeper, and liable as such, though he have no provision for horses. It is not necessary that he should have a sign indicating that he is an inn keeper, but it must be his business to entertain travellers and passengers. His duty extends chiefly to the entertaining and harboring of travellers, etc., and therefore, if one who keeps a common inn refuses to receive a traveller, or to find him in victuals, etc., for a reasonable price (without good excuse, as that his house is full), he is liable not only to a civil action, but to an indictment. For having taken upon himself public employment, he must serve the public to the extent of that employment. *Bacon's Abr., Inns and Innkeepers*, ch. 1." To same effect, see *Southwood v. Myers*, 3 Bush. (Ky.) 681, 684. It has also been pointed out that, in order to charge a party as an inn keeper, it is not necessary to prove that it was only for the reception of travellers that his house was kept open, but it is sufficient to prove that all who came were received as guests, without any previous arrangement as to the duration of their stay or

Keeper of Boarding House, Lodging House, etc.—The keeper of a private boarding house or lodging house, or of a restaurant or coffee house, is not an inn keeper in the view of the law, notwithstanding he may furnish lodgings or food or both for the entertainment of his guests.¹

Occasionally Entertaining Travellers.—So, one who only occasionally entertains travellers for compensation, when it suits his pleasure, and who does not hold himself out to the public as a keeper of a house for the accommodation of the travelling public, is not an inn keeper.²

the terms of their entertainment. *Wintermute v. Clark*, 5 Sandf. (N. Y.) 242, 246.

Licence.—The possession of a licence does not make, or the want of it prevent, a person from being an inn holder at common law. *Narcross v. Narcross*, 53 Me. 163, 168. See also *Lyon v. Smith*, Morris (Iowa), 184, 186, concerning rule under statutes. See *Beale v. Posey*, 72 Ala. 323, 329, 330; *Larider v. Youngblood*, 73 Ala. 587, 590. Compare *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179; s. c., 40 Am. Dec. 642, 644, 645; *Lord v. Jones*, 24 Me. 439; s. c., 41 Am. Dec. 391. In an action to recover the value of property of the plaintiff, stolen while he was dining at the defendant's restaurant, in which it is proved that liquors were sold, the court will take judicial notice that no liquors could be legally sold there unless under a licence, and that no licence could be issued for the sale of liquors upon the premises except the same were kept as an inn, tavern or hotel; and will presume in the absence of evidence to the contrary, that the defendants are inn keepers, and liable as such for the property of guests. *Korn v. Schedler*, 11 Daly (N. Y.) 234, 235.

Holding Out.—Where a person, by the means usually employed in that business, holds himself out to the world as an inn keeper, and in that capacity is accustomed to receive travellers as his guests, and solicits a continuance of their patronage, and a traveller, relying on such representations, goes to the house to receive such entertainment as he has occasion for, the relation of inn keeper and guest is created, and the inn keeper cannot be heard to say that his professions were false, and that he was not, in fact, an inn keeper. *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 660. In this case the court said: "The rules regulating the respective rights, duties and responsi-

bilities of inn keeper and guest have their origin in considerations of public policy, and were designed mainly for the protection and security of travellers and their property. They would afford the traveller but poor security if, before venturing to entrust his property to one who, by his agents, cards, bills, advertisements, sign, and by all the means by which publicity and notoriety can be given to his business, represents himself as an inn keeper, he is required to enquire of the employes as to their interest in the establishment, or take notice of the agencies or means by which the several departments are conducted. The same considerations of public policy that dictated those rules demand that the inn keeper should be held to the responsibilities which, by his representations, he induced his guest to believe that he would assume." See also *Howth v. Franklin*, 20 Tex. 798; s. c., 73 Am. Dec. 218, 219.

Keeping Livery Stable.—An inn keeper who also keeps a livery stable may be liable as an inn keeper for a horse, chaise and harness put into his charge by parties who are not guests. *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, 474.

The fact that a licence was taken out in the name of the paid manager of a hotel which was owned by a company, does not make such manager liable for goods lost at the hotel, but the company is the real inn keeper. *Dixon v. Birch*, Law R., 8 Ex. 135, 136.

1. *Blum v. Southern etc. Car. Co.*, 1 Flip. (U. S.) 500, 502.

2. *Howth v. Franklin*, 20 Tex. 798; s. c., 73 Am. Dec. 218, 219. The case of a farmer along a public road. To like effect see *State v. Mathews*, 2 Dev. & B. (N. Car.) 424; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; s. c., 48 Am. Dec. 416, 419.

In *Lyon v. Smith*, Morr. (Iowa) 184, 186, the court said: "To render a person

Acting in Special Capacity.—An inn keeper may be a bath-house keeper, and may conduct a sea-bathing house as a separate and distinct employment, without being responsible in the one capacity for liabilities incurred in the other.¹

3. Who Are Not Inn Keepers—Those Furnishing Food and Drink to Public.—One who merely furnishes food and drink to the public is not an inn keeper, whether his establishment be called a tavern, a coffee house, an ale house, a restaurant or a bar room.²

liable as a common inn keeper, it is not sufficient to show that he occasionally entertains travellers. Most of the farmers in a new country do this without supposing themselves answerable for the horses or other property of their guests which may be stolen or otherwise lost without any fault of their own. Nor is such the rule in older countries, where it would operate with far less injustice, and be less opposed to good policy than with us. To be subjected to the same responsibilities attaching to inn keepers, a person must make tavern keeping to some extent a regular business, a means of livelihood. He should hold himself out to the world as an inn keeper. It is not necessary that he should have a sign or a licence, provided that he has in any other manner authorized the general understanding that his was a public house, where strangers had a right to require accommodation. The person who occasionally entertains others for a reasonable compensation is no more subject to the extraordinary responsibility of an inn keeper than is he liable as a common carrier, who in certain special cases carries the property of others from one place to another for hire." Accordingly, a party was held not chargeable as an inn keeper where the only proof was that he had entertained several individuals at his house over night and been paid a compensation for his care and attention, but there was no proof that he held himself out in any manner as a common inn keeper, or that he was so regarded by the public.

1. *Minor v. Staples*, 71 Me. 316; s. c., 36 Am. Rep. 318. But an inn keeper who also keeps a livery stable may be liable as an inn keeper for a horse, chaise and harness put in his charge by parties who are not personal guests. *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, 474.

Conclusion as to Who Are Inn Keepers.—"We may gather," remarks a writer on a cognate subject, "that the legal

conclusion as to who are inn keepers must depend upon many circumstances combined: such as the regularity of one's occupation, publicity, one's method of receiving compensation, and his means of accommodating all who may choose to come and go. In short, an inn keeper, one who exercises the public vocation we are now describing, may well be defined as one who regularly keeps open a public house for lodging and entertaining transient comers on the general expectation of his suitable recompense." Schouler on Bailments (2nd ed.), § 279.

2. Schouler on Bailments (1st ed.) 252; see *Doe v. Laming*, 4 Camp. 77 (coffee house); *Carpenter v. Taylor*, 1 Hilt. (N. Y.) 195 (restaurant); *Queen v. Rymer*, L. R., 2 Q. B. D. 136, 139 (refreshment bar with hotel).

Occasionally Entertaining Travellers.—The keeper of a coffee house or boarding house may occasionally entertain travellers without incurring the liability of an inn keeper. *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; s. c., 48 Am. Dec. 416, 419. See further on effect of occasionally entertaining travellers. *Howth v. Franklin*, 20 Tex. 798; s. c., 73 Am. Dec. 218, 219.

Retailing Liquor.—Nor will the simple fact of a person selling spirituous liquors by small measure constitute a person who keeps an ordinary boarding house a tavern keeper, where such person has not received a licence for that purpose, and does not hold herself out as such, or entertain the travelling community. *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Har. (N. J.) 480; s. c., 38 Am. Dec. 525, 529.

Hotel Bill.—It is said to be settled in this country that a person keeping a house for the entertainment of travellers with board and lodging is an hotel keeper, and that as such hotel keeper he is under an obligation to furnish guests with board and lodging; but it is ruled, in the same case in which this statement is made, that an hotel

Keeping Mere Boarding House, Lodging House, etc.—So a person who keeps a mere boarding house or lodging house, or even one who keeps a house for lodging strangers for a season, as visitors to watering places, unless he be the keeper of a tavern, has not the character of an inn keeper or the privilege of retaining the goods of his guest until his charges are paid.¹

keeper is not bound to furnish his guests with liquors, cigars or billiards, and that the person guaranteeing the payment of a "hotel bill" would not be liable for such articles, because he would not expect or anticipate them to be included in the bill. *Patterson v. Gage*, 37 Alb. L. J. 248, where the court said: "It is clear that such articles as an hotel keeper is under obligation to furnish his guests with upon request are proper articles to be included in the term 'hotel bill.' But if the term is extended so as to include items which the hotel keeper is not obligated to furnish, but which he does furnish as a matter of convenience to his guests, then it can have no general and common meaning. But the hotel bill of one hotel keeper might include board and lodging only; that of another might include board, lodging and liquors; and still another might include board, lodging, liquors, cigars and billiards; and this list of articles might be continued so that such bill could be made to include all articles that the guests might order that are kept for sale by the proprietor of the hotel."

1. *Southwood v. Myers*, 3 Bush (Ky.) 681, 685.

Proprietor of Watering-place Establishments.—One whose business it is to rent houses and furnish board, lodging and attention for a season at a watering place to the visitors who resort to it, is not the keeper of a tavern or house of entertainment within the statutory scope of those terms as synonymous with inn, but is rather the keeper of a private boarding house, as he provides for tenants for a season rather than for guests for a day, night or week, for health seekers rather than for travellers, and for special visitors rather than for the general public. *Bonner v. Welborn*, 7 Ga. 296, 307; following *Parkhurst v. Foster*, 5 Mod. 426, and *Parker v. Flint*, 12 Mod. 254, 255. To like effect see statement in *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; s. c., 48 Am. Dec. 416, 418.

Owner of Apartment Hotel in "Flats."—The owner of an apartment hotel

rented out in suites or flats to families for housekeeping purposes is not an inn holder, though he furnishes heat, hot and cold water and janitor's services to each suite, if no board, lodging or accommodation is furnished for transient patrons. *Davis v. Gay*, 141 Mass. 531, 534.

Restaurant Keeper in Twofold Capacity.—It has been suggested that it may well be that a person occupies a twofold character, viz., that of a mere restaurant keeper, so far as relates to his refectory only for the purpose of taking meals, while he is an inn keeper with all the responsibilities attaching to such a character, as respects travellers who are received and accommodated by him, as guests, with lodgings in that portion of the building arranged as lodging places for an uncertain price and with no express engagements. *Krohn v. Sweeney*, 2 Daly (N. Y.) 200, 202. But it has been considered that no such distinction could be maintained consistently with adjudged cases, where there is no doubt of the fact that the party keeps an inn, unless the one business is carried on separate and distinct from the other in the same building (as was the case in *Carpenter v. Taylor*, 1 Hilt. (N. Y.) 193, 195), or it appears (as in *Seward v. Seymour*, *Anthon's Law Student* 51 [stated in *Cromwell v. Stephens*, 2 Daly (N. Y.) 15, 23, 24]) that the guest makes a specific contract with the inn keeper as a regular boarder at a fixed compensation per week or otherwise. *Kopper v. Willis*, 9 Daly (N. Y.) 460, 464.

Boarding-house Keeper.—There is, in the case of the inn keeper, in the absence of any lawful excuse, a necessity to receive the party which does not exist in the boarding-house keeper. *Dansey v. Richardson*, 3 El. & B. 144, 159. "The inn keeper is bound to receive everyone who applies, if in a fit condition to be received, while the boarding-house keeper is not bound to receive anyone, except upon special contract." *Cady v. McDowell*, 1 Lans. (N. Y.) 484, 486. See on distinction between an inn and a boarding house or similar establish-

ment, *Willard v. Reinhardt*, 2 E. D. Smith (N. Y.) 148, 149; *Cromwell v. Stephens*, 2 Daly (N. Y.) 15, 24.

Keeping Occasional Boarders.—In this case it was *held* that a grocer, who was a housekeeper, but not accustomed to take persons to board, and who, upon the application of his wife's brother, received such relative and his children into his own house, for an indefinite time, with a general understanding that he was to be compensated for board and accommodations, was not a boarding house keeper, within the meaning of a statute allowing the detention of the baggage and effects of boarders, for board due; and upon this matter *JOHNSON, J.*, delivering the opinion of the court, said: "Who is a boarding house keeper within the meaning and intention of this act? Is it every housekeeper who in a single instance takes an individual to board for a limited time by way of accommodation, though for compensation, or who occasionally takes one or more persons in that way and no other, but who does not make it his regular business or calling, or is it a person who belongs to a well understood class of persons, which makes the keeping of boarders a business or calling in whole or in part? I am clearly of the opinion that it is the latter class only that the statute was designed to protect, or that comes within its terms and meaning."

"Private House Keeper."—In deciding a question of the parties entitled to registration, it was said by *BREWSTER, J.*: "I do not see why the proprietor of a private boarding house is not a private house keeper. Shall we say that the house is not private because the head of the family boards his son, and if taking a relative to board does not change the character of a private house, is it affected by receiving a stranger as a lodger? It will hardly be contended that it is any the less a private house because it contains one such person, and the moment that is admitted there is an end of this difficulty, for we cannot draw the line and say one, two or six persons may lodge in a house and it still be *private*, but that the moment it receives seven it becomes a public house." *Commonwealth v. Cuncannon*, 3 Brewst. (Pa.) 344, 347.

Lodging House Keeper.—A lodging house keeper must make a contract with every man that comes, and charges by the week or month instead of for the number of days, while an

inn keeper is bound, without making any special contract, to provide lodging and entertainment for all at a reasonable price. *Thompson v. Lacy*, 3 Barn. & Ald. 283, 287. See statement of this case in *Cromwell v. Stephens*, 2 Daly (N. Y.) 15, 23, which discusses at (p. 26) the case of one who kept a separate lodging house and restaurant on the same premises.

Sleeping Car Company.—The company owning a sleeping car, and receiving pay for particular berths for a particular trip from passengers, who have paid their fare on the railroad, no part of which goes to such owner, it was *held* not liable, either as a carrier or an inn keeper, for money stolen from passengers on his car, in *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; s. c., 24 Am. Rep. 258, 260, 261. The grounds for the ruling were that the company did not, like an inn keeper, undertake to accommodate the travelling public indiscriminately, but only a certain class, or to furnish victuals and lodging, but lodging alone, or to care for the necessary goods of the traveller, or any goods whatever.

The court further remarked: "The same necessity does not exist here as in the case of a common inn. At the time when this inn keeper's liability had its origin, wherever the end of the day's journey of the wayfarer man brought him, there he was obliged to stop for the night, and entrust his goods and baggage into the custody of the inn keeper. But here the traveller was not compelled to accept the additional comfort of a sleeping car. He might have remained in the ordinary car, and there were easy methods within his reach by which both money and baggage could be safely transported."

It has since been remarked that it is apparently settled "that sleeping car companies are not liable, either as inn keepers or common carriers, for personal goods stolen from the person of an occupant of a berth in a sleeping car." *Woodruff etc. Co. v. Diehl*, 84 Ind. 474; s. c., 43 Am. Rep. 102, 107; s. c., 9 Am. & Eng. R. R. Cas. 294. To the same effect is the later case of *Pullman Palace Car Co. v. Gaylord*, 30 Alb. L. J. 424; s. c., 23 Am. L. Reg. N. S. 788. These cases cite or review *Welch v. Pullman Palace Car Co.*, 16 Abb. (N. Y.) Pr., N. S. 352; *Palmeter v. Wagner*, 11 Alb. L. J. 149; and *Blum v. Southern etc. Car Co.*, 1 Flip. (U. S.) 500; s. c., 13 Alb. L. J. 221; s.

4. Who Are Guests—Lien and Liability Limited to Guests.—Neither the lien of an inn keeper upon goods entrusted to him, nor his liability for their loss, exists where the owner of the goods was not actually or constructively the guest of the inn keeper.¹

c., 3 Cent. L. J. 592, which fully discusses the liability of such companies. Consult further *Pullman Palace Car Co. v. Gardner*, 16 Am. & Eng. R. R. Cas. 324; *Dargan v. Pullman Palace Car Co.*, 2 Tex. App. 607; s. c., 26 Am. & Eng. R. R. Cas. 149; *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; s. c., 28 Am. & Eng. R. R. Cas. 148. On the liability of a sleeping car company for refusing to permit a party to occupy a sleeping berth assigned to him, and which he offered to pay for, see *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; s. c., 27 Alb. L. J. 303; 11 Am. & Eng. R. R. Cas. 92. See also on expulsion of passenger from sleeping car, *Lawrence v. Pullman Palace Car Co.*, 144 Mass. 1; s. c., 28 Am. & Eng. R. R. Cas. 151. Where a passenger in a day parlor car, when about to go from the car for the purpose of obtaining refreshments, left a small satchel or reticule upon the sill of the car window, and during her absence it was stolen, it was held that she was guilty of negligence contributing to the loss, and that the company owning the car was not liable. *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243; s. c., 28 Am. & Eng. R. R. Cas. 147.

Steamship Company.—A company owning a steamship carrying passengers and goods for hire is not an inn keeper or liable as such for the loss of a watch stolen from the state room of a passenger. *Clark v. Burns*, 118 Mass. 275; 19 Am. Rep. 456, 458, where the court said: "The liability of an inn keeper extends only to goods put in his charge as keeper of a public house and does not attach to a carrier who has no house and is engaged only in the business of transportation."

1. *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 665.

Deposit with Clerk.—"Inn keepers are not liable as such for goods deposited with them by any but guests of their inns. While an individual proprietor of an inn may incur a liability as bailee for the safe keeping of goods which he has voluntarily undertaken to keep for others than guests, it is not within the course of employment of a

mere clerk of such inn keeper to receive on deposit the goods of any except guests of the inn; and if he does so, it is a transaction between him and the owner, and no liability for the loss of such goods attaches to the inn keeper." *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 33; s. c., 58 Am. Rep. 785.

Leaving Horse.—In *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242, 244, *COLE, C. J.*, remarked: "JUSTICE WILDE says, in *Mason v. Thompson*, 9 Pick. (Mass.) 283; s. c., 20 Am. Dec. 471, that it is clearly settled that to constitute a guest in legal contemplation it is not essential that he should be a lodger or have any refreshment at the inn. If he leaves his horse, then the inn keeper is chargeable on account of the benefit he is to receive for the keeping of the horse. JUDGE BRONSON, in commenting on this case in *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 490; s. c., 38 Am. Dec. 663, says [that] where the owner of a horse sent the animal to an inn to be kept, but never went there himself and never intended to go as a guest, it seemed but little short of downright absurdity to say that in legal contemplation he was a guest. On principle it would seem that a person should himself be either actually or constructively at the inn or hotel for entertainment in order to establish the relation of landlord and guest."

In the same case it is said: "If a traveller have no personal entertainment or refreshment at an inn, but simply care and food for his horse, he may be a guest, for he makes the inn his temporary abode—his home for the time being. *Ingalsbee v. Wood*, 36 Barb. (N. Y.) 452; *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188. The term "guest" is held to cover a traveller or wayfarer who obtains entertainment for his beasts for pay. *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 260.

In *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 577, the court, through *REDFIELD, C. J.*, said that to the extent of the horse and equipage "it must be regarded as fully settled by authority, both in England and this country that the inn keeper is liable as such where the horse of a

Scope of Term "Guest."—The prominent idea in the definitions of the term "guest" is that a guest must be a traveller, wayfarer or transient comer to an inn for lodging and entertainment.¹

But the question whether the relation of host and guest had attached only becomes of consequence when the inn keeper is sued for the loss of goods of an alleged guest, and is immaterial where the only complaint is that the inn keeper would not receive parties as guests.²

Fixing Price or Length of Stay.—Though the decisions upon the subject have not been entirely harmonious, yet recent cases indicate a tendency in the courts to conform the old rule to the changes made in hotel keeping in modern times, by holding that a special agreement fixing in advance the price to be paid or the

traveller is put at the inn, although the owner or traveller himself puts up at another place. *Peet v. McGraw*, 25 Wend. (N. Y.) 653." And the cases of *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663; *Thickstun v. Howard*, 8 Blackf. (Ind.) 535; *Hickman v. Thomas*, 16 Ala. 666, which are often referred to as denying that the relation of guest is thereby created so as to impose the increased responsibility of inn keeper, certainly do not decide that point, since it was not involved in the cases, although such an opinion is there intimated. All that is there decided is, that the horse of one not a traveller put at an inn created only the ordinary liability of a bailee for compensation on the part of the inn keeper. And this is altogether consistent with the cases of *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471; *supra*, and *York v. Grindstone*, 1 Salk. 388."

1. *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242, 244.

Purchasers of Liquor on Sunday.—Persons who resort to an inn in Massachusetts on the Lord's Day, for the purpose of procuring and drinking liquor, are not guests within the meaning of the screen liquor law of that State. *Commonwealth v. Moore*, 37 Alb. L. J. 37; *citing* *Com. v. Hagan*, 140 Mass. 289.

2. *Atwater v. Sawyer*, 76 Me. 539, 544.

Definitions of "Guest."—A guest is a "traveller or wayfarer who puts up at an inn. Calye's case, 8 Coke 32. A lodger or stranger in an inn. Jacobs, Law Dict., tit. Guest. A traveller who comes to an inn and is accepted, becomes instantly a guest. Story, Bailments, § 477; *Curtis v. Murphy*, 62

Wis. 4; s. c., 53 Am. Rep. 242, 243.

In *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 260, CHIEF JUSTICE COMEGYS, in his charge to the jury, said: "Every one who is received into an inn and has entertainment there, for which the inn keeper has compensation by way of remuneration or reward for his service, is a guest. The relation of host and guest exists. This general definition, however, only includes those who in a legal sense are travellers or wayfarers; and boarders, or persons who reside in the same place, are not embraced by it. It is only travellers or wayfarers that the inn keeper is bound to accept as guests, and it is to them alone that he is under extraordinary responsibility for the safe keeping of beasts and goods. Inns are for them, as the books teach us; that is, for their sustentation and nourishment, and protection of their goods from depredation by thieves and robbers at stages of repose in their journeyings. The liability of inn keepers to others than those just mentioned are not so great, but are very adequate."

But in *Walling v. Potter*, 35 Conn. 183, 185, CARPENTER, J., in delivering the opinion of the court, said: "A guest is one who patronizes an inn as such." "In short, anyone away from home, receiving accommodations at an inn as a traveller, is a guest, and entitled to hold the inn keeper responsible as such."

So in *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242, 244; *COLE. C. J.*, said: "In these definitions [of a guest] the prominent idea is that a guest must be a traveller, wayfarer, or a transient comer to an inn for lodging and entertainment. It is not now deemed essential that a person should

length of the stay, does not absolutely disturb the relationship of inn keeper and guest, and constitute the person so acting a boarder or lodger.¹

Situation of Parties and Circumstances of Case.—In the absence of a specific agreement, the question whether a party sustained the relation of guest or boarder to one keeping an inn at the time of the loss of articles sued for, would require, for its correct decision, a consideration of the situation of the parties and all the circumstances.²

Nor, as it has been considered, can a party become a guest without the express or implied assent of the inn keeper, as by entering the dining-room of a hotel and ordering dinner.³

have come from a distance to constitute a guest."

1. See *Hancock v. Rand*, 94 N. Y. 1; s. c., 46 Am. Rep. 112, 117.

In *Norcross v. Norcross*, 53 Me. 103, 160, it is said: "Who are guests, in legal contemplation, and when the property of guests may be regarded as committed to the care of the inn keeper, are sometimes questions of no little intricacy. If a person goes to an inn as a wayfarer and a traveller, and the inn keeper receives him into his inn as such, he becomes the inn keeper's guest, and the relation of landlord and guest, with all its rights and liabilities, is instantly established between them. Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day or per week, deprives him of his character as a traveller and a guest, provided he retains his *status* as a traveller in other respects." This statement of the law is adopted as well settled in *Jalie v. Cardinal*, 35 Wis. 118, 128. To like effect see *Mowers v. Fethers*, 6 Lans. (N. Y.) 112; *Ross v. Mellin*, 36 Minn. 421, 422; *Hall v. Pike*, 100 Mass. 495, 497, where COLT, J., said that it is expressly decided "in *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417, 424, that an agreement with an inn keeper for the price of board by the week is not decisive that the relation is that of boarder instead of guest. *Story, Bailm.*, § 477."

Payment in Advance.—In *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 659, 661, the rule observed at a house where a group of miners laden with gold dust and money stopped, was that persons who applied for rooms and lodging were required to pay for the same in advance. But the court said, through RHODES, J., "A traveller

who enters an inn as a guest does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for a part or the whole of the entertainment, or paying for what he has occasion for, as his wants are supplied. We see no reason why the inn keeper may not require payment in advance, or why the guest may not pay in advance, for lodgings for a part or all the time he intends to remain as a guest at the inn."

2. *Hall v. Pike*, 100 Mass. 495, 497, where COLT, J., said: "If the defendant was only an inn keeper, the presumption would be that a temporary sojourner, in the absence of other proof, must be a guest. Where in the same house he carries on the business of inn keeper and keeper of boarders, it is more difficult. The more prominent occupation would perhaps control in a case where there was no other evidence. The duration of the plaintiff's stay, the price paid, the amount of accommodation afforded, the transient or permanent character of the plaintiff's residence and occupation, his knowledge or want of knowledge of any difference of accommodation afforded to, or price paid by, boarders or guests, are all to be regarded in settling the question."

"It is not easy, says Mr. Schouler, to lay down on the whole who should be deemed a guest in the common law sense: the facts in each case must guide the decision. *Bailments* 256; *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242, 243.

3. See *Gastenhofer v. Clair*, 10 Daly (N. Y.) 265, 267, VAN HOESSEN, J., in his concurring opinion in a case where the proprietor of a hotel was held not responsible for the loss of an over coat

5. Restriction of Term "Guests" to Travellers—Nature of Restriction.—The term "guest" is usually confined in its scope to travellers or wayfarers, as distinguished from neighbors, friends or boarders.¹

Basis of Restriction.—The basis of this restriction is that the peculiar liability of inn keepers is limited to those who, as strangers and sojourners, are compelled to put up in an inn without knowing the character of the house.²

left by a party who had ordered and taken a dinner while waiting for his uncle, who was a guest and had invited him to dine at the hotel, placed his decision on the following ground: "There must be at least two parties to every contract, and when it is attempted to charge an inn keeper with liability for the loss of goods belonging to a person who asserts that he was a guest, the enquiry is how was the relation of guest and inn keeper created? No person can make himself a guest without the inn keeper's assent. Of course that assent may be given by an agent or a servant entrusted with the duty of receiving and rejecting travellers. There need be no formal bargain, for the acceptance of a person as a guest will be implied, where he calls for refreshment which is furnished to him by a servant who has the discretion either to give or to withhold it. But a man cannot make himself a guest by slipping into the dining room of a hotel and ordering a dinner of a waiter, who has no discretion whatever, and who brings what is ordered, under the belief that the person who gives the order is in the dining room by permission of the inn keeper. Permission to enter the dining room cannot be implied. A man can no more enter the dining room without permission than he can enter a sleeping room and go to sleep without permission. He must first give the inn keeper an opportunity to receive or to reject him. If he be accepted as a guest, he is, of course, entitled to the usual privileges of a guest, and if the inn keeper refuse, without reason, to receive him, an indictment and a civil action for damages will lie against him."

1. Thus in *Manning v. Wells*, 9 Humph. (Tenn.) 746; s. c., 51 Am. Dec. 688, 689, it is said: "But a guest is a traveller or wayfarer who comes to an inn and is accepted. Story on Bailm., § 477. A neighbor or friend who comes to an inn on the invitation of the inn keeper is not deemed a guest: Bac. Abr.,

Inns and Inn Keepers, 5; Com. Dig., Action on Case for Negligence, B. 2. Nor is a person a guest, in the sense of the law, who comes upon a special contract to board and sojourn at an inn; he is deemed a boarder. And if he is robbed, the host is not answerable for it. 5 Bac. Abr., Inns and Inn Keepers, 5."

2. Thus in *Manning v. Wells*, 9 Humph. (Tenn.) 746; s. c., 51 Am. Dec. 688, 689, where the principles determining that neighbors, friends and boarders are not guests are stated to be "settled by the authorities and founded in sound reason," the court, through GREEN, J., remarks: "A passenger or wayfaring man may be an entire stranger. He must put up and lodge at the inn to which his day's journey may bring him. It is, therefore, important that he should be protected by the most stringent rules of law enforcing the liability of the inn keeper. In such case, therefore, the law makes the inn keeper an insurer of the goods of his guest, except as to losses occasioned by the act of God or public enemies. But as a boarder does not need such protection, the law does not afford it. It is sufficient to give him a remedy when he shall prove the inn keeper has been guilty of culpable negligence."

Similarly in *Neal v. Wilcox*, 4 Jones L. (N. Car.) 46; s. c., 67 Am. Dec. 266, 267, the court, through PEARSON, J., said: "The ground of public policy on which an action on the case on the custom is given against inn keepers is, that persons who are travelling through the country are under a necessity of putting up at inns for entertainment—*transeuntes causa hospitandi* (from which last word they are called 'guests') without knowing anything about the character of the house; for which reason the law gives an assurance of the safety of their property; that is, the goods and animals (*bona et catalla*) which they have with them for the purposes of their journey. The reason

Scope of Restriction.—But though the rights, duties and liabilities of guests are usually considered to be confined to transient or wayfaring men,¹ yet a town man or neighbor may be a guest according to a more liberal view, under which it is not now deemed essential that a person should have come from a distance to constitute a guest.²

restricts this action to guests as distinguished from boarders, who sojourn at an inn on a special contract. 3 Bac. Abr. 666, tit. Inns."

Recent Statements of Grounds.—So in *Horner v. Harvey*, 5 Pac. Rep. (N. M.) 329, AXTELL, C. J., said: "The liability of inn keepers is strict, and justly so; but it is a liability limited to their relation to travellers or wayfaring men. The law of civilized countries benignantly protects men away from home and from those resources with which the denizen or citizen can guard himself from wrong, and protect his property from loss or injury."

Again in *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 259, CHIEF JUSTICE COMEGYS, in his charge to the jury, remarked: "It is said that inns exist for the benefit of the travelling community. In fact, they are almost as much a necessity to travellers as the public means of locomotion are. . . . In them wayfaring people of every kind, if they can afford the expense which the host charges for that service, can be accommodated with diet and lodgings; in other words, can be entertained in their journeyings. The necessities of such people oblige them to solicit entertainment at the public or commort inn, both for themselves and for their beasts, where they travel with such; otherwise they would be without shelter and food. Because of this necessity, and that the host or entertainer is generally unknown to a party resorting to his house or inn, and that such party is compelled to trust himself and his property to his keeping, and that he is charged by the inn keeper for entertainment of himself and his beasts and the custody of his property, the law holds the inn keeper to a strict liability, not from any contract between the parties, but from the duty growing out of his public employment."

1. "The cases show that to entitle one to the privileges and protection of a guest he must have the character of a traveller, one who is a mere temporary lodger, in distinction from one who en-

gages for a fixed period at a certain agreed rate. The main distinction is that one is a wayfarer, or *transiens*, and it matters not how long he remains provided he assumes this character. [Note 6.] *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 451;" *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242, 244.

In *Horner v. Harvey*, 5 Pac. Rep. (N. M.) 329, AXTELL, C. J., said: "When a traveller comes to an inn and is accepted, he instantly becomes a guest. The inn keeper, when he accepts him and his goods becomes his insurer, and the inn keeper must answer in damages for the loss or injury of all goods, money and baggage of his guest brought within his inn and delivered into his charge and custody, according to the usage of travellers and inn keepers; but he must be a guest, and before he can be a guest he must be a traveller. When he ceases to be a traveller or a transient or wayfaring man, and takes up a permanent abode, even in an inn, he ceases to be an object of the law's especial solicitude, and he is no longer a guest, but a boarder; no longer a traveller, but a citizen."

2. *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242, 244.

Distance Not Deemed Material.—In *Walling v. Potter*, 35 Conn. 183, 185, after referring to a definition of an inn in which the word "traveller" was considered to be used in a broad sense to designate those who patronize inns, CARPENTER, J., delivering the opinion of the court, said: "Distance is not material. A townsman or neighbor may be a traveller, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the inn keeper is that of a boarder, but if he resides away from it, whether far or near, and comes to it for entertainment as a traveller, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one."

8. Who Are Travellers.—*Transient or Temporary Visitor.*—

There can be no question that a party is a traveller, and that the relation of inn keeper and guest arises when the character of mere transient or temporary visitor exists and is retained.¹ But the mere length of the party's story is not decisive.²

Fixed Resident.—On the other hand, a person who has long been a resident of a place, engaged in the pursuit of a profession which rendered a fixed residence indispensable, could not be in any wise regarded as coming under the category of travellers so as to enable a tavern keeper to detain his goods for the price of his board.³

Change of Position or Location.—So, one is not a traveller who merely walks about a town or city, or changes his dwelling place therein.⁴

1. "There may be, sometimes, much of difficulty in determining whether the relationship of guest exists. But when the character of traveller, or mere transient or temporary visitor exists and is retained, the relation of guest and inn keeper exists." *Beale v. Posey*, 72 Ala. 323, 331, where it is held that the simple fact that a resident of one town, visiting another for the temporary purposes of his business, contracted for board and lodging for a less price than the inn keeper usually charged, does not change the fact that he was a mere traveller, or temporary, transient visitor.

2. See *Ewart v. Stark*, 8 Rich. L. (S. Car.) 423, 424, where JOHN-SON, J., said that it "seems not to be well ascertained who was or was not a traveller, for whom the inn keeper was bound to provide. By the old law it seems he was called a traveller the first day of his sojourn, a hogenbind the second day, and a menial servant the third. But now, it seems, he will not lose that character, although he remains a week or a month at the same place," and, "perhaps the only mode of ascertaining that fact is to enquire whether he is resident or transient," which "depends necessarily upon the object, nature and extent of time which he has been resident, and must be resolved by the general understanding."

Flying Visit to Family.—A father who comes from another State, wherein he resides, and stays for a month with his family at a hotel in which the family is stopping, is a traveller, and can recover for the theft of his watch from the rooms occupied by himself and

family at the hotel, where his purpose evidently was to make a flying visit to his family, and a merely temporary stay in the city in which the inn was located. *Lusk v. Belote*, 24 Minn. 468, 470. In this case it was laid down that the father's "status as a traveller, like any other status, once shown to exist, is to be presumed to have continued;" and that neither "the agreement by which he was to pay special rates for himself and family, lower than those ordinarily charged for transient guests, nor the fact that he remained in the inn for a month," nor any other facts appearing in the case, furnished "any evidence that his character was changed from that of a traveller to that of a boarder."

Army Officer.—A general of the U. S. army, liable to be called to distant and remote places by the government, and thus obliged to change his headquarters, has been regarded, when stopping at a hotel, as being a transient person, the same as any other traveller or passenger, and not chargeable as a boarder in the absence of a showing of an explicit contract changing his relation to the inn keeper. *Hancock v. Rand*, 94 N. Y. 1; s. c., 46 Am. Rep. 112, 114.

3. *Ewart v. Stark*, 8 Rich. L. (S. Car.) 423, 424.

4. *Promenader in Town.*—In *Queen v. Rymer*, L. R., 2 Q. B. D. 136, where there was an indictment against an inn keeper for refusing to supply the prosecutor with refreshments at a bar within a hotel, some counts of the indictment describing the prosecutor as a traveller, and others not, and it was not proved that the prosecutor was a traveller in

7. Guests and Boarders—Distinction Between.—There are two classes of persons who are entertained by inn keepers for reward, guests and boarders.¹ The distinction between a guest and a boarder, which it is difficult to draw, and which is variously stated, is based mainly upon the fact that boarders contract for a definite stay at specific prices.²

any sense, otherwise than that he was walking about the town with his dog for his own recreation and amusement, a conviction was held not sustainable, partly upon the ground that the prosecutor was not a traveller. On this point KELLY, C. B., said: "I need hardly cite authorities to show that it is essential to such a prosecution that the prosecutor should be a traveller. If any be wanted, the case of *Rex v. Llewellyn*, 12 Mod. 445, in which an indictment was held bad for want of an allegation to that effect, is an express authority upon the point. Here the prosecutor was not a traveller in any sense whatever." DENMAN, J., also remarked: "The principles laid down in *Burgess v. Clements*, 4 Maule & S. 306, show that the object of the law upon the subject of an inn keeper's liability is merely to secure that travellers shall not, while upon their journeys, be deprived of necessary food and lodging."

Changing Dwelling Place.—The strict common law liability of inn keepers existing only in favor of travellers has been held not applicable in favor of children of a nonresident who had with their mother been living in a city for several years, sometimes keeping house and sometimes staying at a hotel or boarding house, the father being in the habit of making them an occasional visit as often as two or three times a year. *Lusk v. Belote*, 22 Minn. 468, 469, 470.

Railroad Employee.—It has ever been held that an employee of a railroad company, making his regular trips as conductor and stopping over at each end of his route, is not a guest at a terminus hotel where he rents a room by the month, at least in the legal sense of the word "guest" as correlative with traveller, so as to maintain an action for damages against the inn keeper for coin stolen from his satchel placed in his room at the hotel. *Horner v. Harvey*, 5 Pac. Rep. (N. M.) 329. Such an employee was regarded as neither a traveller, a wayfaring man, nor a transient person, but a citizen of the community at both ends of his route: and the fact

that he worked upon a train which ran thirty miles an hour was regarded as no more making him a traveller than if he worked in the company's shops.

1. *Pollock v. Landis*, 36 Ia. 651, 652. In *Carter v. Hobbs*, 12 Mich. 52, s. c., 83 Am. Dec. 762, 765, it is said that "if a person comes to an inn on a special contract to board there, the law treats him, not as a guest, but as a boarder. *Bac. Abr.*, tit. Inns, ch. 5; *Parkhurst v. Forster*, 1 Salk. 388; and the goods of a permanent boarder are not protected as those of a guest. *Manning v. Wells*, 9 Humph. (Tenn.) 746; s. c., 51 Am. Dec. 688; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 74; s. c., 48 Am. Dec. 416."

2. See *Lawrence v. Howard*, 1 Utah, 142, 143, where *BOREMAN, J.*, who delivered the opinion of the court, said: "In this country hotel keepers act in a double capacity, being both inn keepers and boarding house keepers. As inn keepers they entertain travellers and transient persons, those who come without bargain as to time or price, and go away at pleasure, paying for only actual entertainment received. As boarding house keepers they entertain residents and regular boarders and lodgers for definite lengths of time and at specific prices previously agreed upon." Compare, however, *Hancock v. Rand*, 94 N. Y. 1; s. c., 46 Am. Rep. 112. In *Shoecraft v. Bailey*, 25 Iowa 553, 555, *BECK, J.*, said: "The distinction between a guest and a boarder seems to be this: 'The guest comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment he receives, and it is not enough to make [one] a boarder, [and] not a guest that he has staid for a long time in the inn in this way.' 1 *Parsons' Contracts* 628; *Story on Bailments*, § 477." This statement of the distinction is also quoted under article *BOARDER*, 2 Am. & Eng. Encycl. of Law, 437.

Difficulty of Discriminating.—In *Neal v. Wilcox*, 4 Jones L. (N. Car.) 146; s. c., 67 Am. Dec. 266, 267, the court said, through *PEARSON, J.*: "It is sometimes

Length of Stay Immaterial.—The mere length of time that a party stays at an inn, however, is not so far material in determining his *status* as to transform him from a guest into a boarder, provided he retains his transient character as a traveller.¹

Question of Fact, etc.—But the question whether a party is a guest or a boarder is a fact to be found on all the evidence by the court when trial by jury has been waived, and unless the evidence is wholly insufficient to support a verdict of a jury, no exceptions will lie.²

8. Obtaining Temporary Refreshment—Sufficiency of Slight Entertainment.—Where it appears by the party's own showing that the establishment he keeps is an inn, it is immaterial how slight may be the entertainment or how temporary the use made

difficult to draw the line between guests and boarders. They frequently run into each other like light and shade. So the line between a common carrier and a bailee to carry is sometimes scarcely perceptible; but the law makes the distinction and it is the province of the judge to draw the line. A transient customer at an inn, although he be not a traveller or a stranger, is considered as a guest; a lodger, who sojourns at an inn, and takes a room for a specified time and pays for his lodging on a special agreement, as by the month or week, is a boarder. *Bennett v. Mellor*, 5 Term Rep. 273."

Distinction as to Inn Keeper's Liability.—In *Chamberlain v. Masterson*, 26 Ala. 371, 378, *GOLDTHWAITE, J.*, said that "there is a distinction between the liability of inn keepers towards guests and boarders, which was taken at an early day. *Calye's Case*, 8 Co. 32; *Bacon's Abr., Inns and Inn Keepers*, ch. 5; *Story on Bailm.* (4th ed.), § 477 (3). If the goods lost belong to a boarder, in order to charge the inn keeper, he would be required to show that the loss was owing to the failure on his part to discharge the duties which his situation as boarding house keeper, or the special contract with the other party, imposed on him; and these duties must be measured by the analogies of the law applicable to other species of bailments." Consult further on this subject, *Vance v. Throckmorton*, 5 Bush (Ky.) 41, 44; *Chamberlain v. Masterson*, 26 Ala. 371, 378.

1. In *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; s. c., 48 Am. Dec. 416, 418, the court, through *MARSHALL, C. J.*, said: "The length of time that a man stays at an inn does not make the differ-

ence, though he stay a week or a month or more. So always, though not strictly *transiens*, he retains his character as a traveller." *Story on Bailm.*, § 177; *Bacon's Abr., Inns and Inn Keepers*, ch. 5. "But if a person comes upon a special contract to board and sojourn at the inn, he is not in the sense of the law a guest, but a boarder. Same authorities." See to like effect *Hancock v. Rand*, 94 N. Y. 1; s. c., 46 Am. Rep. 112, 117; *Vance v. Throckmorton*, 5 Bush (Ky.) 41, 44; *Johnson v. Reynolds*, 3 Kan. 251.

2. *Hall v. Pike*, 100 Mass. 495, 498.

Allegation That Party "Boarded."—An allegation that one "boarded" with an inn keeper does not affirmatively show that he was entertained in the character of a boarder as distinguished from a "guest." *Pollock v. Landis*, 36 Iowa 651, 652, where it is said that "boarded" is the imperfect tense of the verb board, which means to receive food as a lodger, or without lodgings, for a compensation, and that the averment in controversy does not state whether the party received this food as a boarder or as a guest. This case is also stated under article *BOARDER*, 2 Am. & Eng. Encycl. of Law, 437.

Lodger.—In *Parker v. Flint*, 12 Mod. 254, 255 (almost literally quoted in *Hancock v. Rand*, 17 Hun (N. Y.) 279, 284; s. c., on appeal, 94 N. Y. 1; s. c., 46 Am. Rep. 112), *LORD HOLT* remarks: "If one come to an inn and makes a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such is not under the inn keeper's protection. But if he eat and drink there, it is otherwise; or if he pay his diet there, though he do not take it there."

of it, if the party loses his property in the inn while there in the character of a guest.¹

Purchasing Liquor.—Thus, purchasing liquor at an inn has been held sufficient to constitute one a guest.² So, an inn keeper has been held liable where a servant went to the inn and asked if he might leave his master's goods until the next market day, and the inn keeper's wife told him that she could not tell, as they were full of parcels, whereupon the servant sat down in the inn, putting his master's goods immediately behind him on the floor, and had some liquor, but when he got up, after sitting there a little while, the goods were missing.³

Entering Refreshment Rooms, etc.—But a traveller will not be regarded a guest when, after leaving his luggage with the porter of a hotel adjoining a railroad station, he decided not to spend the night at the city in which he had just arrived, and went into the coffee-room to order some refreshments, but not being able to obtain exactly what he desired, passed into the station refreshment room, which was under the same management as the hotel, and connected with it by a covered passage, but shortly afterwards went out, telling the porter to lock up his luggage.⁴

9. Mere Visitor—*Transient Visitor or Caller Not Protected.*—The rule that makes the landlord of an inn responsible for the goods of his guest is a severe one, and can only be applied where the conventional relation of inn keeper and guest exists. It can-

1. *Kopper v. Willis*, 9 Daly (N. Y.) 460, 465.

2. *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560, 562.

Limits of Doctrine.—In *Fitch v. Casler*, 17 Hun (N. Y.) 126, 127, it is admitted to be true "that even the purchasing of liquors has been held sufficient, under some circumstances, to make one the guest of the inn keeper." This is said to show, however, "that it is not the amount of refreshments, but the character under which the purchaser buys them, which determines the relation of the parties."

In *Atkinson v. Sellers*, 5 C. B., N. S. 442, 443 (quoted in *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242, 243), *COCKBURN, C. J.*, remarks: "Of course a man could not be said to be a traveller who goes to a place merely for the purpose of taking refreshment. But if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment, and the inn keeper is justified in supplying it."

3. *Bennett v. Mellor*, 5 T. R. 273. This case is supported in *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560, 563;

distinguished in *Strauss v. County Hotel and Wine Co.*, L. R., 12 Q. B. D. 604; and upheld with expressions of doubt in *Kopper v. Willis*, 9 Daly (N. Y.) 460, 465, and *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 577.

4. *Strauss v. County Hotel and Wine Co.*, L. R., 12 Q. B. D. 27; s. c., 37 Eng. Rep. 604. In this case *MATHEW, J.*, said: "The counsel for the plaintiff [the traveller] were called upon to show at what point of time the relation of landlord and guest commenced. They suggested that it was when he gave his luggage to the porter. But at that time the plaintiff had not made up his mind to become a guest. The fact that he ordered his goods to be locked up is no more than if he had said that in the meantime he wished his goods to be locked up." *LORD COLERIDGE* remarked: "The case of *Bennett v. Mellor*, 5 T. R. 273, has been relied on by the plaintiff as showing that it is not necessary, to make the defendant liable, that the guest should spend the night at the inn. But there it was expressly found that the plaintiff had come within the house and

not be extended so as to protect one who is not a guest, but a mere caller on a guest, or a transient visitor upon the invitation of a guest.¹

Party Attending Ball at Inn.—So the relation of inn keeper and guest does not exist between the inn keeper and one who merely attends a ball given on the inn premises by the proprietor,² or by other parties, as a firemen's company, to whom he furnishes the dancing-room, supper and dressing-room, at a price less per head than that charged for tickets.³

had placed his goods near his chair, so that the case is clearly distinguishable. On the other hand, the case of *Reg. v. Rymer*, L. R., 2 Q. B. D. 136, is, so far as it goes, against the plaintiff."

1. *Gastenhofer v. Clair*, 10 Daly (N. Y.) 265, 266, where J. F. DALY, J., said: "Such was the status of the plaintiff in this case. He claims to have become a guest himself by ordering and taking dinner while waiting for his uncle. This put him in no different position from that he would have occupied had he sat down with his uncle as he had been invited to do. He was there upon the invitation of that gentleman, and with no intent to sojourn at the hotel as a guest for even the briefest period. This distinguishes the case from *Kopper v. Willis*, 9 Daly (N. Y.) 460 [in which case the friend, who asked a party to go to a restaurant, paid for his dinner], and from *Bennett v. Mellor*, 5 T. R. 273 [in which case a servant ordered liquor and put his master's goods near his chair], where the parties came to the inn to partake of its entertainment or accommodation, and for no other purpose. . . . It is not the fact that a person does or does not take lodgings that makes him a guest. It is the motive with which he visits the place, whether to use it even for the briefest period, or the most trifling purpose, as a public house or not, and I think it will be long before the courts will be disposed to hold landlords liable for the property of persons who call to visit their guests, and incidentally enjoy the hospitality of the house. The taking of the dinner without notice to the proprietor or the clerk, no more constitutes plaintiff a guest than his sitting in the parlor, using the reading room or writing room, etc., for any period while waiting for his host to appear."

2. See *Fitch v. Custer*, 17 Hun (N. Y.) 126, 127, in which case the relation of inn keeper and guest was held not to

arise where the defendant, in a suit for injury to plaintiff's horse, was an inn keeper, who issued cards of invitation for a "Fourth of July party" at his inn, and in pursuance of one of these invitations plaintiff went to the hotel, stabled his horse in a barn engaged by the defendant for the occasion, took part in the dance and paid his bill, including an extra charge for liquors which he drank at the hotel. *LEARNED*, P. J., said: "It certainly cannot be that if an inn keeper invites a friend to dinner, that peculiar liability [of an inn keeper for his guest's property] arises. And so in the present case, the plaintiff came on the invitation of the defendant. He came not as to an inn or hotel, but as to a ball room, for the purpose of engaging in a dance. He was to pay a certain charge for admission, and this charge included the care of his horse. Still he was not a traveler, and did not come in that character. He would have had no right to come if he had not been invited. . . . The defendant, in this instance, was in the same position with any other owner of a ball room, who should, for the purpose of profit, invite certain persons to come to it for a dance, and should charge them a certain price for the dance, the supper, and the care of their horses."

3. *Carter v. Hobbs*, 12 Mich. 52; s. c., 83 Am. Dec. 762, 765, where the inn keeper was held not liable, in the absence of negligence, to a nonresident, stopping at another inn in the same town, for the loss of his overcoat, fur collar and gloves, which he had delivered to the clerk at the office on coming in to attend the ball. This was ruled, although at the same time he registered his name, and during the night spent some money for liquors and cigars at a saloon kept by the inn keeper in connection with the hotel. The court, through *CHRISTIANCY*, J., said: "The plaintiff was no more the guest

10. Object of Stay—Propagation of Horses.—Where a party does not come to an inn for entertainment as an ordinary wayfarer, but with a horse to be used, under a special arrangement, in serving mares, the inn keeper is not bound to receive and treat the party as his guest, and is not liable for the destruction of the horse without his fault.¹

Showing or Selling Goods.—So a party cannot hold an inn keeper to his liability, strictly as such, in respect to goods brought to an inn, where such party, who is a guest, has a room specially for the purpose of showing or selling such goods.²

Unlawful Purpose.—Nor, it seems, is a party a guest who hires a room for some purpose of convenience, particularly if his object be an unlawful or immoral one.³

of the inn than any person residing across the street, and attending the ball on the same occasion. If a guest at all, he was rather the guest of the fire company. The defendant on this occasion was no more acting in the character of inn keeper, as to those attending the ball, than any other person furnishing the rooms and supper at any other house for such special occasion. The plaintiff did not resort to the hotel for any purpose which brings him within the common law definition of the guest of an inn."

1. Thus where an arrangement was made and carried out by which plaintiff's stallion was to stand at defendant's inn certain days each week, under an agreement made for the season, for serving mares that should be brought to the enclosure, and the plaintiff was to have the exclusive use of the designated box-stall in defendant's barn, and was to feed and care for the horse while the defendant was to furnish the oats for the horse and meals for the plaintiff, who took charge of the horse, at prices less than those ordinarily charged to travellers, it was *held* that defendant was not liable for the destruction of the barn and horse by fire without negligence on his part, as the plaintiff did not come to the inn for entertainment as an ordinary wayfarer, but under a special arrangement previously made, and that in such case the utmost limits of the defendant's liability was that of an ordinary bailee for hire. *Mowers v. Fethers*, 61 N. Y. 34; s. c., 19 Am. Rep. 244. It was considered that the defendant, as an inn keeper, was under no common law obligation to receive and entertain the plaintiff and his horse for such a purpose, "and where he is not bound to

receive and entertain the person as his guest, the strict rule of common law liability for the preservation of his property does not obtain. The obligation to respond for injury to property depends upon his duty to receive and entertain as an inn keeper, and they must stand or fall together. *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663; *Ingalsbee v. Wood*, 36 Barb. (N. Y.) 455; s. c., 33 N. Y. 577; *Hulett v. Swift*, 33 N. Y. 571."

2. See *Carter v. Hobbs*, 12 Mich. 52; s. c., 83 Am. Dec. 762, 765; *Neal v. Wilcox*, 4 Jones L. (N. Car.) 146; s. c., 67 Am. Dec. 266; *Burgess v. Clements*, 4 Maule & S. 306; *Mowers v. Fethers*, 61 N. Y. 34; s. c., 19 Am. Rep. 244, 246.

3. **Hiring Rooms for Immoral Purposes.**—Where a party, who lived near a hotel in the same town, went there at midnight with a disreputable woman, registered the name of himself and wife, was assigned a room, and delivered some money to the clerk, who absconded therewith, it was *held* that he was not a guest, and could not recover the money from the inn keeper. *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242. *COLE, J.*, said that "while the definition of a guest has been somewhat extended beyond its original meaning, it does not include every one who goes to an inn for convenience to accomplish some purpose. If a man and woman go together to meet by concert at an inn or hotel in the town or city where they reside, and take a room for no other purpose than to have illicit intercourse, can it be that the law protects them as guests? Is the extraordinary rule of liability which was originally adopted from considerations of public policy to protect travellers and wayfarers, not merely from the negligence but the dis-

11. Showing Goods for Sale—Inn Keeper Not Bound to Provide for.—An inn keeper is not bound to receive or accommodate persons desirous of exposing their commodities for sale, nor is he liable as an inn keeper in respect to such goods.¹

Scope of Inn Keeper's Liability.—But his liability is confined to those who come for entertainment, and he is not bound to find show rooms for his guests.²

12. Personal Presence of Guest—Deemed Unnecessary Where Goods in Bailee's Charge.—It has been considered not necessary that one should be at an inn in person in order to constitute him a guest, if his goods be there in charge of a bailee for him.³

Leaving Horse at Inn.—But the tendency of the modern cases is to hold that merely leaving a horse at an inn cannot of itself suffice to constitute one a guest,⁴ though, according to the earlier

honesty of inn keepers and their servants, to be extended to such persons?" After stating that if this were the case, "then for a like reason it would protect a thief who takes a room at an inn and improves the opportunity thus given to enter the rooms and steal the goods of guests and boarders." The conclusion is reached that one "whose status is a guest, is a traveller or transient comer, who puts up at an inn for a lawful purpose, to receive its customary lodging and entertainment," and not "one who takes a room solely to commit an offence against the laws of the State."

1. See *Mowers v. Fethers*, 61 N. Y. 34; s. c., 19 Am. Rep. 244, 246, where REYNOLDS, C., said: "It seems to be apparent from the nature of the duties and obligations of the keeper of a common or public inn that he is not, in his capacity of inn keeper, bound to receive or furnish accommodation for persons desirous of exposing their commodities for sale, or bound to permit his establishment to be made a depot for the propagation of horses."

In *Carter v. Hobbs*, 12 Mich. 52; s. c., 83 Am. Dec. 762, 765, it is said that "if a person, who is a guest, have a room specially for the purpose of showing or selling his goods, he cannot hold the inn keeper to his liability, strictly as such, in respect to these goods. *Burgess v. Clements*, 4 Maule & S. 306." See to like effect *Myers v. Cottrill*, 5 Biss. (U. S.) 465, 471; *Fisher v. Kelsey*, 121 U. S. 383, 385; s. c., 16 Fed. Rep. 71, 74.

2. See *Neal v. Wilcox*, 4 Jones L. (N. Car.) 146; s. c., 67 Am. Dec. 266, 267, where, after discussing the reason why an action on the case "on the custom" is given against inn keepers, and

showing that it is restricted to guests as distinguished from boarders, the court, through PEARSON, J., says: "So the reason restricts the action to one who comes for entertainment—*causa hospitandi*. If one peddling merchandise puts up at an inn, and besides his sleeping apartment takes a separate room in which to show and sell articles—clocks and watches, for instance—these articles are not within the protection of the rule. *Burgess v. Clements*, 4 Maule & S. 306. So if one having a drove of horses or hogs to sell, puts up at an inn, and besides entertainment for himself procures from the landlord a lot in which to keep his animals for the purpose of showing and selling them, they are not specially protected; and it makes no difference whether by the agreement the landlord has them fed, or whether the drover buys provender of the landlord or a third person; for, as LORD ELLENBOROUGH says in the above case, an inn keeper is not bound by law to find show rooms for his guests, but only convenient lodging rooms and lodging."

3. See *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188, 190. The court said, through FOSTER, J.: "To constitute one a guest it is not necessary that he be at the inn in person. It is enough that his property be there in the charge of his wife or servant or agent, who is there in his employment or as a member of his family. But they must be there in such a way that the law implies the property while there to be in his possession, and not in the possession of the person who is there with it as his bailee."

4. See *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 666;

cases, and others which have followed their views, it is not essential, in order to constitute one a guest, in legal contemplation, that he should receive personal entertainment at the inn, but it may be enough that he leave his horse, particularly if he be a traveller, in the strict sense.¹

13. Leaving Horse as Constituting Guest.—The older doctrine that the mere leaving a horse at an inn may constitute the owner a guest, is supported, in the leading American case in which this view is taken,² by an early English decision, recognizing, by a divided court, the lien of an inn keeper in regard to a horse left at his stable by a traveller who did not himself put up at the inn,³

Ingallsbee v. Wood, 33 N. Y. 577, 579; *Healey v. Gray*, 68 Me. 489; s. c., 24 Am. Rep. 80; *Thickstun v. Howard*, 8 Blackf. (Ind.) 535, 538; admitting that if the traveller sought even temporary shelter while his horse was being fed at the inn, this might make him a guest, but stating that in general the privileges granted to travellers "must be regarded as incident to their personal presence." Note to *McDaniels v. Robinson* (26 Vt. 316) in 62 Am. Dec. 588, where it is said that the "doctrine that the mere leaving of a horse at an inn constitutes the owner a guest" seems "to rest on a very slender foundation," and that "it is very doubtful if any court would now so decide."

1. See *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, 474; *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 575, 577; *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 260.

In *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, 474, where the hirer of a horse, chaise and harness remained a visitor at the house of a friend, but sent the animal and equipage to the stable of an inn keeper, *WILDE, J.*, speaking for the court, said that "it is clearly settled that to constitute a guest in legal contemplation it is not essential that he should be a lodger or have any refreshment at the inn. If he leaves his horse there, the inn keeper is chargeable on account of the benefit he is to receive for the keeping of the horse. *LORD HOLT* held a different opinion in the case of *Yorke v. Grenaugh*, 2 Ld. Raym. 866 [s. c. as *Yorke v. Grindstone*, 1 Salk. 388]; but the opinion of the majority of the court has ever since been considered as well settled law."

But on the other hand, in *Healey v. Gray*, 68 Me. 489; s. c., 24 Am. Rep. 80,

it was held that where one leaves his horse with an inn keeper, with no intention of stopping at the inn himself, but stops at a relative's house, he is not a guest of the inn, and the liability of the landlord is simply that of an ordinary bailee for hire. *APPLETON, C. J.*, said: "In *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417, 425, the authority of *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, was somewhat doubted. But in *Grinnell v. Cook*, 3 Hill (N. Y.) 85; s. c., 38 Am. Dec. 663, its authority was denied."

2. *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, 474.

3. *Yorke v. Grindstone*, 1 Salk. 388; s. c., as *Yorke v. Grenaugh*, 2 Ld. Raym. 866.

In *McDaniels v. Robinson*, 26 Vt. 3, 6; s. c., 62 Am. Dec. 574, 576, the court, through *REDFIELD, C. J.*, said: "The case of *Yorke v. Grindstone*, 1 Salk. 388, has been understood by most of the elementary writers as deciding, by a divided court, that one by leaving his horse at an inn becomes a guest. And such is virtually this decision, inasmuch as defendant's lien as inn keeper is recognized, in regards to a horse left at his stable by a traveller who did not himself put up at the inn. And such lien does not exist as to horses put at the stable of an inn keeper, even by those who are not travellers and guests. And so this case is perhaps justly regarded by judges and elementary writers as settling the point that one becomes a guest, as to all the property which the inn keeper consents to take in his keeping, by leaving his horse, from which profit is derived, although the same relation is not created by leaving a dead thing, as a trunk, from which no profit arises, as is intimated, although not decided, in *Golley v.*

and is further sustained by judicial declarations,¹ and statements of legal writers.² It also receives qualified support in this country from a modern leading case, where the point does not seem to be directly involved; and from a recent case in which a preference is given to the view of the older authorities, and it is held that a traveller or wayfarer journeying over the country becomes a guest by obtaining and paying for entertainment for his beasts at an inn;³ but in both these cases the doctrine is apparently confined in its application to those who are travellers or wayfarers as distinguished from residents.⁴

Clerk, Cro. Jac. 188. But that point has since been regarded as settled by this case, although the case was adjourned for advisement, 'being a new case.' . . . And I cannot find that the doctrine of this case of *York v. Grindstone*, *supra*, to the extent above laid down, has ever been questioned in England."

1. See *Peet v. McGraw*, 25 Wend. (N. Y.) 653, 654, adopted in *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 577, but explained in *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 664.

2. See note to *Calye's Case*, 8 Co. 32, in 1 *Smith's Lead. Cas.* 50, 3 *Bac. Abr.*, *Inns and Inn Keepers*, ch. 5, p. 666; as quoted in *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 577.

See *McDaniels v. Robinson*, 26 Vt. 3, 6; s. c., 62 Am. Dec. 574, 575, where one who deposited four thousand dollars in gold with a common inn keeper, the theft of which was the cause of the litigation (afterwards continued, as shown by the report of the same case in 28 Vt. 387, 67 Am. Dec. 720), took a room at the inn and became a guest in the strictest sense, and continued to lodge and board constantly at the inn, apart from an absence at his brother's over one Saturday and Sunday; and the fact that he left his wagon, harness and buffalo skins in the inn keeper's custody does not seem to have called for the opinion expressed in the case, to the effect that the inn keeper is liable to the extent of the horse and equipage at least, if not for other goods, where the horse of one who is strictly a traveller is put up at the inn, although the traveller himself puts up at another place.

3. See *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 260, where CHIEF JUSTICE COMEGYS, in his charge to the jury, says that according to the strict definition of the term, "it would seem that the word

'guest' only applies to those who lodge or obtain meat or drink at an inn for compensation to the inn keeper. But this is not the case, as we think. Upon this subject the authorities are unfortunately not agreed, but after a careful consideration of them, especially upon review of the older ones, those nearest the time when inns began to be recognized and controlled by law,—we are satisfied that the law may be given to you by us, and we now declare it for your guidance, that if a person who comes within the meaning of the term 'traveller' or 'wayfarer,'—that is, being upon a journey passing over the country from place to place, or from one place to another and returning,—has occasion to seek entertainment for his beasts, and obtains it for them, upon a consideration of reward or pay charged him by the host or landlord, he is in [the] legal sense a guest, as much so as if he had himself received personal entertainment; and while such entertainment for his beasts continues, if any damage or injury happen to them, or they be stolen, he is, subject to certain exceptions . . . absolutely liable for them to the same extent as if he had undertaken against the particular damage by a special agreement."

4. Thus in *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 575, the following cases are distinguished upon the ground that all that is therein decided is, that "the horse of one not a traveller put at an inn, created only the ordinary liability of a bailee for compensation on the part of the inn keeper." *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663; *Thickstun v. Howard*, 8 Blackf. (Ind.) 535; *Hickman v. Thomas*, 16 Ala. 666. So in *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 260, it was said by CHIEF JUSTICE COMEGYS: "The existence of an inn involves, in legal contemplation, a stable attached to it also, and travellers with horses

14. Insufficiency of Merely Leaving Horse—Status of Party Never Stopping at Inn.—According to the modern doctrine on the subject, the owner of a horse or other goods could not be regarded as a guest, in legal contemplation, where he had never been at the inn, and never intended to go there as a guest.¹ Hence, where one leaves his horse with an inn keeper with no intention of stopping at the inn himself, but stops at a relative's house, he is not a guest of the inn, and the liability of the landlord is simply that of an ordinary bailee for hire.²

and carriages are not to be presumed to put them up at the inn otherwise than as in inn stables strictly, whereas those not travellers in the sense I have been employing, but merely putting up their teams at the inn stables as a livery (as is the case with persons residing near towns, who use such stables as mere conveniences), are not to be considered in the light of guests and entitled to the same degree of protection as travellers are."

1. See *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 666, where *BRONSON, J.*, delivering the opinion of the court, said: "Now when a man, after he has actually become a guest and delivered his property to the host, goes away for a brief period, leaving his goods behind him, the law is chargeable with no absurdity in considering him as still continuing a guest, so far as relates to the rights and liabilities of the parties. And if one send his horse or his trunk in advance to the inn, saying he will soon be there himself, it may be that he should be deemed a guest from the time the property is taken in charge by the host. But when, as in *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, the owner has never been at the inn and never intends to go there as a guest, it seems to me little short of a downright absurdity to say that in legal contemplation he is a guest. If our law-givers had intended that the inn keeper should be answerable as such for everything he received in charge, guest or no guest, they would have said so. They would not have taken the roundabout mode of saying that he must answer for the goods of his guest, and that every one is a guest who has goods." The case under consideration was shown to differ from that of *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, because in the present instance the party who owned the horse never was the

guest of the inn keeper, and was not a traveller or a transient person, but a neighbor; but *JUDGE BRONSON* said that he should "feel no disposition to follow that case if this difference did not exist," and that he thought that "the extraordinary liability of the inn keeper does not attach until he actually has a guest, and without such liability the inn keeper, as such, has no lien on the goods."

2. *Healey v. Gray*, 68 Me. 489; s. c., 24 Am. Rep. 80.

Horse Left During Visits to Wife.—In *Ingallsbee v. Wood*, 33 N. Y. 577, the brother of one who had been recently married, and resided with his father, but lodged and took his meals with his wife at the residence of her mother, was held not entitled to recover as assignee, against the personal representative of an intestate inn keeper, whose barn had been consumed by fire, for the destruction of a horse which the assignor was in the habit of leaving without charge under the inn keeper's shed, during his visits to his wife, and which he had directed to have put in the stable and fed on the night when the fire occurred. *PORTER, J.*, said that the intestate was not liable because there was no negligence, or express contract of insurance, and "none could be implied, unless it sprang from the relation of inn keeper and guest." But he considered that no such relation existed between the parties, as the "horse was left at the stable by one who was not, and did not expect to be, a guest at the inn." "There was no contract," he declared, "either express or implied, except for the keeping of the animal for the night, and this created no other or greater liability than if the intestate, instead of being an inn keeper, had been the proprietor of a livery stable." Concerning the state of the authorities, the same judge said that the view "that one who contracts for the stabling of his horse by an inn keeper is con-

Other Acts Besides Leaving Horse.—But where a party not only leaves his horse at an inn, but also takes refreshment there and stays there awhile, it would seem beyond question that he becomes a guest, and that the inn keeper becomes liable for the loss of any of his goods.¹

15. Creation of Relation of Host and Guest—Coming and Being Received as Traveller.—In general, if a person puts up at an inn as a traveller, and is received as such, the relation of inn keeper is immediately established with all its rights and liabilities.²

Putting Up Horse.—Some of the cases seem to consider, as already noted, that the relation of host and guest is created by putting up a horse at an inn.³

structively an inmate of his house" is supported by a case reported in Massachusetts, but we think that decision was made under a misapprehension of law. *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471. Its correctness has since been questioned in the able opinion delivered by JUDGE BRONSON in the case of *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, and by JUDGES POTTER and BOCKES, in the present case, in the court below, *Ingalsbee v. Wood*, 36 Barb. 452, and we think their reasoning conclusive against the doctrine that an inn keeper can be held as an insurer of property received from one who is neither traveller nor guest."

Horse Found Dead in Stall.—Where an inn keeper had taken a party's horse to keep a few days before the occurrence which occasioned the suit, and one evening such party rode out the horse, and, on returning to the stable, tied the halter in the stall where the horse had been previously kept, but the next day the horse was found dead in the same stall, with his head fast in the trough, it was held that there could be no recovery against the inn keeper in the absence of a showing of a want of ordinary care on the part of the inn keeper, or that the party who had the horse was a guest at the inn. *Thickstun v. Howard*, 8 Blackf. (Ind.) 535, 538. In this case it was laid down by SMITH, J., that "as inns are established for the personal accommodation of travellers, or those in want of temporary shelter or house room, the privileges with which the law invests such persons must be regarded as incident to their personal presence. The custody of the goods which they carry with them is a secondary matter, and is 'part and parcel of the contract to feed, lodge and accommodate the guest for a suitable

reward.' 2 Kent. Com. 592." "The law imposes this part of the contract upon the inn keeper," the opinion continues, "from considerations of public policy, but it is only a *part* of the contract, and for that reason, if no other existed, we should be obliged to conclude that the mere custody of property belonging either to a resident of the same town or vicinity in which the inn is situated, or to one who may not be such resident, is not sufficient of itself to create by implication of law the entire contract which is held to subsist between an inn keeper and guest."

1. See *Read v. Amidon*, 41 Vt. 15, 18; s. c., 98 Am. Dec. 560; citing *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, and cases there referred to.

Stallion Standing at Inn.—When, however, the party did not come for entertainment as ordinary wayfarer, but under a special arrangement previously made, whereby his stallion was to stand at the inn certain days each week, for the purpose of serving mares, it has been held that the inn keeper was not subject to his common law liability for the preservation of the animal. *Mowers v. Fethers*, 61 N. Y. 34; s. c., 19 Am. Rep. 244.

2. *Ross v. Mellin*, 36 Minn. 421, 422.
Obtaining Refreshments and Staying a Day, etc.—The relation of inn keeper and guest has been held created, within the principle of all the authorities, where a minor went with his father to an inn, and put their horse and wagon in charge of the inn keeper's servant, and they ordered and obtained dinner, and remained until evening, when they left, after paying their bill. *Read v. Amidon*, 41 Vt. 15; s. c., 98 Am. Dec. 560, 561.

3. See *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 576; and

Taking Room.—By the custom of the cities, however, it appears to be “considered that the taking a room is the decisive act to create the relation.”¹

Slipping Into Dining Room.—But it has been laid down that a person cannot make himself a guest by slipping into the dining room of a hotel and ordering a dinner of a waiter who has no discretion whatever, and who fulfils the order under the impression that the party is there by the inn keeper's permission.²

16. Continuance of Relation—During Traveller's Sojourn.—The relation of inn keeper and guest, with all its rights and liabilities, continues so long as the person received as a guest sojourns at the inn as a traveller.³

Where Entertainment Only Partial.—It subsists though a party who has put up his horse and taken a room at an inn merely takes some of his meals and lodges there part of the time.⁴

to like effect *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, 474; *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258. But see different view sustained in *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 666; *Ingallsbee v. Wood*, 33 N. Y. 577, 579; *Healey v. Gray*, 68 Me. 489; s. c., 28 Am. Rep. 80.

1. *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 578.

2. See concurring opinion of VAN HOSSEN, J., in *Gastenhof v. Clair*, 10 Daly (N. Y.) 265, 267.

3. See *Ross v. Mellin*, 36 Minn. 421, 422, where VANDERBURGH, J., says: “It is often a question of no little intricacy to determine who are guests, especially where the hotel is also a boarding house. If a person puts up at an inn as a traveller, and he is received as such, the relation of inn keeper and guest is immediately established with all its rights and liabilities; and once established, neither duration of time nor a special agreement in respect to price necessarily changes such relation, which continues so long as the person so received sojourns as a traveller, which is also to be presumed until the contrary appears. *Norcross v. Norcross*, 53 Me. 163; *Lusk v. Belote*, 22 Minn. 468; *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417; 1 Smith Lead. Cas. (8th ed.) 412; *Story Bailm.*, § 477; *Jalie v. Cardinal*, 35 Wis. 118, 128; 2 Pars. Cont. 150, 152. And see *Hall v. Pike*, 100 Mass. 495.”

So it is laid down that where parties come to an inn and are entertained there as travellers, the contract they commenced with must be presumed to

continue until a new contract is shown to have been entered into. *ERLE, C. J.*, in *Allen v. Smith*, 12 C. B., N. S. 638, 644.

4. Thus in a case which seemed to present, in the first instance, the relation of guest in the strictest sense, on the part of one who sued an inn keeper for the loss of four thousand dollars in gold deposited with the inn keeper and stolen from the premises, it was thought not to be necessary to continue that relation, that the plaintiff should have continued his dwelling for the time being within the inn; and on this point it was remarked: “The relation of guest was clearly created by putting the horse at the inn, and it was undeniably extended to all the plaintiff's goods left at the inn by his taking a room, and taking some of his meals at the inn, and lodging there a portion of the time.” *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 578. “This matter seems to be perfectly settled,” it was further said in the same case, “by the custom of the cities. It is there considered that taking a room is the decisive act to create the relation. That being done, the guest is charged as such for his meals and lodging, whether he takes them at the inn or with his friends, as anyone may know who has had experience in such matters. And this,” continues the opinion, “seems to us well enough. One in so extensive a city as New York might find it convenient to have a room for his parcels and to take his dinner at a down town hotel, while he might choose to have his lodging and most of his personal apparel and baggage at an up-

Nor is it definitely settled how long a person may stay away entirely from an inn without ceasing to be a guest.¹

town house. And it would certainly be unreasonable, if one chose to be at this expense, that he shall not have the same security for his goods left at the one hotel as at the other. Or if one took lodgings at a hotel, and should subsequently find it more comfortable to lodge with a friend, and for any reason should not choose at once to give up his room and break up his connection with the hotel, it would certainly sound very strange that he should not have the same security for his goods as if he made the hotel his constant abiding-place for the time. He would certainly be bound ordinarily to pay till he gave up his room, and in all the books pay, or the right to charge, is made the criterion of the inn keeper's liability. But after one has given up his room, and closed his connection with the hotel, then indeed it is generally understood, and no doubt correctly, that for any baggage left at the inn the landlord is only liable as ordinary bailee."

1. In *Whitemore v. Haroldson*, 2 Lea (Tenn.) 312, 314, it is said that "one who is in fact a guest may leave the inn for a time, and still leave his property under the safeguard of the landlord's liability, but that how long 'he may stay away or leave his property without ceasing to be a guest seems not to have been determined,' though 'it is said [that] he cannot by leaving valuable property over an indefinite period and staying away as long as he pleases, subject the landlord to the peculiar liability of an inn keeper.'" See to like effect 2 Pars. Contr. 153, 154.

Viewing Town on Training Day.—In *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560, 563, it was thought that a party who treated at the bar of an inn on general training day was still to be considered a guest if he was only out to see the town or view the training, intending to return before he left for home and get his overcoat. The court, through MASON, J., said: "It has been expressly adjudged that if the guest goes out to view the town for a while, intending to return, the inn keeper is liable for his goods lost in his absence. (2 Croke's R. 189.) And so if he goes out and says he will return at night (1 Comyn's Dig. 412, 413), JUSTICE BRON-

SON, in the case of *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 666, affirmed this doctrine in the following language: 'Now when a man, after he has actually become a guest and delivered his property to the host, goes away for a brief period, leaving his goods behind him, the law is chargeable with no absurdity in considering him as still continuing a guest, so far as relates to the rights and liabilities of the parties.'"

Occasional Absences of Guest at Races.

—So where a party went to an inn with two race horses and a groom, in the character of guest, and they remain at the inn for several months, taking the horses out every day for exercise and training, and being occasionally absent for several days together at races in different parts of the country, but always with the intention of returning to the inn, it was held that in the absence of evidence of any alteration in the relation of the parties, that of inn keeper and guest must be presumed to have continued; and that the occasional absences did not destroy the inn keeper's lien upon the horses for his bill. *Allen v. Smith*, 12 Com. B., N. S. 638, 644.

Guest Leaving Horse During Absence.

—The doctrine that if the owner of a horse once becomes a guest, he does not cease to be a guest by a temporary absence from the inn, seems also fairly derivable from the opinions holding the inn keeper liable given in *Day v. Batten*, 2 Hurl. & C. 14, 18, 19, where a party came to an inn, where he became a guest and where his horse and gig were put up, but subsequently left, saying that he would not be back till the following Monday, and did not return for about a fortnight, during which time the inn keeper's hostler drove the horse out for the asserted purpose of giving it exercise, when it took fright at a locomotive and was injured.

A rigid view is sometimes maintained. Thus in *Golley v. Clerk*, Cro. Jac. 189, it is said by WILLIAMS, J.: "Where he leaves goods to keep, whereof the defendant is not to have any benefit, and goes from thence for two or three days, although he saith he will return, yet he is at liberty, and therefore is not a guest during that time." *Lynar v. Mossop*, 36 Up. Can., Q. B. 230, 235.

Liability for Property of Guest Temporarily Absent.—A distinction is sometimes maintained, however, in the case of a guest who stays away for a time from the inn, between the liability of the inn keeper for the care of a horse, from which he derives profit, and for which he is therefore chargeable, and his liability for the care of money and other dead property, for which he is deemed not liable, because he was deriving no direct or indirect profit therefrom.¹

17. Termination of Relation—Settling Bill, Leaving Inn and Promising Return.—The relation of inn keeper and guest no longer exists when the guest settles his bill and departs from the inn, leaving his baggage behind him and requesting the inn keeper to keep it until his return, which he says will be in a few days.²

1. See *Towson v. Havre de Grace*, Bank 6, Har. & J. (Del.) 47; s. c., 14 Am. Dec. 254, 256, where the court, through BUCHANAN, J., said: "Inn keepers are answerable, by reason of the profit arising either from the keeping of the horses etc. of their guests, or from the entertaining of the guests themselves, in the case of money or other property, from the keeping of which alone no profit can arise. So that if a guest goes to an inn, and leaves his horse there with the host and goes away himself for a time, and in his absence the horse is stolen, the host is chargeable on account of the profit arising from the keeping of the horse; but if he goes away for several days, leaving money or other dead property there, which is stolen or lost during his absence, the host is not answerable for the loss, as at that time he was deriving no profit or gain, either from the keeping of the money or goods, or from the entertaining of the guest himself."

2. *O'Brien v. Vaill*, 22 Fla. 627.

Derivation of Profit and Expectation of Return.—In the case just cited McWHORTER, C. J., said: "We think the current of authority and the weight of reason is opposed to the conclusion reached by the supreme court of Georgia in *Adams v. Clem*, 41 Ga. 65; s. c., 5 Am. Rep. 524, and the supreme court of New York in *McDonald v. Egerton*, 5 Barb. (N. Y.) 560, *supra*. The law imposes on an inn keeper an extraordinary liability for the protection of the baggage of his guest. He can avoid it only on the grounds of the loss being occasioned by the act of God, the public enemy, the misconduct of the guest, or [of] the friend he brings with him. We can think of no other reason for the imposition of this

liability upon the inn keeper than the profit he receives from entertaining his guest. When the traveller ceases to be his guest, and the inn keeper ceases to derive a profit from his entertainment, the relation of inn keeper and guest has ceased as such, and as a consequence their relative liabilities. . . . The expectation to become a guest, at another time did not continue the relation of inn keeper and guest." The same conclusion was reached where a party spent the night at a hotel in company with two fellow travellers, and the next morning paid his bill and had his name checked off the register, in order to relieve himself of liability as a guest during a day's absence at a neighboring town, but stated to the clerks that he would return at night. On returning and reregistering he discovered that during his absence a valise left by him in his room, with other light baggage in charge of a friend, was lost; and on being refused the payment which he demanded, for the valise and contents, he brought action for the value thereof against the inn keeper, but was *held* not entitled to recover. *Miller v. Peeples*, 60 Miss. 819, 822; s. c., 45 Am. Rep. 423. CAMPBELL, C. J., who delivered the opinion of the court, said: "The relation of inn keeper and guest was intentionally ended by the act of the guest, who paid his bill and had his name stricken from the register of guests for the purpose of freeing himself from liability as a guest, and he could not thereafter, and while he was not a guest, claim the rights of one as to the baggage he left behind him. The expectation thereafter to become a guest did not continue the relation terminated at his instance and for his advantage by settling his account for

Guest's Property Still on Inn Premises.—But such relation may still subsist while property of the guest is not yet removed from the inn premises.¹

entertainment. An inn keeper is chargeable for such 'because of the profit derivable from entertaining.' The right to charge is the criterion of the inn keeper's liability. When the liability of the guest to be charged as such ceases, his claim on the inn keeper as such expires, subject only to the right to hold him responsible for the baggage of the guest for such time as may be reasonable to effect a removal, to be determined by circumstances. Upon the facts of this case the respective rights which spring from the relation of inn keeper and guest did not exist, for one cannot escape the just burdens of a particular relation, and at the same time claim the advantages incident to it."

Right of Compensation for Property Left Behind.—The case of *McDonald v. Egerton*, 5 Barb. (N. Y.) 560, is said in *O'Brien v. Vaill*, 22 Fla. 627, to be partly based upon the case of *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, but to have misconstrued the opinion in that case, wherein *JUDGE BRONSON* "drew a well founded distinction, in respect of the inn keeper's liability for property left by the guest, as to whether the inn keeper was to receive compensation for keeping the property during the absence of the guest," who "had left a horse, which required feed and attention, for which the inn keeper had a right to charge a reasonable compensation." But in *McDonald v. Egerton*, 5 Barb. (N. Y.) 560, according, the plaintiff left behind his coat, and there was no compensation agreed on or expected for keeping it. "Leaving property for which a compensation for keeping was to be paid," however, according to the commenting case, "continued the relation of inn keeper and guest so far as that property was concerned."

Intention to Return Not Told to Inn Keeper.—Where a party arrived in Toronto from Ireland, and drove from the railway station to a hotel, bringing with him a portmanteau, carpet bag, etc., and asked for a room, saying he wanted only to change his dress before going to a friend, had his things taken to the room, and after occupying it for about an hour, went to his friend, with whom he remained, but next morning,

when he returned to get his things, the portmanteau could not be found, it was *held* that such party, who said to a friend, but not to the inn keeper, that he intended to return that night, was not there as a guest after he had dressed and left the inn, and that the inn keeper was not liable for the subsequent loss of the portmanteau. *Lynar v. Mossop*, 36 Up. Can., Q. B. 230, 235.

Subsequent Liability of Inn Keeper.—The liability of an inn keeper after the relation of host and guest ceases, is fully discussed in the light of modern views in the recent case of *Murray v. Marshall*, 9 Colo. 482; s. c., 59 Am. Rep. 152.

1. Thus where a party stopped at a tavern with two horses, which he had put in the barn and fed, and took dinner himself, and having paid his bill, requested the inn keeper to get his horses, but the latter told him to go on and be hitching up, promising to be out in a few minutes, whereupon the guest went to the barn and put the headstalls on the horses, but while the horses were being led out by the driver, one of them, which followed on, was injured by a kick from a stallion, it was insisted that before the injury the servant of the guest had taken the horses into his own possession and charge, and that the relation of landlord and guest had terminated, but it was *held* that the liability of the inn keeper was not at an end when the injury occurred, the horses being still on his premises and in his barn. *Seymour v. Cook*, 53 Barb. (N. Y.) 451, 453; s. c., 35 How. Pr. (N. Y.) 180, 183.

Leaving Horse and Bag of Gold.—Where, however, a departing guest leaves a horse which had been put in the stable of the inn and kept there during the stay of the guest, this may not continue the relation of inn keeper and guest, so as to render the inn keeper liable as such for a bag of gold left with him by the guest while stopping at his house. *McDaniels v. Robinson*, 28 Vt. 387; s. c., 67 Am. Dec. 720, 722. This was *held*, in a suit by the former guest against the inn keeper. *BENNETT, J.*, said for the court that "we are to understand from the case that when the plaintiff handed the gold to the defendant he had made up his mind to leave the defendant's inn not to return again

18. Duties in General—Scope at Common Law.—At common law the inn keeper was compelled to furnish lodgings and entertainment for travellers and passengers, and was bound to protect the property they brought with them, and was liable if it was lost or injured.¹

Reasonable Accommodation Alone Requisite.—The law only obliges an inn keeper, however, to furnish proper and convenient accommodations for his guests, and in doing this he may arrange his business to suit his own advantage, while he complies with the reasonable requirements of his guests.²

Similarity to Those of Common Carrier, etc.—The duties, rights and responsibilities of an inn keeper are in most respects kindred to those of a common carrier, but in order to enforce the strict common law liability of an inn keeper, the technical relation of guest and inn keeper must be established.³

Care of Persons of Guests.—The duty of a hotel keeper is not to insure the persons of his guests against injury, but merely to take reasonable care of their persons, so that they should not be injured by anything happening to them through his negligence while they are his guests.⁴

Procurement of Licence.—The failure of an inn keeper to perform the obligation, frequently imposed upon him by statute, of procuring a licence from municipal officers, does not relieve him of his other obligations to travellers and strangers.⁵

19. Extent of Duty to Receive Guests—In General.—An inn keeper is bound by our law, as a servant of the public and exercising a public vocation, to lodge and entertain, to the extent of his accommodations, all suitable persons who may apply; and he cannot, if he has room enough in his house, unreasonably refuse on any pretence to receive as guest any person who tenders him

to it as a guest, and that he did immediately thereafter leave, with the intention not again to return; and in no proper sense could the plaintiff be said to be the personal guest of the defendant at the time of the loss; and it would be going too far to hold that the leaving of the horse at the inn, under the circumstances of the case, made the plaintiff constructively a guest in relation to the bag of gold."

1. *Hancock v. Rand*, 94 N. Y. 1; s. c., 46 Am. Rep. 112, 117. See *Mowers v. Fethers*, 61 N. Y. 34; s. c., 19 Am. Rep. 244, 246; the Civil Rights Bill, 1 Hughes (U. S.) 541, 542.

2. The Civil Rights Bill, 1 Hughes (U. S.) 541, 543, concerning obligation of an inn keeper, under the statute of Maine, to "be at all times furnished with suitable provisions." See *Atwater v. Sawyer*, Me. 539, 542, 543.

3. *Mowers v. Fethers*, 61 N. Y. 34;

s. c., 19 Am. Rep. 244, 246, where it is also said: "The obligation to respond for injury to property depends upon his [that is, the inn keeper's] duty to receive and entertain as an inn keeper, and they must stand or fall together. *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 665; *Ingalsbee v. Wood*, 36 Barb. (N. Y.) 455; s. c., 33 N. Y. 577; *Hulett v. Swift*, 33 N. Y. 577.

4. *Sandys v. Florence*, 47 L. J., C. P. 598, concerning liability of inn keepers for personal injuries to guests. See *Rommel v. Schumbacher*, 11 Atl. Rep. (Pa.) 779; s. c., 27 Am. L. Reg., N. S. 156, with full note, 158.

5. *Atwater v. Sawyer*, 76 Me. 539, 543, 545. See *Norcross v. Norcross*, 53 Me. 163, 168; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179; s. c., 40 Am. Dec. 642, 645.

Compare Korn v. Schedler, 11 Daly (N. Y.) 234.

reasonable recompense therefor, without rendering himself liable to the party in damages, and perhaps criminally indictable besides.¹

Insufficient Excuses for Refusing Admission.—Indeed, it is no excuse for the inn keeper that the party applying for admission to the inn was travelling on Sunday, or came to the inn at a late hour of the night, or refused to tell his name and abode,² or that the applicant for entertainment was an infant;³ or that other guests of the same class, as militiamen, had been guilty of misconduct.⁴

1. See Schouler on Bailments (2d ed.), § 318; Bacon's Abr., Inns and Inn Keepers (c); *Watson v. Cross*, 2 Duv. (Ky.) 147, 148.

In *Rex v. Ivens*, 7 Car. & P. 213, 219, COLERIDGE, J., in summing up, said that "an indictment lies against an inn keeper, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender." In regard to the grounds of the doctrine, it was declared that the law "is founded in good sense. The inn keeper is not to select his guests. He has no right to say to one, you shall come into my inn; and to another, you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose inn keepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers, and supplying them with what they want."

In *Hawthorn v. Hammond*, 1 Car. & K. 404, 407, PARKE, B., in summing up, said: "There is no doubt that the law is, that a person who keeps a public inn is bound to admit all persons who apply peaceably to be admitted as guests."

Holding Out House as Public Place, etc.—In *Markham v. Brown*, 8 N. H. 523, 528; s. c., 31 Am. Dec. 209, PARKER, J., said: "An inn keeper holds out his house as a public place to which travellers may resort, and of course surrenders some of the rights which he would otherwise have over it. Holding out as a place of accommodation for travellers, he cannot prohibit persons who come under that character in a proper manner, and at suitable times, from entering so long as he has the means of accommodation for them."

Similarity to Common Carrier.—"By the common law, an imperative duty of an inn keeper was, to receive and entertain, for a reasonable compensation, all

persons applying, not of disorderly conduct, and having the means of payment. There was as little discretion left him in the choice of his guests as there was to the common carrier in the selection of the persons for whom he would perform his duties. Each is engaged in public employment, bound, in the absence of reasonable grounds for refusal, to serve all having a necessity for their services." *Beale v. Posey*, 72 Ala. 323, 330.

2. *Rex v. Ivens*, 7 Car. & P. 213, 219, 220.

3. *Watson v. Cross*, 2 Duv. (Ky.) 147, where CHIEF JUSTICE SAMPSON, delivering the opinion of the court, said "that the inn keeper was legally bound to receive and entertain all guests apparently responsible and of good conduct, who might come to his house; and if he refused to do so, he was liable alike to an indictment and an action by the party aggrieved; and the mere fact of infancy would not justify him in any such refusal." "Where a party voluntarily contracts with an infant," the opinion proceeds, "then the infant may avail himself of his legal disability and avoid the contract, if not for necessities; but to apply the principle to contracts which are compulsory on the side of the other contracting party would be to make the law an instrument of oppression. It would be a legal absurdity to compel a man to make a contract, and at the same time permit the other party, who is the instrument of such compulsion, to avoid the contract."

4. *Atwater v. Sawyer*, 76 Me. 539; s. c., 49 Am. Rep. 634, 635.

Civil Rights Bill.—In the Civil Rights Bill, 1 Hughes (U. S.) 541, 544, DICK, J., after reviewing the principles and regulations governing inns, said: "It is thus apparent that all the rights to the full and equal enjoyment of the advantages, accommodations, facilities and privileges of inns, public conveyances,

Sufficient Grounds for Exclusion.—But it is reasonable excuse for an inn keeper to allege that the person refused admission came to the inn drunk or behaved in an indecent or disorderly manner, or was an utterly disreputable or irresponsible person, or came to use the house for prostitution.¹

etc., are derived from the common law and State statutes, and fully existed before the passage of the Civil Rights bill. By the common law and statutes of this State [North Carolina], no discrimination is made against colored men as a class, or against nonresident citizens."

Stage Drivers of Opposition Line.—In *Markham v. Brown*, 8 N. H. 523; s. c., 31 Am. Dec. 209, 211, in holding that an inn keeper has no right to exclude stage drivers soliciting passengers for an opposition line of coaches, while admitting those of other lines, PARKER, J., said: "There seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted and another excluded, so long as each has the same connection with his guests, the same lawful purpose, comes in a like suitable condition, and with as proper a demeanor; any more than he has the right to admit one traveller and exclude another, merely because it is his pleasure. If one comes to injure his house, or if his business operates directly as an injury, that may alter the case; but that has not been alleged here. And perhaps there may be cases in which he may have a right to exclude all but travellers and those who have been sent for by them. It is not necessary to settle that at this time."

1. Schoul. Bailments (2nd. ed.), § 318.

Drunk or Disorderly Persons.—"If a person came to an inn drunk, or behaved in an indecent or improper manner," says COLERIDGE, J., in *Rex v. Ivens*, 7 Car. & P. 213, 219, "I am of opinion that the inn keeper is not bound to receive him." So in *Markham v. Brown*, 8 N. H. 523, 529; s. c., 31 Am. Dec. 209, 210, it is said of an inn keeper that he "has a right to prohibit common drunkards and idle persons from entering and to require them . . . to depart if they have already entered." "An inn keeper may refuse to receive a disorderly guest, or require him to leave his house." The Civil Rights bill, 1 Hughes (U. S.) 541, 543. See 2 Pars. Contr. (7th. ed.) *150. In *Commonwealth v. Power*, 7 Met. (Mass.) 596, 601, it is said that an

owner of a steamboat or railroad "is in a condition somewhat similar to that of an inn keeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound so to regulate his house, as well with regard to the peace and comfort of his guests who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper, to secure such quiet and good order." See, to like effect, *McKee v. Owen*, 15 Mich. 115, 131.

Thieves.—The inn keeper "is indictable if he usually harbor thieves (1 Hawk., ch. 78, § 1; Bac. Abr., Inns, etc.), and he is answerable for the safe keeping of the goods of his guest (*Story on Bailm.* 307), and is not bound to admit one whose notorious character as a thief furnishes good reason to suppose that he will purloin the goods of his guest, or his own." *Markham v. Brown*, 8 N. H. 523; s. c., 31 Am. Dec. 209, 210.

Visitor with Prostitute.—In the case of an action brought against an inn keeper for the loss of money, by one who lived very near the hotel and came there at midnight with a disreputable woman whom he had met on the street, and whose name he did not know, registering her as his wife, and on being assigned a room, delivering his money for safe keeping to a clerk, who absconded therewith, COLE, C. J., said: "Now, if the defendant had been aware of the purpose of the plaintiff in applying for a room [inferred in the opinion to be that of having sexual intercourse with the woman], could he not have refused to receive him into his house? Nay, more; if the plaintiff had been received by the clerk and a room had been assigned him, could not the defendant, on learning the purpose for which the room had been taken, have incontinently turned the plaintiff and the woman into the street, or have called the police and had them arrested? It seems to us there can be no doubt of the right of the defendant thus to have treated the plain-

20. Unreasonable Demands and Obnoxious Visitors—Compliance with Caprices of Guests.—The landlord of an inn is legally bound to do no more than provide reasonable and proper accommodation for his guest, and he is not under obligation to comply with the capricious desire of his guest to occupy a particular apartment, as a bed room, in which to sit up all night.¹

Removal of Obnoxious Person.—If a person has entered a public inn and his presence, for reasons best known to the proprietor, is disagreeable to him or to his guests, he has the undoubted right to request the individual to depart; and if the latter re-

tiff. But if the plaintiff was a guest and entitled to all the rights and privileges of a person having that *status* at the hotel, he could not have been turned into the street, though his profligate conduct was outraging all decency and ruining the reputation of the hotel." *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242, 245.

Brawlers.—An inn keeper "is liable if his house is disorderly (1 Hawk. 451) and cannot be held to wait until an affray is begun before he interpose, but may exclude common brawlers, and any one who comes with intent to commit an assault, or make an affray. So he may prohibit the entry of one whose misconduct in other particulars, or whose filthy condition, would subject his guests to annoyance." *Markham v. Brown*, 8 N. H. 523; s. c., 31 Am. Dec. 209, 210. But compare *Atwater v. Sawyer*, 76 Me. 539; s. c., 49 Am. Rep. 634.

1. *Fell v. Knight*, 8 Mees. & W. 269, 276.

"An inn keeper may refuse to receive a disorderly guest, or require him to leave his house. He is not bound to examine into the reasonableness of the guest's requirements. And while travellers are entitled to proper accommodations, they have no right to select a particular apartment, or to use it for purposes other than those for which it was designed." The Civil Rights bill, 1 Hughes (U. S.) 541, 543. See 2 Pars. Contr. (7th ed.) *150. In the above cited case of *Fell v. Knight*, 8 Mees & W. 269, 276, LORD ABINGER, C. B., said: "I do not think a landlord is bound to provide for his guest the precise room the latter may select. When the guest expresses a desire of sitting up all night, is the landlord bound to supply him with candle light in a bedroom, provided he offers him another proper room for the purpose?"

. . . I think he is not bound to do

so. All that the law requires of him is to find for his guest reasonable and proper accommodation: if he does that he does all that is requisite."

Bringing Dogs Into Inn.—On an indictment charging the defendant, as an inn keeper, with refusing refreshments to the prosecutor, who entered with a large St. Bernard mastiff, one of two dogs which had previously been charged by the inn keeper with being obnoxious visitants, it was *held* that the defendant could not be convicted because the refreshment bar was not an inn, the prosecutor was not a traveller, and the defendant had reasonable ground for his refusal. *The Queen v. Rymer*, L. R., 2 Q. B. 136; s. c., 19 Eng. Rep. 261 (p. 140). On the last point KELLY, C. B., said: "I do not lay down positively that under no circumstances could a guest have a right to bring a dog into an inn. There may possibly be circumstances in which, if a person came to an inn with a dog, and the inn keeper refused to put up the dog in any stable or outhouse, and there were nothing that could make the dog a cause of alarm or annoyance to others, the guest might be justified in bringing the dog into the inn. But it is not necessary to decide any such question. In this case, looking at the previous facts, the number of dogs previously brought, and their kind and behavior, the nature of the right claimed by the prosecutor in his letter [insisting upon being allowed to follow his inclinations as heretofore, as against the remonstrance of the defendant], and the size and class of the dog, I think the defendant would have had ample ground for his refusal even if the place had been an inn and the prosecutor a traveller." MANISTY, J., said (p. 141): "I agree upon all points. I only wish to add that, in my opinion, a guest cannot, under any circumstances, insist on bringing a dog into any room or place in an inn where other guests are."

fuses, the inn keeper can lay his hands gently upon the other party and lead him out, or if resistance is made, use all the force necessary to put him out.¹

21. Callers Upon Guests—Duty to Receive Business Callers.—An inn keeper may be bound to permit the entry not only of persons who have been sent for by guests, but also of those who have business with guests, provided that such parties come at a suitable time, in a proper manner, demean themselves properly, and remain no longer than is necessary.²

Qualified View.—But in a case where it was merely the caller's friend who had business with the guest, it was considered that the admission of a caller upon business was rather a matter of courtesy than of sheer right, and that if the landlord should re-

1. *Commonwealth v. Mitchel*, 2 Pars. Sel. Cas. (Pa.) 431, 434, where PARSONS, J., delivering the opinion of the court, said: "This rule I deem sound and necessary for the protection of the proprietor and his guests. Any other rule would expose all well regulated public houses to the constant intrusions of the idle, dissolute and abandoned in the community, and every guest to that annoyance which would make a hotel anything else than the quiet home of the stranger, which it ought to be. And there is the soundest reason why such should be the law, for if a theft be committed on a guest that lodgeth in an inn, by the servants of the inn or by any other person (not the guest's servant or companion), the inn keeper is answerable in an action on the case. 8 Mod. Rep. 32, 33; 1 Salk. 388. Now if he is liable for the loss of property taken from his guests, surely he should be permitted to protect himself from the intrusion of pickpockets and robbers. If it should be held, as was contended on the argument, that because a man keeps a public house all who choose have a right to enter and occupy the hall or bar-room, or even the public parlor in a hotel, and that the proprietor has not a right to request them to leave, and if they do not, and he gently lays his hands on one to lead him out, he is guilty of assault and battery, but few persons would be found as lodgers in public houses. For where is the distinction to be drawn? If one may enter the inn and tarry there, all may. The pickpocket, the burglar, gambler and horse thief can come and take his seat by the side of the most virtuous man in the community in the gentleman's common parlor at the hotel, and the proprietor cannot eject

him (no matter how annoying it may be to the guest) without being indicted for an assault and battery. Nor would the line of distinction be drawn here—the filthy and unclean would claim the same right. It is only necessary to state such a proposition to show its absurdity."

Party Creating Disturbance.—It appears to be considered that in the case of a party creating a disturbance in a public house, the landlord may lay hands on the unruly party and give him into the custody of a watchman witnessing his actions, if he forcibly resists being turned out, or even where he makes no resistance, if the disturbance is such as to alarm the neighborhood and the passers by. *Howell v. Jackson*, 6 Car. & P. 723, 725, where the party suing for false imprisonment was in company with several other young men who were "skylarking, bonneting and kicking up a rumpus." See also *Markham v. Brown*, 8 N. H. 523; s. c., 31 Am. Dec. 209, 212, where the driver of a stage coach was sued by an inn keeper in trespass, and it appeared that the defendant, while soliciting passengers for an opposition line of coaches, entered the plaintiff's inn in violation of a previous prohibition, got into an altercation and affray with another driver, and being ordered by the plaintiff to leave the house, made forcible resistance, or, according to other testimony, merely refused to leave until plaintiff laid down a club he had taken up.

2. *Markham v. Brown*, 8 N. H. 523; s. c., 31 Am. Dec. 209, 212, where PARKER, J., said of the inn keeper: "As he is bound to admit travellers, under certain limitations, he may likewise be held, under proper limitations, to admit

fuse to suffer the visitor to come in, or if had entered, should request him to depart, and on his refusal, gently lead him out, he would not be guilty of an assault and battery for so doing.¹

22. Inn Keeper's Rights in General—Compensation and Lien Therefor.—The most important of an inn keeper's rights is that of compensation for the entertainment he provides,² and his further right of lien for such compensation upon the goods of his guest.³

Hotel Bill of Another.—A drummer who is a transient patron at a hotel does not bind his employer for board furnished him from time to time, through an extended period, when it is the custom for transient patrons to pay cash, and notice is not given the employer of the failure of the drummer to do so.⁴

Tender of Price.—"An inn keeper may demand the expenses before he receives the guest." An inn keeper has no right, however, to refuse a suitable guest for whom he has room, when either the price of the guest's entertainment is tendered to him, or such circumstances occur as will dispense with that tender.⁵

those who have business with them as such. This may be considered as derived from the right of the traveller. It is conceded that he may be bound to permit the entry of persons who have been sent for by the guest. But we think the rule is not to be limited, in all cases, to this. There may be such connection between travellers and those engaged in their conveyance, that the latter, although not specially sent for, may have a right to enter a common inn, or such that the landlord, if he give a general licence to some of those whose business is connected with his guests, in their characters as travellers, cannot lawfully exclude others pursuing the same business, and who enter for a similar object."

1. *Commonwealth v. Mitchel*, 2 Pars. Sel. Cas. (Pa.) 431, 436. It is admitted, however, that he would doubtless be liable, both to the guest and the visitor, in an action for any injury either might sustain in consequence of such proceedings of the proprietor.

2. See, concerning this right, *Mulliner v. Florence*, L. R., 3 Q. B. D. 484, 488; s. c., 28 Eng. Rep. 390, 394; *Proctor v. Nicholson*, 7 Car. & P. 67, 68, 69; *Rex v. Ivens*, 7 Car. & P. 213, 219; *Fell v. Knight*, 8 Mees. & W. 269, 276.

3. On existence and nature of this right, see statements in *Manning v. Hollenbeck*, 27 Wis. 202, 204; *Nichols v. Halliday*, 27 Wis. 406, 407; *Watson v. Cross*, 2 Duv. (Ky.) 147, 149; *Grin-*

nell v. Cook, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 664; *Cook v. Kane*, 13 Ore. 482; s. c., 57 Am. Rep. 28, 29.

Also of Property.—The inn keeper has the right to use property left on his hands without any discoverable owner, moderately and prudently, to the extent of compensating him for his charges for keeping, but if he has used it sufficiently for this purpose, he is liable in conversion for refusing to deliver it to the owner on demand. *Alvord v. Davenport*, 43 Vt. 30, 34.

4. *Covington v. Newhouse*, 99 N. Car. 523. The term "hotel bill," when used in a contract which constitutes a guaranty of payment of such a bill, includes board and lodging, these being items which every common inn keeper is bound to furnish each guest, but excludes billiards, cigars and liquors: *Patterson v. Gage*, 16 Pac. Rep. (Colo.) 560; s. c., 37 Alb. L. J. 248.

5. *Rex v. Ivens*, 7 Car. & P. 213, 219, where COLERIDGE, J., in summing up, said: "With respect to the nontender of the money by the prosecutor [upon an indictment for refusing to receive him into the inn], it is now a custom so universal with inn keepers to trust that a person will pay before he leaves an inn, that it cannot be necessary for a guest to tender money before he goes into an inn; indeed, in the present case, no objection was made that Mr. Williams [the prosecutor] did not make a tender; and they did not even insinuate

Connected with Character of Guest.—An inn keeper appears also to have various rights connected with the character of the guest, such as the right to refuse to receive a disorderly guest, or to require him to leave his house.¹

23. Inn Keeper's Lien in General—When Exists.—Whenever, by virtue of the relation of inn keeper and guest, the law imposes the extraordinary responsibility which is placed upon inn keepers for the goods of the guest, it gives the inn keeper a corresponding security upon the goods put by the guest into his possession.²

Qualified Denial of Lien.—It has been laid down, however, in a case which involved the claim to keep a bill until the party tendered the proper change, and which was decided on a different ground, that an inn keeper has no right to detain the property of his guest as a pledge for what is due him, though he may detain his person, unless in the case of a horse, etc., which may be detained for his feeding, but not for the meat of his master.³

any suspicion that he could not pay for whatever entertainment might be furnished to him." But in *Fell v. Knight*, 8 Mees. & W. 269, 276, LORD ABINGER, said: "I am also inclined to think, notwithstanding the case which has been cited of *Rex v. Jones* [meaning *Rex v. Ivens*, 7 Car. & P. 213], that the declaration [in an action for refusing to receive a party at an inn, and turning him out therefrom] is bad for want of an allegation of a tender of the amount to which the inn keeper would be reasonably entitled for the entertainment furnished to his guest; it is not sufficient for the plaintiff to allege that he was ready to pay; he should state further that he was willing and offered to pay. There may be cases where a tender may be dispensed with, as, for instance, where a man shuts up his doors or windows, so that no tender can be made; but I rather think these facts ought to be stated in the indictment or declaration, and I have therefore some doubt as to the complete correctness of the judgment of my brother COLERIDGE, in the case cited; but it is not necessary to decide that point in the present case."

1. At least such is the implication from The Civil Rights bill, 1 Hughes (U. S.) 541, 543; 2 Pars. Contr. (7th ed.) *150; Markham v. Brown, 8 N. H. 523; s. c., 31 Am. Dec. 209, 210. Compare *Atwater v. Sawyer*, 76 Me. 538; s. c., 49 Am. Rep. 634.

2. *Cook v. Kane*, 13 Ore. 482; s. c., 57 Am. Rep. 2831.

Lien Dependent on Liability.—In *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 664, 665, BRONSON, J., for the court, said: "On account of this extraordinary liability [of an inn keeper for the goods of his guest] the law gives the inn keeper a lien on the goods of his guest for the satisfaction of his reasonable charges. It was once held that he might detain the person of his guest (see *Newton v. Trigg*, 1 Show. 268), but that doctrine is now exploded (see *Sunbolt v. Alford*, 3 Mees. & W. 248, 253, 254), and the lien is confined to the goods. . . . The lien and the liability must stand or fall together. Inn keepers cannot claim the one with any just expectation of escaping the other." So it is said of an inn keeper that "his lien as an inn keeper would seem to involve a concession of his liability as an inn keeper. Since the law gives the lien on account of his extraordinary liability." *Murray v. Marshall*, 9 Colo. 482, 485; s. c., 59 Am. Rep. 152.

General Doctrine.—"It is a well settled principle," says CHIEF JUSTICE SIMPSON, in delivering the opinion of the court in *Watson v. Cross*, 2 Duv. (Ky.) 147, 149, "that an inn keeper has a lien on the property of his guest for the price of his entertainment." See, to same effect, *Manning v. Hollenbeck*, 27 Wis. 202, 204.

3. *Carlisle v. Quattlebaum*, 2 Bail. L. (S. Car.) 452, 453. It is pointed out, however, that this case "does not rule that an inn keeper has no lien on the goods of his guest for the payment of his bill. The true principle on which

Extends to Third Person's Goods.—This security consists of a lien not only upon the property of his guest, but also upon the property of third persons for whom the guest is bailee, unless the inn keeper is aware that the guest has no right to give the goods into the inn keeper's charge.¹

Extends to Exempt Property, etc.—The lien extends even to property of the guest which is exempt from execution, such as a coat for whose recovery replevin is brought against the inn keeper.²

Trial of Question of Lien.—The question of the inn keeper's

it rests is, that Quattlebaum was not an inn keeper, and therefore not entitled to the rights and remedies of one. He was one who occasionally, and only as he thought proper, afforded accommodation to travellers. Such being his situation, he was not subject to the liabilities or rights of an inn keeper without special contract." *Dunlap v. Thorne*, 1 Rich. (S. Car.) 213, 217. Furthermore, so far as this case favors any right to detain the person of the guest, it is in conflict with *Sunbolf v. Alford*, 3 Mees. & W. 248, 253, 254, where this view is fully discussed and controverted.

1. See *Cook v. Kane*, 13 Oreg. 482; s. c., 57 Am. Rep. 28, 29. LORD J. said of the inn keeper: "Compelled to afford entertainment to whomsoever may apply and behave with decency, the law, as an indemnity for the extraordinary liabilities which it imposes, has clothed the inn keeper with extraordinary privileges. It gives him as a security for unpaid charges a lien upon the property of his guest, and upon the goods put by the guest into his possession. *Overton, Liens* [149]. Nor is the lien confined to property only owned by the guest, but it will attach to the property of third persons for whom the guest is bailee, provided only he received the property on the faith of the inn keeping relation. *Schoul. Bailm.* 292; *Calye's Case*, 1 *Smith's Lead. Cas.* 247; *Manning v. Hollenbeck*, 27 Wis. 202. But the lien will not attach if the inn keeper knew that the property taken in his custody was not owned by his guest, nor had any right to deposit it as bailee or otherwise, except perhaps some proper charge incurred against the specific chattel." See, to like effect, *Threfall v. Borwick*, Law R., 10 Q. B. 210; s. c., 12 Eng. Rep. 210, 211; affirming same case, Law R., 7 Q. B. 711, or 2 Eng. Rep. 689. In regard to exception of charge against specific chattel, see *Domestic Sewing Machine*

Co. v. Watters, 50 Ga. 573, 574. Concerning knowledge of guest's want of ownership, see *Broadwood v. Granara*, 10 Ex. 417.

2. *Swan v. Bourne*, 47 Iowa 501; s. c., 29 Am. Rep. 492, 493, where ADAMS, J., said: "An inn keeper's lien exists by common law, and we see nothing in the statute exempting certain property from execution to indicate an intention to abrogate the common law in this respect. The statute exempts only from general execution. It was never designed to prevent persons from giving a lien upon whatever property they see fit. Where a lien is given, it may of course be enforced. Had the plaintiff given a chattel mortgage upon his coat to secure his hotel bill, no one would doubt the right of the defendant to foreclose it, notwithstanding the coat might have been a part of the plaintiff's ordinary wearing apparel. When the plaintiff became defendant's guest at his hotel, he gave the defendant a lien upon his coat as effectually as if he had given him a mortgage upon it. The law implied that from the act of becoming the defendant's guest and taking his coat with him. The rule is too well established to require support from authorities. Besides, it is obvious that without such a rule the business of hotel keeping could not be done."

Covers More Than Reasonable Quantity.—In a case where the guest was a lieutenant in the royal navy, and the son of a lady of fortune, who seems to have warned the inn keeper not to allow his guest more than a certain quantity of brandy and water, it was held that the lien of the hotel keeper covered all the goods ordered by the guest and supplied to him, irrespective of the question whether they were reasonable in quantity or not, as the landlord of an inn was not bound to investigate the nature of the articles which were ordered by a guest before

lien upon property for charges incurred in respect to it, may be tried in defence to an action of conversion.¹

By Whom May be Exercised.—A person is not entitled to an inn keeper's lien or to the rights and remedies of an inn keeper generally, if he merely occasionally, and as he thinks proper, affords accommodation to travellers.²

Agisters and Livery Stable Keepers.—Neither the agisters of cattle nor the keepers of a livery stable have any lien, without a special agreement to that effect,³

he supplied them. *Proctor v. Nicholson*, 7 Car. & P. 67, 68.

1. *Alvord v. Davenport*, 43 Vt. 30, 35.

2. See *Dunlap v. Thorne*, 1 Rich. (S. Car.) 213, explaining *Carlisle v. Quattlebaum*, 2 Bail. L. (S. Car.) 452, 453.

3. *Fox v. McGregor*, 11 Barb. (N. Y.) 41, 42.

In *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 667 (1842), *BRONSON, J.*, said for the court: "The right of lien has always been admitted where the party was bound by law to receive the goods; and in modern times the lien has been extended so far that it may now be laid down as a general rule that every bailee for hire who, by his labor and skill, has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen and laborers as receive property for the purpose of repairing or otherwise improving its condition. But the rule does not extend to a livery stable keeper, for the reason that he only keeps the horse without imparting any new value to the animal. And besides, he does not come within the policy of the law, which gives a lien for the benefit of trade. Upon the same reasons the agister or farmer who pastures the horses or cattle of another has no lien for their keeping, unless there be a special agreement to that effect. This doctrine was laid down in *Chapman v. Allen*, Cro. Car. 271. And in *Yorke v. Grenaugh*, 2 Ld. Raym. 868, *LORD HOLT* said a livery stable keeper had no lien. See the remarks of *LORD LYNTHURST, C. B.*, upon this case, in *Judson v. Etheridge*, 1 Crompt. & M. 743. I am not aware that this rule has ever been departed from, though it has been suggested that it would be well enough to place the livery man on the same footing with other persons who bestow their labor

and care upon the property entrusted to their keeping. *Cowen's Tr.*, 299 (2nd ed.) But the question has recently undergone a good deal of discussion in England, and the result is that the old cases remain unshaken, and it must now be regarded as the settled doctrine that agisters and livery stable keepers have no lien unless there be a special contract to that effect. *Wallace v. Woodgate*, 1 Car. & P. 575; s. c., Ry. & M. 193; *Bevan v. Waters*, 3 Car. & P. 520; *Judson v. Etheridge*, 1 Crompt. & M. 743; *Jackson v. Cummins*, 5 Mees. & W. 342. And see *Jacobs v. Latour*, 5 Bing. 139; s. c., 2 Moore & P. 201; *Sanderson v. Bell*, 2 Mees. & W. 304; *Scarfe v. Morgan*, 4 Mees. & W. 270. It will be seen from the cases which have been mentioned, that a distinction in relation to the question of lien has been taken between the mere keeper and the trainer of a horse; and it is said that the latter has a lien, because he has done something for the improvement of the animal. And in *Judson v. Etheridge* [1 Crompt. & M. 743], it was suggested by *Bolland, B.*, that the doctrine might perhaps be extended to the case of a breaker who takes a young horse to be broken, on the ground that he makes it a different animal from what it was before, and improves it by the application of labor and skill. On the same principle it has been *held*, that if a farmer or stable keeper receive a mare for the purpose of being covered by his stallion, he has a specific lien for the charge of covering. Whether these distinctions were well taken or not, they show that the courts have steadily adhered to the rule that one who merely provides food and takes the care of an animal, as an agister or livery stable keeper, has no lien except by contract." A further reason given why there is no lien in these cases is that the owner may have the possession of the animal and so destroy the lien beyond revival. So the law is treated as well settled

or by force of statute.¹

Against Whom May be Exercised.—Inn keepers acquire no lien, by virtue of their employment as such, upon property, unless it was delivered to them by a guest;² and, while an inn keeper has a lien upon the goods of a guest, he has none upon those of a boarder.³

24. Lien on Third Person's Goods—At Common Law.—At common law the inn keeper's lien extended to property brought by the guest and not owned by him.⁴

English Doctrine.—So it is now the undoubted English doctrine, despite the raising of a question as to the character of the property and the obligation to receive it, that there is no distinction, in regard to the inn keeper's lien, between the goods of a guest and those of a third person brought to the inn by a guest,

that neither the agister of cattle nor the livery stable keeper, can assert a lien on cattle or horses to pay for their keep, unless by virtue of an express contract, as against a customer who is not required to pay what may be due for their keep, on every occasion when he may take possession of the horses or cattle for the purpose of using or employing them. *Hickman v. Thomas*, 16 Ala. 666, 669.

No Lien by Local Custom.—A lien of a livery stable keeper upon a horse delivered to him to be fed and kept, being denied to him, in the absence of a special agreement, by the general law, cannot be created by any usage of a particular town or city such as is merely local and partial; but to acquire the form of law, such usage or custom must, according to the familiar principle, have been established and have become general, so that a presumption of knowledge by the parties can be said to arise. *Saint v. Smith*, 1 Coldw. (Tenn.) 51, 53.

Lien by Special Agreement.—But a stable keeper may by special agreement, acquire a lien on horses for their keep, and may have a right to repossess himself of them if the owner fraudulently takes them away in order to destroy the lien. *Wallace v. Woodgate*, 1 Car. & P. 575, 576. So the agreement may be so framed as not to divest the lien when the cow was taken away from the agister and creditor to be milked as by making provisions that if the cow was not returned, such agister might retake her whenever or wherever he found her. *Richards v. Symons*, 15 Law J. Q. B. 35, 36.

¹ See *Young v. Kimball*, 23 Pa. St.

193, 195; *Colquitt v. Kirkman*, 47 Ga. 555, 558. In the latter case it was held that under the construction given to the statutes of the State (Ga. Code of 1867, §§ 2096, 2097) the lien of the stable keeper is good against the true owner or prior incumbrancer of an article deposited by another, only for the expense of feeding or taking care of that particular article. See *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573, 575.

² *Fox v. McGregor*, 11 Barb. (N. Y.) 41, 43. See, to same effect, *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 489; s. c., 38 Am. Dec. 663, where the lien and the liability of an inn keeper are treated as correlative; also *Hickman v. Thomas*, 16 Ala. 666, 669; *Binns v. Pigott*, 9 Car. & P. 208, 209.

³ *Pollock v. Landis*, 36 Iowa 651, 652; *Hursh v. Byers*, 29 Mo. 469, 470; *Ewart v. Stark*, 8 Rich. L. (S. Car.) 423, 424, stating grounds of doctrine. See also *Jones v. Morrill*, 42 Barb. (N. Y.) 623, 627. But compare *Smith v. Keyes*, 2 Thomp. & C. (N. Y.) 650, 651, 652.

⁴ *Jones v. Merrill*, 42 Barb. (N. Y.) 623, 626. Thus it was laid down that if "A injuriously take away the horse of B and put him into an inn to be kept [and] B comes and demands him, he shall not have him until he hath satisfied the inn keeper for his meat; for when an inn keeper takes a horse into his keeping he is not bound to enquire who is the owner of the horse, which he is obliged to keep, let him belong to whom he will, and therefore no reason that the innkeeper should be obliged to deliver him until he is satisfied. Bac. Abr., Inns and Inn Keepers (D). To same

at least in the absence of knowledge, on the part of the inn keeper, of the real ownership of the goods.¹

American Doctrine.—Like views prevail in this country;² and the law is substantially laid down, in a leading case, to be, that the lien of the inn keeper is not ordinarily confined to property owned by the guest, but will attach to the property of third persons for whom the guest is bailee, provided only the inn keeper received the property on the faith of the inn keeping relation.³

effect see statement of Robinson v. Walter, Poph. 127; s. c., 3 Bulst. 269, in Grinnell v. Cook, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 666.

1. See Turrill v. Crawley, 13 Q. B. 197, 202, 203; Threfall v. Borwick, Law R., 7 Q. B. 711, 714.

State of the Authorities.—In the former case, it was held that an inn keeper had a lien for standing room on a carriage brought to the inn by a guest, but belonging to another person. COLERIDGE, J., said (at p. 202): "I think it clear that with reference to the inn keepers' lien there is no distinction between the goods of a guest and those of a third person brought to an inn by a guest. Three judges to one were of this opinion in Robinson v. Walter, 3 Bulst. 269; s. c., 1 Roll. Rep. 449 n; Poph. 127; and their opinion may be taken as sufficient authority for so reasonable a doctrine." WIGHTMAN, J., further said (at p. 203): "Doubts have been suggested as to the inn keeper's lien on the goods of a third person; and the doubts of judges in former times have been referred to. The judges were divided equally, it appears, in the first case, Skipwith v. —, 1 Bulst. 170; 3 Bulst. 271; then in the next case, Robinson v. Walter, 3 Bulst. 269; s. c., 1 Roll. Rep. 449; Poph. 127; they were divided three to one in favor of the lien; and in subsequent cases these doubts disappear altogether. In Johnson v. Hill, 3 Stark. 172, it was stated by counsel to have been 'held' by all the judges that even in the case where a robber had brought a horse which he had stolen to an inn, the inn keeper had a lien for its keep against the owner; and ABBOTT, C. J., said he had no doubt as to the law as stated." So in the report of the case of Threfall v. Borwick, 26 L. T., N. S. 794, or 2 Eng. Rep. 689, in Law R., 7 Q. B. 711, 714; s. c., affirmed Law R., 10 Q. B. 210, or 12 Eng. Rep. 266; LUSH, J., says that if the inn keeper has a lien as against the guest upon all the goods

which the guest brings with him and the inn keeper receives as his, "the cases have established beyond all doubt that he has the same right as against the real owner of the article, if it has been brought to the inn by the guest as owner." QUAIN, J., also said that the cases "show that if the thing be brought by the guest as owner, and the landlord takes it in thinking it is the guest's own, he has the same rights against the stranger, the real owner, as against the guest."

2. See Manning v. Hollenbeck, 27 Wis. 202, 205.

3. Cook v. Kane, 13 Oreg. 482; s. c., 57 Am. Rep. 28.

Dissenting View.—But in the same case as re-reported in 57 Am. Rep. 28, 31, note, THAYER J., delivered a dissenting opinion in which he said that upon the main question in the case under consideration, where a lien was claimed by an inn keeper on a piano, which had been consigned to a guest to sell on commission, there was "some doubt in view of the authorities upon the subject," though "upon a common sense view there would not seem to be any;" and that "it would shock all sense of property right" that a party could pledge another's piano "for his own hotel bill, or in any way subject it to the payment thereof." He referred to the fact that numerous cases had been cited where "such a lien had attached to the property of a third person," and thereupon remarked: "I have no doubt that such lien will in many cases attach to the property taken by the guest to the inn at which he obtains accommodation, though he be not the owner of it. But in all such cases it seems to me the property must have derived some special benefit, or else the owner must have entrusted it to a party under circumstances from which he could reasonably have concluded that the party would become the guest of an inn and take the property with him there as his own; and I do

25. Knowledge of Ownership of Goods—Known Ownership of Piano Loaned by Manufacturers, etc.—An inn keeper has been held not entitled to a lien where he knew that the piano sent to his guest, who was a professional pianist, did not belong to the guest, but was lent to him by a manufacturer of pianos, and the inn keeper did not receive it as a part of the guest's goods.¹

not think the rule should extend further than this The property of one man should not be taken for the debt of another against the former's consent, unless he has done some act or neglected some duty creating the liability. A party cannot be deprived of his ownership to property to satisfy the claim of another unless he has in some way obligated himself to submit to it. He must have agreed to it in terms, or have done some act directly or remotely authorizing it."

Under Statutory Regulations.—In Georgia, under a construction purporting to follow the language of the statute, it has been held that the lien of the landlord of an inn upon goods in possession of a guest, which belong to a third person, must be limited to charges for keeping, storing or feeding the specific property sought to be subjected to the lien, and does not extend to a claim for board of the guest. *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573, 574, 575, following like ruling as to lien of livery stable keepers in *Colquitt v. Kirkham*, 47 Ga. 555, 558. See Ga. Code of 1882 and 1873, § 2122, corresponding with § 2066 of the code of 1867. The keeper of a boarding house has a lien for board, under the New York statute, upon goods belonging to a boarder's mother but brought upon the premises by the boarder to furnish his room. *Jones v. Morrill*, 42 Barb. (N. Y.) 623, 626, 627. Where the lien of inn keepers and of boarding house keepers is confined by the statute to the "baggage and other valuables of their guests and boarders," it will not cover goods of third persons taken to the inn by the guest. *Wyckoff v. Southern Hotel Co.*, 24 Mo. App. 382, 387, where a lien was claimed on a typewriter which had been loaned to a guest at the hotel, but the court insisted upon a strict construction of the statute in this regard, though in the course of the opinion the scope and grounds of the inn keeper's lien at common law were thus stated. (p. 386) by THOMPSON, J.: "The authorities cited on behalf of the de-

fendant (who was the inn keeper) go to show that by the common law an inn keeper had a lien upon the goods of his guest, brought to his inn for board and lodging furnished by him to the guest at the request of the latter, although the goods may not have been the property of the guest, but may have been the property of some third person, provided the inn keeper was not aware that the goods were not the property of the guest. *Calye's Case*, 8 Coke Rep. 32 a; *Threfall v. Borwick*, L. R., 7 Q. B. 177 [s. c., 26 L. T., N. S. 794, or 2 Eng. Rep. 689]; s. c., affirmed, L. R., 10 Q. B. 210 [or 12 Eng. Rep. 266]; *Manning v. Hollenbeck*, 27 Wis. 202; *Cook v. Prentice* (Supr. Ct. Oreg. 1886), 34 Alb. L. J. 93; since reported as *Cook v. Kane*, 13 Oreg. 482; s. c., 57 Am. Rep. 28; *Jones v. Morrill*, 42 Barb. (N. Y.) 623, 626, per Barnard, J.; *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 490, per Bronson, J.; s. c., 38 Am. Dec. 663; *Turrell v. Crawley*, 18 L. J. (Q. B.) 155. This rule has been thought by enlightened judges, even in recent times, to be a just rule. It is grounded upon the extraordinary liability which the law imposes upon an inn keeper in respect of goods brought by his guest to his inn, he being answerable for any loss or destruction of such goods, except such as arise from the act of God or the public enemy. Several of the decisions above quoted show that the courts have regarded it as immaterial that the inn keeper may not have been obliged to receive into his inn goods of the character of the article in controversy, since when he did consent to receive them the extraordinary liability with which the law charges an inn keeper attached to him in respect to them, for which reason, they argue, he ought to have a lien upon them. And the cases go upon the ground that the lien of the inn keeper is coextensive with his liability."

1. *Broadwood v. Granara*, 10 Ex. 417, 422, where the case was characterized as one relating to goods not brought to the inn by a traveller as his goods, either upon his coming to or

Want of Knowledge of Ownership of Consigned Piano, etc.—But a piano has been held not chargeable with an inn keeper's lien for board and lodging furnished his guest, where the inn keeper did not know the fact that it was the property of a third person, who had consigned it to the guest to sell on commission, but such inn keeper, at the request of the guest, paid the freight charges on the piano and took it into his custody, receiving it, in his character as an inn keeper, as the property of his guest.¹

Drummer's Goods Known to Belong to Employer.—So the doctrine that the inn keeper has no lien upon the goods of a guest which he knows to belong to a third person, has been applied to the goods of a drummer, for whose hotel bill the inn keeper brought suit against the employer.²

whilst staying at the inn, but goods furnished for his temporary use by a third person, and known by the inn keeper to belong to that person. PLATT, B., further said, at p. 423: "Here the plaintiffs sent a pianoforte to the room of the guest, and the inn keeper well knew that it was not the property of the guest, and that it was not competent for him to pledge it for a debt of his own. Then how can it be said that any act of the plaintiffs gave the defendant a right to detain the pianoforte for his guest's debt? The plaintiff might have taken it away the next minute. The case does not fall within the principles of law relating to the lien of inn keepers." It has been remarked concerning this case, that "although there are certain *dicta* not necessary to the decision . . . to the effect that the inn keeper was not bound to receive the piano, yet the real ground of the decision was based on the fact that the inn keeper knew that the piano sent to his guest was the property of a third person, and did not therefore receive it as part of his guest's goods, that the right to subject the piano to his lien was denied, but, *e converso*, if he had not known the piano was the property of a third person, and had received it as the property of his guest, would not his lien have attached?" *Cook v. Kane*, 13 Oreg. 482; s. c., 57 Am. Rep. 28, 36.

Appropriating Horse and Cart.—In *Johnson v. Hill*, 3 Stark. 172, a person took a horse and cart which the servant of the owner was driving, directed the horse to be put in the stable of a neighboring inn, where had refreshment, and refused to give up the cart and horse until the owner paid a certain sum for not having his name on the cart, for which he unsuccessfully prose-

cuted the owner. The latter brought trover against the inn keeper, who had offered to restore the cart and horse only upon being paid for the keep of the horse up to that time. Concerning this case PLATT, B., said, in *Broadwood v. Granara*, 10 Ex. 417, 423: "If a person brings the horse of another to an inn, the inn keeper may detain it from the owner until its keep is paid. But if, as the jury found in *Johnson v. Hill*, 3 Stark. 172, the inn keeper knew that the person bringing the horse illegally got possession of it, and therefore had no right to pledge it for his debt, then the lien does not attach."

1. *Cook v. Kane*, 13 Oreg. 482; s. c., 57 Am. Rep. 28, 29, 31. In this case LORD, J., said it was not doubted but what the inn keeper "would be liable for the loss of the piano," and "in such case it is difficult to perceive upon what principle of law or justice he can be denied his lien." But THAYER, J., in his dissenting opinion was "inclined to believe that the burden of proof" was upon the inn keeper "to show that he supposed the piano to belong to the guest, and that he entertained him upon the faith that such was the fact, before he could claim a lien upon it for the hotel bill."

2. *Covington v. Newberger*, 99 N. Car. 523, where DAVIS, J., said: "But counsel for the plaintiff insists that the inn keeper has a lien even upon the goods of a third person held by a guest, and brought within the inn; and and [that] when the defendant replevied the goods he became liable. The landlord's or inn keeper's lien is well recognized. And the case of *Cook v. Kane*, 13 Oreg. 482; s. c., 57 Am. Rep. 28, cited by counsel, is authority for the

26. Obligation to Receive Goods—Declarations Treating as Criterion of Lien.—There are declarations in some of the cases to the effect that the lien of an inn keeper upon property is only commensurate with his obligation to receive it, with which his liability is inseparably connected.¹

Modern Doctrine Holding Immaterial.—But the later and better sustained view is that it "is not material whether the inn keeper is bound to receive such property or not," but that "if he does receive [it] as the property of his guest, and thereby becomes liable for it, he must be entitled to his lien."²

27. Articles Covered by Lien—All Goods Brought by Guest.—The lien of the inn keeper on the goods of his guest is not confined to such things as travelling guests ordinarily bring with them for their own use in journeying; but, like the inn keeper's liability, which covers even chests of deeds, charters or obligations, his lien extends to all the goods which the guest brings with him to the inn, and the landlord receives as his regardless of their character, in regard to bulk, etc.³

position taken by counsel, but it has the qualification 'unless he knew it was not the property of the guest.'

Lawyer's Blue Bag.—In a case concerning a letter-book in a blue bag, brought to an inn by the former clerk of an attorney with some things of his own in it, in the ordinary way, CRESSWELL, J., said that the inn keeper "could have no suspicion that it contained property belonging to any third person," and distinguished the case of *Broadwood v. Granara*, 10 Ex. 417.

Lien on Hired Carriage.—In commenting on a case where a lien was considered to cover the hired carriage of a guest, but the question of the inn keeper's knowledge of the true ownership was not passed on, *Turrill v. Crawley*, 13 Q. B. 197, the general doctrine of the existence of a lien on goods brought to the inn by a guest, where the inn keeper does not know they belong to a third person, and there is nothing in the circumstances of the case to show that the goods were not those of the guest, was asserted on the authority of the case under consideration. *Threfall v. Borwick*, 26 L. T., N. S. 794, 797; 2 Eng. Rep. 689, 697. Compare report of same case in Law R., 7 Q. B. 711, 714.

1. In *Threfall v. Borwick*, Law R., 10 Q. B. 210, 211; s. c., 12 Eng. Rep. 266, 267, LORD COLERIDGE, C. J., said: "Is there any authority except the dicta of PARKE, B. [in *Broadwood v. Granara*, 10 Ex. 417, 420, 423], which

was unnecessary for the decision of the case in hand, that the lien is only commensurate with the obligation to receive?" In *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 664, 665, it is said that the question whether a party has a lien on horses depends on whether he was bound to receive and take care of them, and would have been answerable for their loss if they had been stolen without any negligence on his part.

2. *Cook v. Kane*, 13 Oreg. 482; s. c., 57 Am. Rep. 28, 31; quoting opinions given in *Threfall v. Borwick*, Law R., 7 Q. B. 711, 713 (also reported in 26 L. T., N. S. 794, or 2 Eng. Rep. 689), which was affirmed on appeal in Law R., 10 Q. B. 210, 211; 12 Eng. Rep. 266, 267. In the latter case it was considered that, according to the advanced usages of society, an inn keeper might well be bound to receive a piano which a guest brought to the inn for his own amusement, if there was room for it. But irrespective of this point, it was regarded as too clear to be doubted that an inn keeper, having taken in such an article and safely kept it, had a lien upon it.

3. See opinions on *Threfall v. Borwick*, L. R., 7 Q. B. 711, 714 (also reported in 26 L. T., N. S. 794, 797, or 2 Eng. Rep. 689, 698); s. c. affirmed on appeal, L. R., 10 Q. B. 210; s. c., 12 Eng. Rep. 266. Consult also, for quotations from these opinions, *Cook v. Kane*, 13 Oreg. 482; s. c., 57 Am.

Carriages and Horses.—So the lien of an inn keeper covers carriages as well as horses, since carriages are commonly used in travelling in modern times, and the inn keeper's duties and privileges are extended to them.¹

28. General and Special Lien.—The lien of an inn keeper is general for his whole bill, and extends to all the goods which the guest brings with him to the inn, instead of being a separate lien on each particular article for the charges incurred in respect thereto.² But by the construction given to statutory provisions,³ the lien of an inn keeper is sometimes restricted, so far as concerns goods in possession of a guest which belong to a third person, to charges for the care of the specific property, and is not permitted to extend to a claim for the board of the guest.⁴ So it would seem that besides the general lien for all the expenses of a guest there might be a special lien on a particular thing for its own expenses, as on a carriage for its standing room.⁵

29. Enforcement of Lien—Not by Sale Without Judicial Process.—An inn keeper has a lien on the baggage of his guests for the nonpayment of their bills, but he has no power to enforce such lien by sale without judicial process.⁶ Indeed, despite a *dictum* to the contrary,⁷ it is settled that, except within the city of London, an inn keeper cannot, at common law, sell his guest's horse

Rep. 28, 30. Previously there were declarations of a contrary scope, to the effect that an inn keeper is bound to take in only such articles as both in nature and quality are reasonable for a traveller, and that it is questionable whether he is bound to take in articles of extraordinary bulk, like a piano, or has any lien on such or other articles which he is not under obligations to receive. See remarks of PARKE, B., in *Broadwood v. Granara*, 10 Ex. 417, quoted in *Wilkins v. Earle*, 3 Rob. (N. Y.) 352; s. c., 19 Abb. Pr. (N. Y.) 190; s. c. on appeal, 44 N. Y. 172.

1. See *Turrell v. Crawley*, 13 Q. B. 197, 202; *Threfall v. Borwick*, 26 L. T., N. S. 794, 796, or 2 Eng. Rep. 689, 696; s. c., L. R., 7 Q. B. 711; s. c. on appeal, L. R., 10 Q. B. 210, or 12 Eng. Rep. 266.

"Effects" of Boarders.—An inn keeper who is accustomed to take boarders is a boarding house keeper within the New Hampshire statutes relating to the lien of boarding house keepers on the baggage and "effects" of their guests and boarders (N. H. Stats. 1859, ch. 2230), and has a lien upon the horse his boarder for such boarder's own fare and board, but not for the keeping of his horse. *Cross v. Wilkins*, 43 N. H. 332, 336.

2. See *Mulliner v. Florence*, L. R., 3 Q. B. D. 484; s. c., 28 Eng. Rep. 390, where a lien for the guest's reasonable expenses was held to attach to his horses, his harness, his carriage, and all his goods conjointly, as there was one contract and one debt, and therefore one lien, which could not be split up and a separate lien claimed in respect of different chattels.

3. See Georgia code of 1867, § 2096.

4. *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573, 574, following like rule as to lien of livery stable keepers in *Colquitt v. Kirkham*, 47 Ga. 555, 558.

5. See opinion of LORD DENMAN, C. J. in *Turrell v. Crawley*, 13 Q. B. 197.

6. See *Case v. Fogg*, 46 Mo. 44, 48, where it appears from the opinion that a tenfold security for the husband's bill was demanded of the wife, and she was hardly permitted to take a change of clothing from her abundant stores, but in a short time without judicial process, large Saratoga trunks, loaded with rich goods when left, and of whose contents every one was ignorant except one of the firm of inn keepers, were put up at auction and sold for a song.

7. By POPHAM, C. J., in *Hostler's Case*, Yelv.

for his keeping;¹ but the remedy to enforce the lien is by action in the nature of a bill in chancery.²

Statutory Regulation, etc.—Under an enactment in England³ on the subject, however, the inn keeper not only has a passive lien, but also the active right, to sell the goods upon giving the notice required by the act.⁴

Under the Missouri statute creating a lien in favor of hotel, inn and boarding house keepers, upon the baggage and other valuables of their guests or boarders, etc., and upon the wages of such guests, etc., a justice's judgment for the debt is a prerequisite to the enforcement of the lien, and such enforcement must be made in conformity with the statute which affords an adequate and exclusive remedy.⁵

30. Waiver of Lien—By Loss of Possession.—Upon the ground that retention of possession is considered necessary to the continuance of a lien, the lien of an inn keeper is deemed waived by loss of possession.⁶

1. See *Jones v. Pearle*, 1 Strange 556; *Fox v. McGregor*, 11 Barb. (N. Y.) 41, 43; 2 Kent Com. 642.

2. *Fox v. McGregor*, 11 Barb. (N. Y.) 41, 43.

Distinction Between Lien by Custom, and Pawn or Pledge.—The distinction made in this connection is between a mere lien for work and materials, as in the case of mechanics, inn holders, and others, by custom, and an express pawn or pledge of goods by the owner, as collateral security for a loan of money, where, upon the lapse of a reasonable time after default the creditor may sell the pledge. *Doane v. Russell*, 3 Gray (Mass.) 382, 384.

3. 41 & 42 Vict., ch. 38.

4. *Angus v. McLachlan*, Law R., 23 Ch. D. 330, 336.

Detention of Property After Demand.—

An inn keeper is guilty of conversion if he refuses to deliver to the owner, upon demand, property left by a disappearing party, which he has used to such an extent as to amount to a full equivalent for his compensation: *Alford v. Davenport*, 43 Vt. 30, 34.

Third Person's Promise to Pay Debt of Guest.—When an inn keeper has a complete and enforceable lien on the trunk of his guest, a promise of a third person to pay the debt of the guest on condition that the property subject to the lien be given up, is binding and not within the statute of frauds: *Dunlap v. Thorne*, 1 Rich. (S. Car.) 213, 215.

5. *Coates v. Acheson*, 23 Mo. App. 255, 260.

6. In *Perkins v. Boardman*, 14 Gray (Mass.) 481, 483, it is said by MERRICK,

J.: "To complete the right of lien, it is essential that the possession and right of possession of the goods pledged should be continued and uninterrupted. A relinquishment of the possession of property, by the party in whose favor a lien or pledge exists to the general owner, is an abandonment, and operates as an immediate release of it. *Forth v. Simpson*, 13 Ad. (N. Y.) & E. 680; *Bigelow v. Heaton*, 4 Denio 406; *Bailey v. Quint*, 22 Vt. 464. A lien may perhaps be renewed by the return and restitution of the property; but in such case it will be subordinate to any intervening incumbrance to which the property in the meantime has become subject."

Animals Used by Mail Contractor.—

The right of an inn keeper to a lien on property is denied where the owner thereof has possession of the property, as in the cases of horses of a mail contractor which were always in his possession and regularly used by him until the inn keeper locked them up to secure the debt due for providing stables and provender for them. *Hickman v. Thomas*, 16 Ala. 666, 670.

Drummers' Goods.—The principle that there may be a waiver of lien by relinquishing possession of the goods of the guest, as well as by an extension of credit, seems to receive recognition from statements made in a case where an inn keeper sued a merchant for his drummer's hotel bill, and where at the time of issuing the summons, and as ancillary to the action, a warrant of attachment was issued, under which certain trunks and packages of sam-

Exception Where Fraudulent Inducements to Part with Possession.—But an inn keeper does not waive his lien when he is induced to part with the possession of the property through false and fraudulent representations made by the guest.¹

By Selling Chattel.—The lien of an inn keeper over a chattel is waived if, in order to reimburse himself, he sells it, even

ples in possession of the drummer were seized and afterwards replevied by the defendant. *Covington v. Newberger*, 99 N. Car. 523. In this case DAVIS, J., said: "Assuming that upon a notification of the failure of the drummer in the first instance, to pay cash, according to the general custom, the defendant would have been liable for the hotel bill (when the amount of the account was insignificant), and assuming that the plaintiff would then have had a lien upon the trunks and samples in the possession of the drummer to secure the cash then due from his customer, and instead of availing himself of it, had permitted the drummer to carry them away and extended the credit from time to time, in the manner indicated in the account, and from which, we think, there is no evidence of authority, then he would have had no lien upon the defendant's property for the amount of the unauthorized credit, and the fact that the defendant replevied the goods cannot help the plaintiff."

Agisters and Livery Stable Keepers.—Besides the reasons why agisters and livery stable keepers have no lien upon the animals in their charge, found in the fact that they do not impart any new value to the animal, or come within the policy of the law, which gives the lien for the benefit of trade, further reasons are given in the effect of the loss of the possession of the animal which may be taken by the owner. Thus in *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 668, BRONSON, J., said for the court: "When horses are kept at livery, the owner takes and uses them at pleasure, and the bailee only has a lien so long as he retains the uninterrupted possession. If the owner gets the property into his hands without fraud, the lien is at an end, and it will not be revived by the return of the goods. *Bevan v. Waters*, 3 Car. & P. 520; *Jones v. Thurloe*, 8 Mod. 172; *Jones v. Pearle*, 1 Strange 556; *Sweet v. Pym*, 1 East 4. So in the case of milch cows, the agister has no lien, for the reason that the owner

has occasional possession for the purpose of milking them. *Jackson v. Cummins*, 5 Mees. & W. 342; *Cross on Lien* 25, 36, 332. In the same opinion it was also considered that an inn keeper in whose stable horses were placed by a resident of the same village, who never stopped at the inn, could not stand upon any better footing than a livery stable keeper, and as such had no lien. This position was taken because the inn keeper was not to have the continued and exclusive possession of the horses, but the owner was at liberty to take and use them when he pleased, and did in fact take them at his pleasure; and while it was not shown that the inn keeper was at home when the owner took the horses, yet there was no pretence that they were taken by fraud, or against the will of the inn keeper.

Trainer of Horses.—So it is held that the labor and skill employed on a race horse by a trainer are a good foundation for a lien; but that if by usage or contract the owner may send the horse to run at any race he chooses, and may select the jockey, the trainer has no continuing right of possession, and consequently no lien. *Forth v. Simpson*, 13 Q. B. 680, 684, 686. A trainer's lien is sustained, however, in *Bevan v. Waters*, 3 Car. & P. 520, 522; *Harris v. Woodruff*, 124 Mass. 205.

1. *Manning v. Hollenbeck*, 27 Wis. 202, 204. In this case it was claimed that there was a clear waiver of an inn keeper's lien on a sample trunk by accepting a draft for the hotel bill and parting with the possession of the trunk, with which the guest was allowed to depart in reliance upon his representations that the draft would be promptly paid. But it was considered that such a case is "in principle analogous to the case where a vendor is induced to part with his goods through the fraud of the vendee," under which circumstances the "vendor may recover the possession from the fraudulent purchaser, or from anyone claiming under him, not being a *bona fide* purchaser."

though the retention of the chattel is attended with expense.¹

By Taking Security.—An inn keeper who accepts security from his guest for the payment of hotel charges does not waive his lien at common law upon the goods of his guest for the payment of such charges, unless there is something in the nature of the security, or in the circumstances under which it was taken, which was inconsistent with the existence or continuance of the lien, and, therefore, destructive of it.²

31. Boarding House Keeper's Lien.—*Inn Keeper Accustomed to Take Boarders, etc.*—The lien of boarding house keepers is created by statute, and is sometimes extended to include inn keepers who are accustomed to take boarders.³

Under New York Statute.—Under the New York statute "for the protection of boarding house keepers," the keeper of a boarding house has a lien for board upon goods brought upon the premises by a boarder to furnish his room, although they do not in fact belong to the boarder, but to a stranger.⁴

Under Massachusetts Statute.—Under the Massachusetts statute relating to the lien of boarding house keepers, such lien is valid and effectual for board furnished under the original contract after a secret sale of the property brought to the boarding house by the boarder.⁵

32. Inn Keeper's Liabilities in General.—*For Refusal to Furnish Entertainment, etc.*—If an inn keeper refuse to receive and entertain any guest who comes to his house and is apparently responsible and of good conduct, he is liable alike to an indictment and to an action by the party aggrieved.⁶

For Personal Injuries.—So inn keepers may be liable for direct personal injuries, as assault and battery, and for those of an in-

1. See *Mulliner v. Florence*, Law R., 3 Q. B. 484; s. c., 28 Eng. Rep. 390. For similar expressions in earlier English cases, see *Jones v. Thurloe*, 8 Mod. 172; *Jones v. Pearle*, 1 Strange 556, 557.

2. *Angus v. McLachlan*, Law R., 23 Ch. D. 330, 334-335.

3. This is the case under the New Hampshire statutes of June, 1859, ch. 2330, to which the construction is given that an inn keeper has a lien upon the horse of his boarder for such boarder's fare and board, but not for the keeping of the horse. *Cross v. Wilkins*, 43 N. H. 332, 336. Lien of boarding house keeper under Wisconsin statute like that of inn keeper on goods of guest. *Nichols v. Halliday*, 27 Wis. 406, 407.

4. *Jones v. Morrill*, 42 Barb. (N. Y.) 623, 626, 627. The intent of the statute is to give keepers of boarding-houses the same lien which an inn keeper has upon the effects of a guest, without ref-

erence to the permanent or transient character of the guests. *Stewart v. McCready*, 24 How. Pr. (N. Y.) 62, 63. But the statute limits the lien to that for board actually due, and does not include board to become due under an agreement to board in future. *Shafer v. Guest*, 6 Rob. (N. Y.) 264; s. c., 35 How. (N. Y.) Pr. 184, 188.

5. *Bayley v. Merrill*, 10 Allen (Mass.) 360. But a boarding-house keeper has, under such statute, no lien for board on the property of a husband brought to the boarding house by his wife and child, although they have been driven from home by the cruelty of the husband. *Mills v. Shirley*, 110 Mass. 158, 159.

6. *Watson v. Cross*, 2 Duv. (Ky.) 147, 148. See also the Civil Rights bill, 1 Hughes (U. S.) 541, 542; *Rex v. Ivens*, 7 Car. & P. 213, 219.

Enactments Against Bad Food and Extra Prices.—Inn keepers were also

direct nature, such as result from negligence, and even for those of more remote origin, as the communication of an infectious disease, or a harmful trick played by a fellow guest.¹

Liability for Goods of Guest.—But the chief liability of an inn keeper, and that which has been the subject of the most discussion in the courts, is his extraordinary common law responsibility for the loss of the goods of his guest.²

33. Liability for Personal Injuries—Assault and Indirect Injuries.—Although there are early expressions adverse to the liability of an inn keeper where the guest is beaten in the inn,³ yet in a modern case there seems to be a recognition of the liability of an inn keeper for an assault and battery committed by his employes.⁴

Injuries by Other Guests.—The doctrine has further been laid down and applied so as to hold a tavern keeper liable in damages for injuries suffered by a minor, to whose back another intoxicated guest pinned a paper and set it on fire. Where one

restrained by ancient statutes from charging exorbitant prices for "horse, bread," etc., or disposing of "corrupt wine or victuals." See *Bac. Abr., Inns and Inn keepers (c) 2*.

1. See *Wade v. Thayer*, 40 Cal. 578, 585; *Sandys v. Florence*, 47 Law J. Com. P. 598; *Gilbert v. Hoffman*, 66 Iowa 205; s. c., 55 Am. Rep. 263, 264; *Rommel v. Schambacher*, 11 Atl. Rep. (Pa.) 779; s. c., 27 Am. L. Reg., N. S. 156, and note, 158.

2. For general statements of the existence of this liability, see *Curtis v. Murphy*, 62 Wis. 4; s. c., 53 Am. Rep. 242, 243; *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258; s. c., 23 The Reporter 267.

3. See *Calye's Case*, 8 Co. 32, 33 b; s. c., 1 Smith's Lead. Cas. *135; *Bac. Abr., Inns and Inn keepers (c)*.

4. *Wade v. Thayer*, 40 Cal. 578, 585. In this case there was evidence tending to show that the plaintiff, in violation of the rules of a hotel, and without first having obtained leave to do so, entered one of the bedrooms while in a state of intoxication, and went to sleep on the bed without undressing, in which condition he was discovered by the clerk and the porter, who made a violent assault upon him, inflicting serious bodily injuries. In passing upon instructions requested by the hotel keeper and the immediate assailants, who comprised the defendants, it was held, that exemplary damages might be given for a wanton, malicious and unprovoked assault upon the person, and that if the assault was committed by the clerk and porter while in the performance of

their duties as the servants and employes of the hotel keeper, the latter would be responsible for the actual damage which the plaintiff suffered, even though he was not present and in no manner consented to the assault or aided therein. *CROCKETT, J.*, who delivered the opinion of the court, said: "He would be responsible as principal for all the actual damage caused by his agents and servants in the performance of their official duties, but would not be liable for wanton and malicious acts done without his consent or approval. This question was fully discussed and the authorities cited in *Turner v. N. etc. R. Co.*, 34 Cal. 599, and need not be further noticed." But a landlord of an inn has been held not indictable for assault and battery for gently leading out an obnoxious guest. *Commonwealth v. Mitchell*, 2 Pars. Sel. Cas. (Pa.) 431, 436.

Negligence Where Ceiling Fell.—A statement of claim has further been held to sufficiently show a cause of action against the proprietor of a hotel, where it alleges that while the plaintiff was using such hotel as a guest for reward, by the negligence of the defendant the ceiling of the room in which the plaintiff then was fell upon and injured him. *Sandys v. Florence*, 47 L. J., C. P. 598.

Communication of Infectious Disease.—So where a jury was justified in finding that inn keepers, with knowledge of the prevalence of smallpox in their hotel, kept it open for business, and permitted a party to become a guest

enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults not only of those who are in his employ, but also of the drunken or vicious men whom he may choose to harbor.¹

34. Extraordinary Liability of Inn Keeper—Beyond Nearly All Bailees.—The liability of an inn keeper is more severe than that of any other bailee, except a common carrier.²

At Common Law.—The common law, as is well known, upon grounds of public policy, for the protection of travellers, imposes an extraordinary liability upon an inn keeper for the goods of his guest, though they may have been lost without his fault.³

Uncertain Extent and Limits.—But the exact extent and limits of an inn keeper's liability for the goods of his guest are not harmoniously settled by the decisions,⁴ and, indeed, the rulings and declarations of the cases are remarkably uncertain upon the vital phases of the subject.⁵

without informing her of the presence of the disease, such inn keepers would be liable to the guest if she contracted the disease while in their house, and was herself guilty of no negligence contributing to the injury. *Gilbert v. Hoffman*, 66 Iowa 205; s. c., 55 Am. Rep. 263, 264.

1. *Rommel v. Schambacher*, 11 Atl. Rep. (Pa.) 779, s. c., 27 Am. L. Reg. N. S. 156, with full note, 158, treating this as a novel but sustainable case. After stating the case of *Railroad Co. v. Pillow*, 76 Pa. St. 510, the opinion proceeds: "If then a railroad company is liable for the conduct of drunken men who may chance to board its cars, much more the tavern keeper who not only permits drunken men about the premises, but furnishes liquor to make them drunk, and who is thus instrumental in fitting them for the accomplishment of just such an insane and brutal trick as that disclosed by the evidence of the case in hand."

2. See *McDaniels v. Robinson*, 26 Vt. 3, 6; s. c., 62 Am. Dec. 574, 580, where *REDFIELD. C. J.*, speaking for the court, said: "We have never intimated that we were prepared to put the liability of an inn keeper upon the same ground as that of other bailees. On the contrary, we regard it as well settled that the liability of an inn keeper is more severe than that of any other bailee, with the single exception of common carriers."

3. *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 241, 243. See characterization of this liability as "very nearly

absolute" in *Myers v. Cottrill*, 5 Biss. (U. S.) 465, 470.

4. See notes to *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 452, 453, and notes to *Cutler v. Bonney*, 30 Mich. 259; s. c., 18 Am. Rep. 130, 133. Consult also *Pinkerton v. Woodward*, 33 Cal. 557, s. c., 91 Am. Dec. 657, 662.

5. See *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 579, where the court said, through *REDFIELD, C. J.*: "In regard to the general liability of an inn keeper it is surprising that the law should still be so indeterminate. But the cases are fewer and less decisive upon this important subject than might have been expected. . . . So too, we find numerous creditable judges, and some decisions, carrying the liability of an inn keeper to the full extent of a common carrier, and thus making him an insurer against all losses not caused by the act of God or the public enemy. But such is clearly not the course of the decisions in Westminster hall, and that extreme responsibility was expressly repudiated by this court: *Merritt v. Clagham*, 23 Vt. 177."

So in discussing the question of the obligation of inn keepers to respond to their guests for property destroyed by fire without negligence on the part of the inn keepers, *CAMPBELL, J.*, said, in *Cutler v. Bonney*, 30 Mich. 259; s. c., 18 Am. Rep. 130: "It is unfortunate that upon this subject there is some confusion, arising from the loose *dicta* in which many courts have indulged, when dealing with cases involving the

35. Liability Compared with that of Common Carrier—*Similarity.*

—The liability of the common carrier and inn keeper is very similar, as they are both bailees, and liable for losses under similar circumstances;¹ and the same rule seems to be applicable to both as to the mode of subjecting them to liability.² Indeed, the liability of an inn keeper is widely regarded as like that of a common carrier, inasmuch as both are treated by a large proportion of the cases as insurers of property committed to their care.³

Difference.—But it has been pointed out that the cases of an inn keeper and a common carrier, though analogous, may not be alike;⁴ and this difference is developed as the basis of a more restricted view of the liability of an inn keeper, making more liberal exemptions in his favor.⁵

liability of inn keepers. It is unsafe to give any force to such remarks beyond the analogies of the cases in which they are found. Upon all questions not decided by recognized and accepted precedents, we can only rest upon the ancient maxims of the common law."

1. *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547; s. c., 24 Am. Dec. 88, 89. References to the similarity of the functions and liabilities of these two classes of bailees we also found in *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 261, 262.

2. *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547; s. c., 24 Am. Dec. 88, 89, where it was accordingly held, that the same rule is applicable in an action of trover against an inn keeper which governs in that action against a common carrier or wharfinger, and that therefore an actual conversion must be proved to maintain such an action for a bridle and saddle entrusted to an inn keeper's servant by a guest at an inn, but which could not be found when called for.

3. See *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, 473; *Neal v. Wilcox*, 4 Jones L. (N. Car.) 146; 67 Am. Dec. 266.

In *Johnson v. Richardson*, 17 Ill. 302; s. c., 63 Am. Dec. 369, 371, it is said: "Some of the cases hold inn keepers liable in regard to the property of the guest to the same extent as carriers are in reference to goods committed to them for transportation; that is, for all loss or injury not the result of accident."

Special Privileges, etc.—In *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 262, it is said: "Public policy demands that the necessities of intercourse by travel shall not involve danger of loss from

inn keepers any more than from common carriers who are liable to those employing them exactly as inn keepers are to their guests; and they alike have a right to protect themselves by special contract not contravening such policy, and have also the important privilege of retaining the property for which their liability exists until their charges, in the one case for the entertainment given, and in the other for the carriage of the goods, are paid."

4. See *Fuller v. Coats*, 18 Ohio St. 343, 350, where it is said that the "rules of law controlling both these classes of liability have their foundation in considerations of public utility," but that "it does not therefore follow that the rule in every case is precisely the same," and that it "would seem, rather, that where the circumstances of the two classes differ, public utility might reasonably require a corresponding modification of the rules applicable to the case." The opinion by DAY, C. J., further shows how the case of a common carrier and that of an inn keeper, though analogous, may not be alike, but explained the charge of the court below, which was under consideration, without drawing any distinction between the liability in the two cases.

5. See *McDaniels v. Robinson*, 26 Vt. 3, 6; s. c., 62 Am. Dec. 574, 580, where REDFIELD, C. J., said for the court: "In *Richmond v. Smith*, 8 Barn. & C. 9; s. c., 15 Eng. Com. L. 144, LORD TENTERDEN says in regard to goods stolen from the custody of an inn keeper: 'The situation of an inn keeper is precisely analogous to that of a carrier.' This may be too strongly expressed, if applied to all cases of goods taken from

36. Scope of Liability—In General.—Despite the divergence of the decisions in regard to the scope of the liability of the inn keeper, it has generally been held that he is absolutely liable for all thefts from within, or unexplained losses of property in his charge, but that he may be discharged from liability by any contributory negligence of the guest, his servants or companions; and in many cases he has been discharged where the guest exercised any special control over his property.¹

Accidental Casualties and Acts of Force from Without.—But conflicting views have been held concerning the liability of the inn keeper for losses by purely accidental casualties or acts of force from without.²

the custody of an inn keeper. For it may be done by superior force, and without his fault, and still not the force of a public enemy, which is necessary to be shown to excuse a common carrier. But in regard to goods stolen from the custody of an inn keeper, and no evidence to show how it was done, or by whom, the liability is the same as that of a carrier."

"In order to hold a bailee liable for that which is in no respect to be imputed either to his own negligence," says CAMPBELL, J., in *Cutler v. Bonney*, 30 Mich. 259; s. c., 18 Am. Rep. 127, "or to that of persons for whom he is responsible, there should be found clear authority. The common law has declared this liability against one class of bailees, and has made common carriers responsible for all losses not caused by public enemies, or some casualty in no way arising out of human action." Then referring to the claim that in this respect common carriers and inn keepers stand on the same footing, it is further said: "There are many cases in which it has been said by judges that the liability is not distinguishable. Most of these have been collected in the notes of Mr. Holmes to the last edition of Kent's Commentaries. 2 Kent 506. But . . . there is nothing in the facts of any authority which we have discovered which called for any such remark, or which would justify the enforcement of a liability for such a loss as the present" [where goods were destroyed by accidental or incidental fire, without fault or negligence on the part of the inn keepers or their servants]. Exception to the last statement was admitted to exist in some decisions, which, aside from one or two cases, had "arisen from thefts or unexplained losses of property, while it was within the legal custody or protection of the

inn keeper." In regard to the statements of text writers it was said: "These writers, or at least such of them as are of recognized authority, have drawn a line between carriers and inn keepers, resting on the distinction between absolute and qualified responsibility. And none of the accepted writers have found any authority for disregarding this distinction. The two classes of bailees have been kept carefully separate."

1. See *Cutler v. Bonney*, 30 Mich. 259; s. c., 18 Am. Rep. 127, 128, where it is said that the rule actually applied in all cases arising from thefts or unexplained losses of property, while it was within the legal custody or protection of the inn keeper, has been that all such losses were presumably due to the neglect of the inn keeper. Then the following comprehensive statement of the scope of an inn keeper's liability is made: "Generally, and perhaps universally, he has been held to an absolute responsibility for all thefts from within, or unexplained, whether committed by guests, servants or strangers. But he has quite as uniformly been discharged by any negligence of the guest, conducing to the injury, and he has not been held for acts done by the servants of guests, or by those whom they have admitted into their rooms. And in many cases he has been held discharged where the guest has exercised any special control over his property. The general principle seems to be that the inn keeper guarantees the good conduct of all persons whom he admits under his roof, provided his guests are themselves guilty of no negligence to forfeit the guarantee."

2. In *Cutler v. Bonney*, 30 Mich. 259; s. c., 18 Am. Rep. 127, 128, CAMPBELL, J., said: "We have found no decision holding inn keepers liable for

Various Views Maintained.—According to the stricter view, nothing short of inevitable accident, casualty of war, or act of the guest, his servants, or friends of his company, will excuse the inn keeper.¹ But three more or less distinct views of the scope of the inn keeper's liability have obtained currency, and these may be designated respectively as the doctrines of *prima facie* liability, superior force and strict insurance.²

losses by purely accidental casualties or from riots, or acts of force from without, such as have been from the beginning excepted by the text writers." But see statement of views of different lines of cases in *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 662, 663. Consult also *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303, 307, 311. Compare *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 582.

In *Lanier v. Youngblood*, 73 Ala. 587, 591, referring to the common law liability of inn keepers it is said: "There is a conflict it is true among the authorities on one point. This liability is stated by many to be commensurate with that of the common carrier, who is regarded as an insurer, being responsible for losses of every character, except such as were occasioned by 'the act of God, the public enemy or the party complaining.' 2 Parsons' Contr. 146; 2 Story's Contr., § 909; Chitty on Contr. 675; Saunders on Negl. 212. By other writers inn keepers are held to be excused for losses occasioned by *vis major* or irresistible force such as robbery or fire. 2 Kent's Com. 593; Wharton on Negl., § 678; Redf. on Car., § 596; Story on Bailments, § 472. But however this may be, nothing is better settled than that they are liable, under the rules of the common law, for losses occasioned by theft, unless superinduced by the proximate contributory negligence of the owner. 2 Kent's Com. 592; Mason v. Thompson, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471; Houser v. Tully, 62 Pa. St. 92; s. c., Am. Rep. 390; Dunbier v. Day, 12 Neb. 596; s. c., 41 Am. Rep. 772; Story on Contr., § 748."

1. *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 261, where it is said that where the relation of guest in an inn exists, whether from personal entertainment or that given to the traveller's beasts, the inn keeper is absolutely liable for all loss or damage to the property of the guest, subject to certain exceptions. They are what is

called the 'act of God', such as earthquake, lightning, flood, the public enemy, that is, the forces of a nation engaged in a hostile war with that of the inn keeper; and the act or conduct of the guest, or his friends or servants. The first of these is aptly called inevitable accident without the intervention of man. (2 Kent's Com. 597); that is, some casualty which human foresight could not discern and from the consequences of which, therefore, no protection could be provided . . . This is apparently hard law; but were it otherwise the property of guests at an inn would be in such insecurity from the practices of dishonest landlords with corrupt servants that the necessity of travel would be encountered with dread and apprehension. Compare with text Statement of New York rule in *Classen v. Leopold*, 2 Sweeny (N. Y.) 705, 710.

2. Perhaps the best summary of these positions is that given in the following statement in *Sibley v. Aldrich*, 33 N. H. 553; s. c., 66 Am. Dec. 745, 751: "Three different rules appear to be laid down on this subject in different authorities: 1. That the inn keeper is *prima facie* liable for the loss of goods in his charge, but may discharge himself by showing that the goods were lost without his negligence or default. . . . This view of the law is sustained by *Dawson v. Chauncey*, 5 Ad. & E. (N. S.) [5 Q. B.] 165, and by *Metcalf v. Hess*, 14 Ill. 129. 2. That the inn keeper is discharged by showing how the accident happened, and that it happened by inevitable accident or irresistible force, though the accident might not amount to what the law denominates the act of God, and the force might not be the power of a public enemy. This rule is countenanced by *Merritt v. Claghorn*, 23 Vt. 177, and *Kesten [Kisten] v. Hildebrand*, 9 B. Mon. [Ky.] 72; [s. c., 48 Am. Dec. 416]. 3. That the inn keeper is liable unless the loss was caused by the act of God, or the public enemy, or by the fault, direct or implied, of the guest. This rule is maintained in *Burgess v. Clem-*

Limited to Guests.—An inn keeper is responsible for money or other dead property lost in his inn only where the party losing it was a guest at the inn at the time of the loss.¹ Nor, according to the tendency of the modern cases as previously discussed, will the mere leaving of a horse at an inn constitute a party a guest so as to render the inn keeper liable for his goods.²

Liability to Boarders.—There is, however, a distinction, taken at an early day, between the liability of inn keepers towards guests and boarders, pursuant to which, if the goods lost belong to a boarder,³ he would be required, in order to charge the inn keeper, to show that the loss was owing to the failure on his part to discharge the duties which his situation as boarding house keeper, or the special contract with the other party, imposed on him; and these duties must be measured by the analogies of the law applicable to other species of bailments.⁴

Suggested Reconciliation of Authorities.—An attempt has been made to reconcile the conflicting decisions on the inn keeper's liability for property of his guests brought within the inn, and to present a statement of the law on the subject, as thus conceived to be harmonized.⁵

ent, 4 Maule & S. 306; *Richmond v. Smith*, 8 Barn. & C. 9; *Farnworth v. Packwood*, 1 Stark. 249; *Kent v. Shackford*, 2 Barn. & Ald. 803; *Armistead v. White*, 6 Eng. L. & Eq. 349; *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471; *Shaw v. Berry*, 31 Me. 478; s. c., 52 Am. Dec. 628. Of text writers, Story, though with hesitation, goes for the first rule; Kent states the third rule strongly, and Metcalf adopts the same, and the civil law places the liability of the inn keeper and the common carrier on the same footing . . . On the whole, we think that the better rule is the strict one as laid down in the elaborate and very satisfactory case of *Shaw v. Berry*, 31 Me. 478; s. c., 52 Am. Dec. 628, *supra*. The weight of authority is heavily that way, and the policy and analogies of the law lead to the same conclusion."

1. *Towson v. Havre de Grace Bank*, 6 Har. & J. (Del.) 47; s. c., 14 Am. Dec. 254, 257, where this view is based on the fact that the profit arising from the entertainment of the guest is the foundation of the inn keeper's liability. "Inn keepers are answerable," it is said in this case (14 Am. Dec. 256), "by reason of the profit arising either from the keeping of the horses, etc., of their guests, or from the entertaining of the guests themselves, in the case of money or other property, from the keeping of which alone no profit can arise." "It

is well settled," says BENNETT, J., for the court in *McDaniels v. Robinson*, 28 Vt. 387; s. c., 67 Am. Dec. 720, 722, "that if a person leave at an inn property from which the inn keeper can derive no gain from its keeping, that is dead property, as it is termed, and goes away himself, and it is stolen in his absence, he shall have no action against his host as inn keeper, for the reason that he was not a guest at the time. See *York v. Grindstone*, 1 Salk. 388; *Selman v. King*, Cro. Jac. 183; 3 Bac. Abr., Wilson's Ed. 665, tit. Inn Keeper. *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663; *McDonald v. Edgerton* [Edgerton], 5 Barb. [N. Y.] 560. In such a case, all that could be claimed would be to charge him as bailee."

2. *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663; *Ingallsbee v. Wood*, 33 N. Y. 577, 579; s. c., 88 Am. Dec. 409; *Healey v. Gray*, 68 Me. 489; s. c., 28 Am. Rep. 80.

But see *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 576-578; *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 260.

3. *Manning v. Wells*, 9 Humph. (Tenn.) 746; s. c., 51 Am. Dec. 688, 689. Compare *Ingallsbee v. Wood*, 33 N. Y. 577; s. c., 88 Am. Dec. 409, 410.

4. *Chamberlain v. Masterson*, 26 Ala. 371, 378.

5. Thus in *Schouler on Bailments*

37. Acts of Parties Within the Inn—Servants or Agents.—The responsibility of the inn keeper extends to all his servants and domestics, and to all the movable goods and chattels and moneys of his guest which are placed within the inn."¹

Guests.—Inn keepers are furthermore answerable for the honesty, not only of their servants, but of their guests.² Indeed, all the cases are said to agree that an inn keeper is "responsible for the acts of everyone within his house, unless introduced by a guest."³

(2nd ed.), § 306, note 6, it is said: "To attempt to reconcile all that English and American courts have said concerning an inn keeper's liability for property of guests brought within the inn would be a hopeless task. But . . . some such statement as the following may be thought to bring the decisions into just harmony. The common law policy aims to promote the comfort and security of guests at an inn, by holding the inn keeper responsible as extraordinary bailee of the guest, for such property as the latter may have brought *infra hospitium*, to the extent of loss or damage occasioned by the negligence or misconduct of the inn keeper himself, or that of his servants and his family, and apparently of other guests and all such parties as he may have admitted upon the premises. As to these he is deemed an insurer, in which sense he cannot set up their want of authority from him or even his noncontribution to their wrongful acts to screen himself from the consequences of loss occasioned the guest. But beyond this, he is answerable only so far as he or they may have contributed, by ordinary negligence or wilful misconduct, to such loss or injury as is occasioned by those from without the inn precincts, as by rioters, genuine burglars, forcible robbers, and the like; and the same as to losses caused by accidental fire, or the act of God, or a public enemy. Yet the presumption is against the inn keeper whenever the loss occurs; so that if it be by persons not admitted, but forcing their way into the house, the burden is upon him of showing this. The inn-keeper may exonerate himself by showing that the guest himself was at fault, or excluded him from custody, and so contributed to the loss; and special contract, custom and legislation may afford him special exoneration in a certain measure, or in some particular respect."

1. 2 Kent Com. 593, as quoted in

Pinkerton v. Woodward, 33 Cal. 557; s. c., 91 Am. Dec. 657, 664.

Persons Officiating as Servants or Agents.—In *Rockwell v. Proctor*, 39 Ga. 105, 107, it was said by WARNER, J.: "It was the duty of the inn keeper, either by himself or competent servants or agents, to take charge of the goods of his guests, and if he allowed persons to officiate in that capacity during his absence in his hotel, he is responsible for their conduct, and for the loss of the goods deposited therein as directed by such servants or agents."

2. *Gils v. Libby*, 36 Barb. (N. Y.) 70, 75, a case which keeps inn keepers to the strictest responsibility, and is said in *Dessauer v. Baker*, 1 Wils. (Ind.) 429, 431, to hold the absolute liability of the host for robberies or larcenies committed by his servants, and guests upon guests. In *Merritt v. Claghorn*, 23 Vt. 177, 182, JUDGE REDFIELD says: "The host is, we apprehend, upon principle, always liable for any act of his servants or guests. He employs such servants as he chooses, and is bound to take every quiet and orderly guest which offers; and if he takes others, even in good faith, it ought not to be at the expense of his other guests, who derive no profit and have no concern in their being there. In holding the inn keeper liable to this extent, all opinions concur." This language is quoted in *Dessauer v. Baker*, 1 Wils. (Ind.) 429, 432, in which case it is also held that an inn keeper is responsible for the conduct of another guest placed in a room already occupied, without the consent of the occupant. See also *Baker v. Dessauer*, 49 Ind. 28.

3. *McDaniels v. Robinson*, 26 Vt. 316, 337; s. c., 62 Am. Dec. 574.

"If the goods of the guest are damaged in the inn," it is said in *Houser v. Tully*, 62 Pa. St. 92, 96; s. c., 1 Am. Rep. 390 (quoted in *Dunbier v. Day*, 12 Neb. 596; s. c., 41 Am. Rep. 772, 775); "or are stolen from it by the servants or

38. Acts of Parties Without the Inn—Doctrine of Some of the Cases.—Some of the cases hold that the inn keeper is not responsible when the loss was occasioned by inevitable casualty, by irresistible force, by superior force, or by robbery, or burglary committed by persons from without the inn;¹ and some go even further, and hold that the presumption of negligence may be rebutted by showing that there was no negligence in point of fact on his part, or that of his servants.²

More General View.—But the preponderating weight of authority from the time of the decision in *Calye's Case*, 8 Coke 32, to the present time, is said to be in favor of the rule that he is liable as an insurer,³ and is responsible for a loss occasioned by his own servants, by other guests, by robbery or burglary from without the house, or by rioters or mobs.⁴

domestics, or by a stranger guest, he [referring to the inn keeper] is bound to make restitution, for it is his duty to provide honest servants and to exercise an exact vigilance over all persons coming into his house, as guests or otherwise. His responsibility extends to all his servants and domestics, and to all the moneys of his guests which are placed within the inn; and he is bound in every event to pay for them if stolen, unless they were stolen by a servant or companion of the guest." "In case of a loss by theft," it is further said in the same case, "it is no excuse for the inn keeper that he was sick or absent from home at the time; for he is bound, in such cases, to provide honest and faithful servants according to the confidence reposed in him by the public." The doctrine of this case is reaffirmed in *Walsh v. Porterfield*, 87 Pa. St. 376.

1. See *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 73, 74; s. c., 48 Am. Dec. 416.

2. *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 662. See, on extent of inn keeper's liability, note to *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 452, 453; also note to *Cutler v. Bonney*, 30 Mich. 259; s. c., 18 Am. Rep. 130, 133.

3. *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 663.

Grain Stolen from Sleigh.—In *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 448, a wagoner was held entitled to recover in an action against a tavern keeper for the value of several bags of wheat and barley stolen from the sleigh of the plaintiff during the night, while he was entertained as a

guest in defendant's house. The court said: "On general principles applicable to this subject, the defendant is liable for the loss sustained in this case. He received the defendant as his guest for the night, with his loaded sleigh and horses. The sleigh, with all its contents, was put into an outhouse, appurtenant to the inn, 'where it had been usual for the defendant to receive loads of that description.' The doors of this wagon house were broken open, from which it may be inferred that the building was close, and the doors fastened in such a manner as to promise security. The bags of grain, therefore, may be deemed to have been *infra hospitium*; and being so, it is not necessary to prove negligence in the inn keeper to make him liable for the loss. *Calye's Case*, 8 Coke 32; *Bennett v. Miller* [Mellor], 5 T. R. 273."

4. 1 Pars. Contr. 523, as quoted in *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 663. Thus in *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303, 307-311, it is held, upon a full review of the conflicting authorities, that an inn keeper is bound to keep the property of his guest safe from burglars and robbers without as well as from thieves within his house.

Superior Force.—In *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 582 (1854), it was said that "the recent decisions seem rather to incline to the view that the host is liable for all losses of the goods of his guest, even by burglary or robbery, unless produced absolutely by superior force, the *vis major* of the schools." In that case it was held, that an inn keeper cannot be exonerated from the loss of

39. Liability of Inn Keepers as Insurers—Common Law Doctrine.—

It is the doctrine of the common law, as generally understood, and the view maintained by many, if not a majority of the cases, that inn keepers, as well as common carriers, are, on grounds of public policy, treated as insurers, and are liable, except for acts of God or the public enemy, without proof of negligence.¹

More Exact Statement of Doctrine.—As the doctrine is more exactly expressed, inn keepers as well as common carriers are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God or the common enemy, or the neglect or fault of the owner of the property.²

Development of Doctrine.—The grounds for maintaining this doctrine are developed in cases which show the different views entertained on the subject.³

the goods of his guest upon presumption merely, or indeed without proof of some of the circumstances attending the breaking of a house securely fastened, but that he is bound to prove the mode in which the goods were taken from him, and that it was without any fault or negligence on his part. Under the Civil Code of Louisiana, inn keepers are responsible when the effects of travellers who lodge in their house are stolen, unless they show that the same were stolen by force and arms, or with exterior breaking of doors, or by any other extraordinary violence. *Woodworth v. Morse*, 18 La. An. 156, 157.

1. Thus in an action on the case on the "custom of the land," inn keepers as well as common carriers are, on ground of public policy, treated as insurers, and are liable, "except for the acts of God and the enemies of the State," without proof of negligence: *Neal v. Wilcox*, 4 Jones L. (N. Car.) 146; s. c., 67 Am. Dec. 266.

2. *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, 473, where the court, through WILDE, J., said: "The law . . . rests on the same principle of policy here as it does in England and other countries, and it is wise and reasonable. Inn keepers have peculiar privileges, and great facilities to abuse their trust, if they are so disposed, and therefore it is that some peculiar liabilities are imposed upon them in order to prevent, as far as possible, any such abuse."

In *Thickstun v. Howard*, 8 Blackf. (Ind.) 535, the court likewise says that inn keepers, as well as common carriers, "are regarded as insurers of the goods

of their guests, while in their keeping, and are bound to make restitution for any injury or loss, not occasioned by the act of God, the common enemy, or by the negligence or fault of the guest." "This statement of the law as to the liability of inn keepers," says WORDEN, J., in *Laird v. Eichold*, 10 Ind. 212, 213; s. c., 71 Am. Dec. 323, 324, "is certainly broad enough to cover the case of a loss or injury happening without the negligence or fault of the inn keeper. But the question as to his liability under such circumstances, did not arise in the case, and was not involved in the decision, hence, what is said about such liability must be looked upon, not as the point decided, but as a general statement of the law as to the liability of inn keepers, without advert- ing to possible exceptions or qualifica- tions."

3. Thus in *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 662, (1867), referring to the question discussed by counsel whether an inn keeper is an insurer of the property of his guest committed to his care, RHODES, J., said for the court: "The authorities do not agree upon this question. Some of the cases hold that the inn keeper is not responsible when the loss was occasioned by inevitable casualty, by irresistible force, by superior force, or by robbery or burglary committed by persons from without the inn; and some go even further, and hold that the presumption of negligence may be rebutted by showing that there was no negligence in point of fact on his part or that of his servants. But the preponderating weight of au-

thority, from the time of the decision in Calye's Case, 8 Coke 32, to the present time, is in favor of the rule that he is liable as an insurer. The rule is thus stated in 1 Parsons on Contracts, 523: "Public policy imposes upon an inn keeper a severe liability. The later, and on the whole prevailing authorities make him an insurer of the property committed to his care, against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property. He would then be liable for a loss occasioned by his own servants, by other guests, by robbery or burglary from without the house, or by rioters or mobs." The rule is carried to the same extent in *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303. We deem it unnecessary at this time to enter upon a review of the cases, or to recapitulate the argument or reasons in support of the rule, as this has very fully been done in *Shaw v. Berry*, 31 Me. 478; s. c., 52 Am. Dec. 628; *Sibley v. Aldrich*, 33 N. H. 553; s. c., 66 Am. Dec. 745; *Hulett v. Swift*, 42 Barb. (N. Y.) 230; s. c., 33 N. Y. 571; s. c., 88 Am. Dec. 405. See also *Grinnell v. Cook*, 3 Hill [N. Y.] 485, [s. c., 38 Am. Dec. 663]; *Thickstone [Thickstun] v. Howard*, 8 Blackf. (Ind.) 535; *Piper v. Manny*, 21 Wend. [N. Y.] 282; *Mason v. Thompson*, 9 Pick. [Mass.] 280; s. c., 20 Am. Dec. 471."

In *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303, 307, in discussing the question whether robbery from without, or burglary, will excuse an inn keeper for the loss of the goods of his guest, after repeating the views of an inn keeper's liability, given in 2 Kent. Com. 591, 593; *Story Bailm.* § 472 and *Jones Bailm.* pp. 94, 96, the court, through *BENNETT, J.*, says: "It thus appears that while Judge Story leaves the point under consideration at loose ends, the two other distinguished commentators above cited are still more uncertain, as neither of them apparently agrees with himself, and from their opposing rules, it is difficult to determine to which side of the question they intended to adhere. The contradiction found in the writings of commentators, as well as the diversity which exists in the decisions on which their various statements are rested, seem to have sprung out of a departure from the principles on which the extraordinary liability of inn keepers and common carriers is based, and from what appears to be an erroneous

construction of the doctrine laid down by LORD COKE, in Calye's Case, 8 Co. 32."

In *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 262, CHIEF JUSTICE COMEGYS, in his charge to the jury, expressed the view that "the report of Calye's Case, in 8 Coke 32, did not justify the opinion of it expressed by some eminent judges, particularly JUSTICE STORY, in treating of the law concerning inn keepers." "LORD COKE certainly, we think," the opinion proceeds, "did not mean that the inn keeper was not an insurer, or he would not have used the language immediately following that relied upon by JUSTICE STORY in support of his theory of qualified liability beyond that of a carrier. His meaning seems to be that ascribed to his language by a learned California judge in *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 302."

In *Hulett v. Swift*, 33 N. Y. 571; s. c., 88 Am. Dec. 405, 408, the court, through *PORTER, J.*, said: "A shade of doubt has at times been thrown over the question by the unguarded language of elementary writers, and especially by the suggestion of JUDGE STORY in his treatise on the Law of Bailments, that the inn keeper could exonerate himself from liability by proving that he was not guilty of actual negligence, and this view seems to have been adopted in two of the Vermont and one of the English cases. *Story on Bailments*, § 472; *Dawson v. Champney*, 8 Ad. & E., N. S. 164 [which should be cited as 5 Q. B. 164]; *Merrit v. Claghorn*, 23 Vt. 177; *McDaniels v. Robinson*, 28 Vt. 337; s. c., 67 Am. Dec. 720. The doctrine of these cases is opposed to the general current of English and American authority, and evidently had its origin in a misapprehension of the rule as stated by the judges in Calye's Case, 8 Coke 32. It is true that the liability of the inn keeper, by the custom of the realm, was not unlimited and absolute, and that the loss of the goods of the guest was merely presumptive evidence of the default of the landlord. But this presumption could only be repelled by proof that the loss was attributable to the negligence and fraud of the guest, or to the act of God or the public enemy. No degree of diligence or vigilance on the part of the inn keeper could absolve him from his common law obligation for the loss of his guest, unless traceable to one of these ex-

Modification of Doctrine.—A modified view of the doctrine perhaps midway between the conflicting positions, exacts of an inn keeper extraordinary care of the goods of his guest, and holds him to a responsibility approximating insurance of such articles when confided to his care and custody.¹

40. Prima Facie Liability of Inn Keepers—Statement of Doctrine.

—It is the view of various cases that an inn keeper is only *prima facie* liable for loss or damage to the goods of his guest, and that he may exonerate himself by showing that the loss happened without any fault on his part, and that he exercised the strictest care and diligence.²

ceptional causes. *Shaw v. Berry*, 31 Me. 745; s. c., 52 Am. Dec. 628; *Sibley v. Aldrich*, 33 N. H. 553; s. c., 66 Am. Dec. 643. The rule is salutary; and should be steadily and firmly upheld, subject to the statutory regulations for the protection of hotel proprietors from fraud and negligence on the part of their guests."

1. See *Weisenger v. Taylor*, 1 Bush (Ky.) 275; s. c., 89 Am. Dec. 626, 627, where it is said by the court, through ROBERTSON, J.: "The common, like the civil law, but even more stringent, exacts of inn keepers as bailees of the baggage and goods of their guests, extraordinary care, and imposes on them a responsibility nearly commensurable with that of common carriers, approximating insurance of such articles when confided expressly or impliedly to their custody and care. But whenever the guest assumes the custody and control of his goods in such a way as to indicate that he does not trust the inn keeper, and concedes to him no control, they are not in the implied custody of the inn keeper, and he is therefore not responsible, unless they shall be stolen by some of his own household, whose honesty and fidelity he is presumed to guarantee."

2. **Prima Facie Liability in General.**—There is not an entire uniformity of opinion among legal writers, according to *Hill v. Owen*, 5 Blackf. (Ind.) 323; s. c., 35 Am. Dec. 124, upon the question "whether an inn keeper is under the same rigid liability for the loss of property committed to his care that a common carrier is subjected to by a like event." "But that the loss of the property of a guest from a common tavern," it is said by DEWEY, J., in that case: "is *prima facie* evidence of negligence on the part of its keeper, and unexplained, sufficient to render him liable, we believe to be a doctrine with

regard to which there is no doubt. Story on Bailm. 314; *Burgess v. Clements*, 4 Maule & S. 306." This statement is substantially reiterated in *Laird v. Eichold*, 10 Ind. 212, 213; s. c., 71 Am. Dec. 323, 324. Expressions involving the idea of *prima facie* liability are used even in cases which do not adopt the doctrine which is based on that expression.

Thus in *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 261 (1886), CHIEF JUSTICE COMEGYS, in his charge to the jury, said: "An inn keeper is like a common carrier, an insurer of the goods of his guest. When such liability is the subject of an action, he is deemed in law to be *prima facie* responsible, so that if a plaintiff proves himself a guest in [the] legal sense, and sustains a loss while that relation exists, the inn keeper's obligation to pay for it at once becomes perfect, unless he can show that the loss occurred by the act of God, the enemies of the country or the fault or misconduct of the plaintiff or his servants, or friends of his company, as before stated. Nothing short of inevitable accident, casualty of war, or act of the plaintiff, his servant, or such friends, will excuse him."

See on this point explanation of presumptive negligence of inn keeper in *Hulett v. Swift*, 33 N. Y. 571; s. c., 88 Am. Dec. 405, 408.

See *Laird v. Eichold*, 10 Ind. 212, 215; s. c., 71 Am. Dec. 323, 325, in which case it is declared to be the correct doctrine, founded on principle as well as authority, and fully established by the cases of *Dawson v. Chauncey*, 48 Eng. Com. Law 164; *Kisten v. Hildebrand* 9 B. Mon. (Ky.) 72; s. c., 48 Am. Dec. 416; *Metcalf v. Hess*, 14 Ill. 129; and *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574; that "an inn keeper is only *prima facie* liable for loss or damage to the goods of his guest

Current Expression of Doctrine.—As the doctrine is comprehensively expressed, inn keepers are not responsible to the same extent as common carriers, but though the loss of goods while at an inn will be presumptive evidence of the negligence of the inn keeper or his domestics, yet he may, if he can, repel the presumption of negligence and show that there has been no negligence whatever, or that the loss has been occasioned by inevitable accident or superior force.¹

Complete Formulation of Doctrine.—Perhaps the most complete statement of this doctrine is contained in the following extract from the opinion in a leading case: "The general doctrine deducible from the authorities, ancient and modern, is that keepers of public inns are bound well and safely to keep the property of their guests accompanying them at the inn; and in case such property is lost or injured, the inn keeper can only absolve himself from liability by showing that the loss or injury occurred without any fault whatever on his part; or by the fault of the guest, his companions or servants; or by superior force; and the burden

while in his possession, and that he may exculpate himself by proof that the loss did not happen through any neglect or fault on his part, or that of his servants for whom he is responsible." "The interests of the public," said WORDEN, J., in that case, which reviews various authorities, "are sufficiently subserved by holding the inn keeper *prima facie* liable for the loss or injury of the goods of his guest, thus throwing the burthen of proof upon him to show that the injury or loss happened without any default whatever on his part, and that he exercised the strictest care and diligence. And it is more in accordance with the principles of natural justice to permit him to exonerate himself by making such proof than to shut the door against him and hold him responsible for an accident happening entirely without his default, and against which strict care and prudence would not guard." It is said of this case in *Baker v. Dessauer*, 49 Ind. 28, 31, that it "decides that although an inn keeper is *prima facie* liable for the loss of the goods of his guest, yet that he may exonerate himself by showing that the loss happened without any fault on his part, and that he exercised the strictest care and diligence."

¹ See *Howe Machine Co. v. Pease*, 49 Vt. 477, 483, REDFIELD, J., said: "JUDGE STORY comprehensively states the rule of duty and liability of inn keepers: 'Inn keepers are not responsible to the same extent as common carriers. The loss of goods while at an inn will

be presumptive evidence of the negligence of the inn keeper or his domestics. But he may if he can repel the presumption of negligence and show that there has been no negligence whatever, or that the loss has been occasioned by inevitable casualty or superior force.' This rule and definition was adopted by CHIEF JUSTICE REDFIELD in *McDaniels v. Robinson*, 26 Vt. 316, 336; s. c., 62 Am. Dec. 574, 581; and we would not attempt to improve this as a rule of duty. This rule of law is of universal application as to all species of property put in charge of the landlord by the guest. But when the matter of fact, whether the landlord is at fault in a particular case is being enquired into and ascertained, in the application of the rule to different species of property and different conditions of property, counter presumptions are often met which exonerate the landlord from any fault. Animals subject to disease, cutlery and machinery liable to rust, fresh fruits and fish liable to decay, possess within themselves the germs and susceptibilities that work out such results. If a horse becomes suddenly diseased with the botts or other malady, or if fruits perish in the package as delivered to the landlord, the natural presumption is that this condition occurred in the due course and order of things, and from the inherent qualities of the property, and the imputed fault or negligence is repelled."

In *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 73; s. c., 48 Am. Dec. 416,

of proof to exonerate the inn keeper is upon him, for, in the first instance, the law will attribute the injury to his default."¹

41. Exoneration by Showing Extreme Care—Permissibility of.—Under the doctrine of the *prima facie* liability of the inn keeper, he may exonerate himself from liability by showing that he has used extreme care and diligence.²

What Constitutes "Utmost Care" Uncertain.—But what facts will excuse the inn keeper, or what constitutes this "utmost care," are matters which do not seem to be well settled.³

Ordinary Care.—Sometimes, though there does not seem to be any line of cases to such purport, even "ordinary care" is spoken of as sufficient for the inn keeper to show in order to relieve himself of liability.⁴

185. CHIEF JUSTICE MARSHALL, who delivered the opinion of the court, also said: "An inn keeper is *prima facie* liable for all losses which happen to the goods of his guests in his inn, all such being attributed to him on the ground of public policy, and the confidence necessarily reposed in him, and on account of the difficulty of proving actual negligence. But he is not liable if the loss be occasioned by external force or robbery, or if it be attributable to the neglect of the guest, or to the act of his servant or companion."

1. Johnson v. Richardson, 17 Ill. 278; s. c., 63 Am. Dec. 369, 371.

2. Howth v. Franklin, 20 Tex. 798; s. c., 73 Am. Dec. 218, 219.

The correctness of a charge of the court is regarded as beyond question, in Dickerson v. Rogers, 4 Humph. (Tenn.) 179; s. c., 40 Am. Dec. 642, 643, where it was to the effect that an inn keeper is bound to take all possible care of the goods of his guests; and that if through any default of him or his servants, any injury or loss should occur, he will be liable in damages for the value of the property lost; but that if the injury occurred through accident, and from no default or neglect of the inn keeper or his servant, he will be exonerated from liability. The opinion of the court, by GREEN, J., states or quotes in support of this view the positions taken in 2 Kent Com. (2nd. ed.) 593; Story Bailm. 306, § 470, and Jones on Bailments 95. But see criticism of these authorities in Mateer v. Brown, Cal. 221; s. c., 52 Am. Dec. 303, 307.

3. In Howth v. Franklin, 20 Tex. 798; s. c., 73 Am. Dec. 218, 219, ROBERTS, J., said for the court: "When property committed to the custody of an inn keeper by his guest is lost, the presumption is that

the inn keeper is liable for it; and he can relieve himself from that liability by showing that he has used extreme diligence. What facts will excuse him is a question, perhaps, not very well settled; but it is well settled that he cannot excuse himself without showing that he has used extreme care and diligence in relation to the property lost; Edwards on Bailments 406; 2 Kent Com. 592."

In Dunbier v. Day, 12 Neb. 596, 605; s. c., 41 Am. Rep. 772, 774 (1882), reference is made, in passing upon an instruction deemed objectionable, to that extreme care which, according to the weight of authority, the law imposes upon an inn keeper, and quotations to show the nature of this "utmost care" are given from 2 Kent Com. 592; Houser v. Tulley, 62 Pa. St. 92; s. c., 1 Am. Rep. 390; Redfield on Carriers and Other Bailees, pp. 458 *et seq.* 464. Reference is also made, in regard to the inn keeper's liability for losses by theft, to § 596 of the same work and to Pinkerton v. Woodward, 33 Cal. 557; s. c., 91 Am. Dec. 657; Sibley v. Aldrich, 33 N. H. 558; s. c., 66 Am. Dec. 745; Shaw v. Berry, 31 Me. 478; s. c., 52 Am. Dec. 628; McDaniels v. Robinson, 26 Vt. 316; s. c., 62 Am. Dec. 574; Piper v. Manny, 21 Wend. (N. Y.) 282; Howth v. Franklin, 20 Tex. 798; s. c., 73 Am. Dec. 218; Johnson v. Richardson, 17 Ill. 302; s. c., 63 Am. Dec. 369; Mason v. Thompson, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471; Norcross v. Norcross, 53 Me. 163. It will be seen that many of these cases are such as hold an inn keeper to the strict liability of an insurer and would not admit proof of his negligence at all, thus including any question of the degree of care and diligence exercised by him. 4. Thus in Newson v. Axon, 1 Mc-

Guest's Contributory Negligence.—Again, it is declared that the standard of duty for the inn keeper is "extraordinary diligence," but that in case of the loss of his guest's goods, the presumption is a "want of proper diligence," though the inn keeper may relieve himself by showing contributory negligence on the part of the guest.¹

42. Loss by Accidental Fire—Conflict of Authorities.—The authorities are not harmonious in regard to the liability of the inn keeper for accidental or incidental fire occurring without his fault or negligence, and destroying or damaging the goods of his guest.²

Inn Keeper's Liability Maintained.—The doctrine that an inn keeper is responsible for the safe keeping of property committed to his custody by a guest, and that he is an insurer against loss, unless caused by the negligence or fraud of the guest, or by the act of God or the public enemy, has been applied, in a leading case in New York, so as to hold the inn keeper responsible for the value of property of a guest destroyed by fire while in the inn keeper's custody.³

Inn Keeper's Liability Denied.—But the opposite view, exempting the inn keeper from liability for goods of his guest destroyed by fire without his negligence, is strenuously maintained in a leading case in Michigan,⁴

Cord L. (S. Car.) 509; s. c., 10 Am. Dec. 685, the position seems to be taken that an inn keeper is liable for all losses that might have been prevented by ordinary care; and that whether ordinary care has been exercised by him is a question for the jury, the burden being on the inn keeper to show such ordinary care.

1. By the common law as well as by the statutes of Georgia, it is said in that state, in the case of *Sasseen v. Clark*, 37 Ga., 242, 248 (1867), "inn keepers are bound to extraordinary diligence in preserving the property of their guests, entrusted to their care, and are liable for the same if stolen, where the guests have complied with all reasonable rules of the inns. Rev. Code, § 2091; Story Bailm. §§ 470, 471; Edwards Bailm. 4028."

"In case of the loss of the goods entrusted to the care of the inn keeper by his guest," continues WALKER, J., in the same case, "the presumption is a want of proper diligence in the landlord. Rev. Code, § 2094; Story Bailm. § 472. He may, however, relieve himself from liability by showing that the loss was occasioned by the negligence or fault of the guest himself."

2. See consideration of subject in note to *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 453, 454.

3. *Hulett v. Swift*, 33 N. Y. 571; s. c., 88 Am. Dec. 405 (1865). But after the decision in this case the law was modified by statute in 1866, apparently with the view of mitigating the rigor of the rule declared in that case; See *Faucett v. Nicholls*, 64 N. Y. 377, 380. Compare *Mowers v. Fethers*, 61 N. Y. 34; s. c., 19 Am. Rep. 244.

Party Leaving Property Not a Guest.—In *Ingallsbee v. Wood*, 33 N. Y. 577; s. c., 88 Am. Dec. 409, it is held that an inn keeper is not responsible except as an ordinary bailee for hire, for the safe keeping of a horse left in his stable by one who is neither a lodger nor a guest, where the animal is consumed by fire without negligence on the part of the inn keeper.

Showing Want of Ordinary or Reasonable Care.—Under the statutes of Maine (Stats. 174, c. 1874, § 2) inn holders are answerable to their guests, in case of loss by fire, only for ordinary or reasonable care in the custody of their baggage or other property, and consequently cannot be held liable where no want of such care is alleged or proved. *Burnham v. Young*, 72 Me. 273, 274.

4. *Cutler v. Bonney*, 30 Mich. 259; s. c., 18 Am. Rep. 127, 129, where CAMPBELL, J., said: "Accidental fire

which reviews such authorities as are found on the subject.¹

43. Injuries to Animals—Without Negligence of Inn Keeper.—The inn keeper has been held liable, according to the strict view of his responsibility, in the case of an injury to an animal placed in the inn keeper's stable by a guest, where such injury happened without the fault of any one, or at any rate without actual negligence on the part of the inn keeper.²

stands on quite as strong grounds of exemption as other mishaps. The common law has in some things been modified by decisions, but it is contrary to law to follow *dicta* made in cases calling for no departure from the old law. It would be a manifest innovation to create a liability where no possible default exists, and to sustain such an innovation there ought to be both reason and authority. We cannot object to follow settled law in our own views of what policy ought to make it. But we are not prepared to assume there is any policy which will compel persons who are in no wise in fault to respond in damages where the law is not clear against them. And the authorities directly in point on losses by fire are not numerous, and do not, in our judgment, call for any such consequences."

1. See the case just cited, of *Cutler v. Bonney*, 30 Mich. 259; s. c., 18 Am. Rep. 127, 130, where it is said that the doctrine imposing upon the inn keeper liability for accidental fires "may be said to rest entirely on what was said by JUSTICE PORTER in *Hulett v. Swift*, 33 N. Y. 571; s. c., 88 Am. Dec. 405. In that case the subject is discussed at length, and with some ability. But no foundation is shown there for the doctrine asserted, beyond remarks which are confessedly opposed to the text books, and which were foreign to what was actually decided in the cases where they are found. The whole opinion of the learned judge is open to the same criticism; as he himself declares, the point discussed did not really arise, inasmuch as no proof was introduced changing the presumption raised by law against the defendant. The opinion was not unanimous, and the dissent of JUDGE DENIO would detract much from its force, even if it had been pertinent to the facts. Opposed to this is the case of *Merritt v. Claghorn*, 23 Vt. 177, in which JUDGE REDFIELD, delivering the opinion of the court, reached the conclusion that where there was no negli-

gence there was no responsibility for loss by fire. This opinion is an able one, and was not given beyond the facts. It has been both approved and criticised, but no occasion has heretofore arisen to consider its correctness upon similar facts. *Vance v. Throckmorton*, 5 Bush (Ky.) 42; s. c., 96 Am. Dec. 327, is to the same effect, but there, too, the decision might have rested on other grounds, and its authority is therefore diminished. We regard the decision in *Vermont* as reasonable, and as within the fair meaning of the common law rule."

2. Thus in *Sibley v. Aldrich*, 33 N. H. 553; s. c., 66 Am. Dec. 745, 749 (1856), it is said: "The question was very fully and ably discussed in the recent case of *Shaw v. Berry*, 31 Me. 478; s. c., 52 Am. Dec. 628, and the court there came to the conclusion that to discharge an inn keeper from liability for the loss of goods in his charge it is not sufficient for him to show that the loss did not happen by his neglect or default, but that he must go further and show that it happened by the fault, direct or indirect, of the owner." In the first of these cases "a horse placed by a servant of the guest in the inn keeper's stable was kicked by the horse of another traveller, and his leg broken, while in the other case the horse of the guest was placed in the stable in the evening and properly cared for, but in the morning one of his hind legs was found to have been broken above the gambrel joint." On facts very similar to those of the former case, however, a different conclusion was supported in *Dawson v. Chauncey*, 5 Q. B. 164, 168.

Inevitable Accident.—In *Russell v. Fagan*, 8 Atl. Rep. (Del.) 258, 261, one of the exceptions to the absolute liability of the inn keeper for the goods of his guest is said to be the act of God, "which is aptly called inevitable accident without the intervention of man (2 Kent Com. 597); that is, some casualty which human foresight could

Death of Animal.—Where the doctrine of *prima facie* liability prevails, it is deemed applicable to loss to the guest occasioned by the death of an animal.¹

not discern, and from the consequences of which, therefore, no protection could be provided;" and the question to be decided was stated to be, whether the breaking of a mare's leg was a pure accident, that is, a casualty in no degree chargeable to any act or omission of the inn keeper or his groom.

1. Thus in *Metcalf v. Hess*, 14 Ill. 129, 131, it is laid down that in cases "where the loss is occasioned by the death of an animal, the requirements of public policy are fully answered by holding the inn keeper *prima facie* liable for the loss, leaving him to exonerate himself, if he can, by showing that the death was in no manner occasioned by a want of proper care and attention on his part."

More Stringent Rule Not Sustained.—

There has been a refusal to support a more stringent rule against the guest in *Hill v. Owen*, 5 Blackf. (Ind.) 323, 324; s. c. 35 Am. Dec. 124, where DEWEY, J. said: "It is true, we have seen no case against an inn keeper, in which the loss complained of was caused by the death of an animal. But as this kind of loss, like that occasioned by the absence of property must take place under circumstances which may or may not excuse the defendant, as the case may be, we see no reason to distinguish between them in the application of the rules of evidence, making the loss in the latter event *prima facie* evidence of negligence and in the former requiring the plaintiff to go further, and show the acts of neglect which caused the loss. The policy of the law has devolved upon inn keepers a severe liability, lest they be tempted by motives of gain to collude with evil disposed persons, and afford facilities in purloining the property of their guests. This reason, we are aware, does not apply to the loss of property rendered useless by death; but as the tavern keeper has it more in his power to give to such an event the appearance of inevitable accident, by throwing around it delusive circumstances, than the owner of the property has to do away that appearance, we think there is sufficient reason why the death of an animal, while in his keeping, should be considered sufficient to charge him with the loss, unless

he can exculpate himself by showing due care on his part."

Repelling Landlord's Imputed Fault or Negligence.—Indeed an extension of the rule in the other direction is indicated in *Howe Machine Co. v. Pease*, 49 Vt. 477, 483, 484, where it is said, in the case of an action against an inn keeper for alleged negligence in keeping a horse, whereby he fell ill and became worthless: "If a horse becomes suddenly diseased, with the botts or other malady, or if fruits perish in the package as delivered to the landlord, the natural presumption is that this condition occurred in the due course and order of things, and from the inherent qualities of the property; and the imputed fault or negligence of the landlord is repelled."

Death from Injury During Removal of Animal from Inn Premises.—An inn keeper has been held liable for an injury to a guest's horse causing its death from the kick of a stallion while passing the stall of the latter animal, where such injury occurred while the guest's driver was getting the horse off the premises. *Seymour v. Cook*, 53 Barb. (N. Y.) 451, 453.

Horse Found Dead in Stall.—In *Thickstun v. Howard*, 8 Blackf. (Ind.) 535, a party was held not entitled to recover from an inn keeper under the following circumstances: The inn keeper had taken the party's horse to keep a few days before the accident happened which occasioned the suit. The owner of the horse rode him out one evening, and on returning to the stable, tied him in the stall where he had been previously kept. The next morning the horse was found dead in the same stall with his head fast in the trough. The trough was made of a hollow beach log, having a bulge in the middle which rendered that part of the trough wider than it was at the top. The horse had got his head fast in the trough by the jaws, and as the witnesses supposed, had killed himself in the attempt to draw it out. The decision was based mainly upon the point particularly raised that the party was not a guest; but in sustaining the instructions and verdict of the lower court it was said that "the evidence amounts to this only, that the

44. To What Articles Liability Attaches—Kind or Value Immaterial.—An inn keeper's liability is not limited to property of any particular kind or value, but embraces all the personal property of the guest brought to the inn.¹

Money Included.—It includes money as well as other movable goods and chattels,² for there can be no distinction in this respect between goods and money.³

Not Confined to Travelling Appurtenances.—Furthermore, the liability extends to money and chattels other than those provided for the necessary or convenient use of the guest while travelling.⁴

defendant was an inn keeper, and the horse was accidentally killed while in his keeping, without showing a want of ordinary care upon the part of the defendant or that the plaintiff was a guest at the inn." The body of the opinion, however, seems to make no reference to the need of showing "want of ordinary care," but repeats the strict doctrine of the liability of the inn keeper as an insurer.

1. *Kellogg v. Sweeney*, 1 Lans. (N. Y.) 397, 403; s. c., 46 N. Y. 291.

In *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 57, 664; after quoting the resolution in Calye's Case, 8 Coke 32, concerning deeds, obligations, etc., brought into the inn, it is said: "The language of MR. CHANCELLOR KENT is equally strong: 'The responsibility of the inn keeper extends to all his servants and domestics and to all the movable goods and chattels and moneys of his guest which are placed within the inn.' 2 Kent's Com. 593." This language is also quoted in *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 414, 427.

A more limited scope is given to the liability of the inn keeper in *Lanier v. Youngblood*, 73 Ala. 587, 591, where it is said by SOMERVILLE, J., that it "may be considered as the fair result of all the cases" that the common law liability of inn keepers "covers all the personal property of every kind, *infra hospitium*, which the traveller or guest finds it convenient to carry about him, including money, jewelry or other valuables devoted to use or ornament. Redf. on Carriers, 458; *Ramaley v. Leland*, 43 N. Y. 539; s. c., 3 Am. Rep. 728."

2. In *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 664, it is said: "In Calye's Case, 8 Coke 32, it was resolved that 'if one brings a bag or chest, etc., of evidences into the inn, or obligations, deeds, or other specialties, and by default of the

inn keeper they are taken away, the inn keeper shall answer for them." In *Kent v. Shuckard*, 2 Barn. & Adol. 803, 804, 805, the passage from Calye's Case, 8 Coke 32, 33a, is given more at length, and it is then said of the inn keeper by TAUNTON, J.: "On the same principle he must be responsible for money."

3. See *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 414, 427, where it is said: "The liability of an inn keeper for the goods of his guest being founded, both by the civil and common law, upon the principles of public utility and the safety and security of the guest, there can be no distinction in this respect between the goods and money. *Kent v. Shuckard*, 2 B. & Ad. 803; *Armistead v. White*, 6 Eng. Law & Eq. R. 349; *Quinton v. Courtney*, *Haywood* (N. Car.) 40." In *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 667, this language is quoted as the decision of the court in that case, and is regarded as decisive authority upon the point that the liability of the inn keeper extends beyond an amount of money sufficient for reasonable travelling expenses of the guest. The facts of the case are stated to be that the sum of five hundred dollars in cash was stolen from the trunk of the plaintiff's agent, which was in a room occupied by him in the defendant's hotel.

4. See *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 664, where it is said by RHODES, J., for the court: "There are many cases in which it is held that his responsibility (meaning that of the inn keeper) extends to money and chattels other than such as are provided by the guest for his necessary or convenient use while travelling. In *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 448, the guest recovered for certain bags of wheat and barley. In *Piper v. Manny*, 21 Wend. (N. Y.) 282, the recovery was for a tub of butter. In *Sneider v. Geiss*, 1

Extends Beyond Reasonable Travelling Expenses.—Indeed, the position has been repudiated that the inn keeper is not liable for an amount of money beyond what is sufficient for the reasonable travelling expenses of the guest.¹

Not Confined to Property Arriving with Guest.—Nor is the liability of the inn keeper confined to such property as the guest has in his possession at the time of his arrival at the inn.²

Yeates (Pa.) 34, the inn keeper was held liable for 230 Spanish milled dollars. In *Hulett v. Swift*, 33 N. Y. 571; s. c., 88 Am. Dec. 405, the plaintiff recovered the value of his horses, wagon and a load of buckskin goods. In *Townson [Townson] v. Havre de Grace Bank*, 6 Har. & J. 47; s. c., 14 Am. Dec. 254, the property in controversy was one thousand dollars in bank bills. In *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303, the amount deposited was five thousand five hundred dollars in gold dust."

1. See *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 663, where it is said: "The doctrine of *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303, is opposed to the limited liability contended for. It would be altogether impracticable for the court to lay down any rules for determining what would be reasonable travelling expenses. One person might choose to make the trip in the cheapest manner, and another might indulge in the most lavish expenditures. The contingencies to which the party might be subject on his journey could not be anticipated, nor the expenses calculated with any certainty." The opinion criticises at length the case of *Wilkins v. Earle*, 3 Rob. (N. Y.) 352; s. c., 4 Am. Law Reg., N. S. 742, which was, however, reversed on appeal, upon full consideration of the subject, in 44 N. Y. 204; s. c., 4 Am. Rep. 664. In *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 414, 427, it is also said that "the principle . . . that inn keepers are liable for such sums only as are necessary and designed for the ordinary travelling expenses of the guest is unsupported by authority, and wholly inconsistent with the principle upon which the liability of an inn keeper rests. The reasoning, both of the civil and common law, by which the doctrine of the liability of inn keepers, without proof of fraud or negligence, is maintained, is that travellers are obliged to rely almost entirely upon the good faith of inn keepers; that it would be almost impos-

sible for them in any given case to make out proof of fraud or negligence in the landlord, and that, therefore, the public good and the safety of travellers require that inn holders should be held responsible for the safe keeping of the goods of the guests. This reasoning maintains the liability of the inn keeper for the money of the guest quite as strongly as his liability for goods and chattels. To same effect see *Johnson v. Richardson*, 17 Ill. 302; s. c., 63 Am. Dec. 369, 371, 372. But a different view is maintained in Maryland. See *Treileer v. Burrows*, 27 Md. 130, 147. Compare, also, *Simon v. Miller*, 7 La. An. 360, 361; *Pope v. Hall*, 14 La. An. 324, 326; *Noble v. Milliken*, 74 Me. 225, 229; *Wisenger v. Taylor*, 1 Bush (Ky.) 275; s. c., 89 Am. Dec. 626, 627.

In *Smith v. Wilson*, 36 Minn. 334, 336, it is said in a case where the guest had the sum of nearly \$500 in a belt upon his person, that the responsibility of the inn keeper in respect to the money of his guest was not limited to such an amount as was necessary for the guest's travelling expenses. *Armistead v. Wilde*, 17 Q. B. 261; *Berkshire Woollen Co. v. Cush*, (Mass.) 417; *Wilkins v. Earle*, 44 N. Y. 172; s. c., 4 Am. Rep. 664; *Quinton v. Courtney*, Hayw. (N. C.) 40; *Redf. Carr.* 598, 605; *Pinkerton v. Woodward*, 33 Cal. 557, 600; s. c., 91 Am. Dec. 657, 663.

2. See *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 662, where *RHODES, J.*, for the court, said: "No reason is perceived why the responsibility of the inn keeper for the safe keeping of his guest's property should be limited to such property as the guest may have in his immediate possession at the moment of his arrival at the inn. The relation of inn keeper and guest, out of which springs the responsibility, is the same, whether the guest's baggage is conveyed to the inn with him or at a subsequent time; or whether he then has in his possession or afterwards procures the money, clothing, etc., that he may need on his journey." *Mateer v. Brown*, 1 Cal.

"Dead Property" Left by Departing Guest.—If a person, however, leave at an inn property which the inn keeper can derive no profit from keeping, it is termed "dead property";¹ and if he goes away himself, and the property is stolen in his absence, he has no action against his host, for the reason that he was not a guest at the time.²

45. Baggage of Guest—Liability Not Ordinarily Confined to.—The liability of an inn keeper is not, ordinarily, limited to wearing apparel and such articles as travellers are accustomed to carry under the denomination of baggage, but it extends to the goods of a guest, and includes packages left from time to time for a guest, which are received by him for the accommodation of his customers or lodgers.³

Different Rule in Maryland.—But in Maryland, inn keepers are placed, in relation to the baggage of their guests, on the same footing with carriers of passengers, and are not held liable for any valuables of a guest beyond ordinary baggage, unless their safety is secured by special contract or arrangement.⁴

46. Responsibility for Valuables—Rigorous Rule Sustained.—Despite the rigor of the rule, the position seems to be maintained that the inn keeper is liable for money, jewelry or other valuables left in a guest's room in a trunk or other receptacle, without disclosing their character, unless the inn keeper brings home to the guest notice that such valuables must be delivered to the inn keeper or deposited in such place as he directs.⁵

221; s. c., 52 Am. Dec. 303, was regarded as "authority that the inn keeper may be held responsible for the property of the guest, placed under his care, after the owner of the property has become a guest at the inn."

1. See *Towson v. Haver de Grace Bank*, 6 Har. & J. (Del.) 47; s. c., 14 Am. Dec. 254, 256, 257.

2. *McDaniels v. Robinson*, 28 Vt. 387; s. c., 67 Am. Dec. 720, 723. In this case a bag of gold was left by a guest who on departing also allowed his horse to remain in the stable at the inn, and subsequently sued the inn keeper for the loss of the money. *BENNETT, J.*, said for the court: "The bag of gold was dead property, giving to the defendant no right to make gain from its keep as inn keeper; and it had no connection with the cessation or continuance of the original relation of host and guest; and to say that the leaving of the horse at the inn is to have an effect upon the capacity in which the defendant can be charged for the safe keeping of the money is to say what we cannot well understand."

3. *Needles v. Howard*, 1 E. D.

Smith (N. Y.) 54, 55, 60. To same effect is statement in *Taylor v. Monnot*, 4 Duer 116, 117. See also discussion of subject of limitation of his liability to baggage in *Sasseen v. Clark*, 37 Ga. 242, 249.

4. *Treiber v. Burrows*, 27 Md. 130, 149. Concerning baggage in general, consult further article in *Am. & Eng. Cycl. of Law* 1042.

5. See *Kellogg v. Sweeney*, 1 Lans. (N. Y.) 397, 404, where it is said by *MULLIN, J.*: "It would seem to be just and reasonable, that when a satchel, bag, or trunk of a guest contains articles of great value, he should disclose it to the inn keeper, to the end that he may adopt such precautions against loss as the magnitude of the value makes necessary. It is very hard upon a landlord to hold him liable for large sums of money or jewelry which has been left in a guest's room in his trunk, when no intimation has been given that any such property has been taken there. But hard as it is, I find no case which exempts him unless he brings home to the guest notice that such valuables must be delivered to

Objection Coming Too Late.—An inn keeper cannot raise the objection that the amount of money brought by the guest was larger than the guest might need for his reasonable expenses, after the money committed to his special custody, according to the rules of the inn, has been stolen, even admitting that the objection would be good before the deposit was made.¹

Distinction Concerning Presumed Custody.—But a distinction has been made between articles attached to the person of the guest or carried about with him for his personal convenience, such as wearing apparel, pocket-money, etc., as to which the inn keeper is *prima facie* the responsible curator without delivery to him for safe keeping, and articles of special value, such as packages of money or a case of jewelry, which should be placed in the custody and control of the inn keeper in order to make him responsible therefor.²

Statutory Regulation, etc.—Statutes also sometimes modify the strict common law liability of the inn keeper, as by providing that if the proprietor of a hotel should furnish a safe at the office of the hotel for the safe keeping of money and other valuables of his guests, and should notify them thereof by posting notices in the rooms occupied by his guests, he should not be liable for any loss of money or valuables, etc., if the guests should neglect to deposit the same in such safe.³

him (the landlord) or deposited in such place as he shall direct." In *Johnson v. Richardson*, 17 Ill. 302; s. c., 63 Am. Dec. 369, 371, it is held that a guest of a hotel is not required to place his valuables in the custody of the inn keeper, even though the inn keeper has an iron safe for that purpose, and the guest knew of that fact.

Peddler's Pack.—An inn keeper has been held liable for the safe keeping of the valise and box of a peddler who was a guest at the hotel, although the inn keeper was not notified of the nature and value of their contents, and the peddler was too drunk to take proper care of them. *Rubenstein v. Cruikshanks*, 54 Mich. 199; s. c., 52 Am. Rep. 806.

1. *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 663.

2. Thus in *Weisenger v. Taylor*. 1 Bush (Ky.) 275; s. c., 89 Am. Dec. 626, 627, the court, through ROBERTSON J., says: "The inn keeper's responsibility is only coextensive with his custody and control, and his pledge of the integrity of his servants. And the question of custody and control depends on facts indicative of intention. If the guest having an article not attached to his person, nor carried about him for his

personal convenience,—such, for example, as a bag of gold, a case of jewelry, or a package of paper currency—the fact that he does not either notify the host of it, or offer to place it in his actual custody, would imply that he trusted to his own care, and intended to risk all consequences. And if the article thus held by himself alone should be stolen from him while abiding in the inn, the loss, like the preferred custody, might be his own alone, unless it resulted from the dishonesty of some of the household. The inn keeper, deprived of both custody and control, could not be held responsible on any just or consistent principle. But such articles as apparel worn at the time, and watch and pocket money, are not expected to be delivered to the inn keeper for safe keeping, and the retention of them in the guest's room neither keeps them from the implied custody of the inn keeper nor implies a waiver of his responsibility. In respect to such articles, therefore, thus kept, the inn keeper is *prima facie* the responsible curator."

3. See statement of *Purvis v. Coleman*, 21 N. Y. 112, in *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 665. On construction of

Law of Louisiana.—Under the law of Louisiana, inn keepers are responsible only for what is usually and ordinarily in the trunks of travellers, such as their clothes and the money necessary for their journey, and are not responsible for the unknown treasure of the traveller, unless placed in the hands of his host.¹

New York statute, see *Ramaley v. Leland*, 43 N. Y. 539; s. c., 3 Am. Rep. 728.

Special Agreement for Safe Keeping.—

The statutes of Massachusetts exempt inn holders from liability for the loss of goods which are not personal baggage and effects, unless such goods shall be delivered by the traveller to the inn holder for safe keeping: Pub. Stats., ch. 102, § 12. Where, therefore, a trunk of a commercial traveller containing goods for sale comes into the custody of the inn keeper, only in his capacity as such, the inn keeper is not liable for the loss of such trunk, which was stolen while deposited by the agent of the express company on the sidewalk in front of the inn, unless there was proof of the special agreement for safe keeping contemplated by the statute: *Becker v. Haynes* (Mass.), 29 Fed. Rep. 441, holding that in the absence of evidence tending to show that the loss resulted from the wilful default or neglect of the inn keeper or his servants, the jury should not have been instructed that the owner was entitled to recover if the trunk was lost by the carelessness or negligence of the inn keeper.

Proof of Posting Notices.—Where there is no clear proof that an inn keeper posted the notice required by statute, that valuables must be left with him for safe keeping, and no actual notice is brought home to the guest, the entire question of the posting of the notice is properly left to the jury. *Chamberlain v. West*, 37 Minn. 54.

Articles Not Covered by Enactment.—

In Maryland, where the statute provides a mode by which an inn keeper may protect himself from liability to his guests for losses of money, plate and jewelry, it has been held that a compliance with such provisions would not relieve the inn keeper from liability for the theft from the room of a guest of a watch, watch guard, pocketbook, and ninety dollars in money. *Maltby v. Chapman*, 25 Md. 310, 316, where it was considered that all of these articles, with the exception of the money, were of a class not within the statutory provisions referred to, while the enactment would not apply to the money if

it was reasonable and necessary for travelling expenses.

Depositary not Bailee for Hire.—A deposit of valuables has been regarded as made with the inn keeper in his character as such, and not as a bailee without hire, where guests of the inn were requested by notice not to leave money or articles of value in their rooms, but to deposit the same for safe keeping in a safe, and a deposit of money and gold dust is so made by a guest in part several days after his arrival, apparently in compliance with the notice and for the better care of the property. *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 662, where *RHODES, J.*, speaking for the court, said that there was nothing in the case to show that the deposits were made by the guests or received by the inn keeper "for any other reason or purpose than in pursuance of such request, and the better to enable the inn keeper to give that care and security to the property which are required of him by law," and that in "*Needles v. Howard*, 1 E. D. Smith (N. Y.) 55 and *Stanton v. Leland*, 4 E. D. Smith (N. Y.) 94, the material questions arising upon this point were very fully considered, and the conclusion was adverse" to the position of the inn keeper.

Failure to Disclose Contents of Pocket

Book, etc.—A guest has been held not guilty of such negligence as to defeat his right to recover against the inn keeper, in not informing the clerk of the hotel that there was money in the pocket book handed him for safe keeping, where the book was such as is commonly used for carrying money, and the evidence showed that the clerk understood that it contained money. *Sheraft v. Bailey*, 25 Iowa 553, 555. Concerning right of traveller to assume that clerk in charge has authority to receive money for safe keeping, see *Curtis v. Murphy*, 63 Wis. 4; s. c., 53 Am. Rep. 242, 246.

1. *Simon v. Miller*, 7 La. An. 360, 361. But the inn keeper will be liable for the theft of the necessary baggage of the traveller, including his watch, and the money which he has about him for his personal use, notwithstanding a

Maryland Doctrine, etc.—In Maryland, it is considered that "money in the trunk of a guest, to constitute a part of his baggage for which the inn keeper is responsible, should be of such an amount only as would be convenient to meet his travelling expenses," and that to arrive at this the condition of the guest, his mode of life, his habits, tastes, the nature, character and objects of his journey, must be taken into consideration by the jury."¹

47. Goods Kept for Show and Sale—Use of Room for Special Purpose.—The particular responsibility imposed upon inn keepers at common law does not extend to goods lost or stolen from a room in a public inn furnished to a person for purposes distinct from his accommodation as a guest.²

Release of Inn Keeper from Common Law Liability.—Accordingly, where a guest at a hotel takes to his room valuable articles of merchandise, and keeps them there for show and for sale, inviting purchasers to examine them, the hotel keeper is relieved, as to such merchandise, from the special liability of the common law.³

Statutory Regulation.—But this matter has been the subject of statutory regulation in some of the States.⁴

regulation of the inn requiring travellers to deposit articles of value in the safe at the office. *Pope v. Hall*, 14 La. An. 324, 326.

1. *Treiber v. Burrows*, 27 Md. 130, 147, stating that "it is the province of the jury in such a case to determine the question of sufficiency, under such directions and limitations as the court can prescribe." The opinion reviews the authorities on the question of what constitutes the baggage proper of a traveller or the guest of an inn, upon which were based the decisions in *Pettigrew v. Barnum*, 11 Md. 434, and *Giles v. Fauntleroy*, 13 Md. 126.

Money Which May Be Carried as Baggage.—Where the amount of money taken for a journey is no more than is reasonably prudent for the payment of expenses, including liabilities to accident, delays and sickness, it is exempted from the provisions of the Maine statute referring to "personal baggage, or money necessary for travelling expenses and personal use," and may properly be carried as baggage, for the loss of which an inn holder would be liable without special delivery to him. *Noble v. Milliken*, 74 Me. 225, 229.

2. See *Fisher v. Kelsey*, 121 U. S. 383, 385; s. c., 16 Fed. Rep. 71, 74; where JUSTICE HARLAN, delivering the opinion of the court, remarks: "Kent says that 'if a guest applies for a room in an inn for a purpose of business distinct from his accommodation as a guest, the particular responsibility does

not extend to goods lost or stolen from that room.' 2 Kent Com. 596. See also *Myers v. Cottrill*, 5 Biss. [U. S.] 465, 470 per DRUMMOND, J.; *Story on Bailments*, § 476; *Burgess v. Clements*, 4 M. & S. 306; *Redfield on Carriers and Bailees*, 443; *Addison Law of Contracts* (6th ed.) 360."

3. *Myers v. Cottrill*, 5 Biss. (U. S.) 465, 471; where "the true rule of law on the subject" is said to be that if "a person, going into a hotel as a guest, takes to his room not ordinary baggage, not those articles which generally accompany the traveller, but valuable merchandise, such as watches and jewelry, and keeps them there for show and sale, and from time to time invites parties into his room to inspect and to purchase, unless there is some special circumstance in the case showing that the inn keeper assumes the responsibility, as of ordinary baggage, as to such merchandise, the special obligations imposed by the common law do not exist, and the guest, as to those goods, becomes their vendor and uses his room for the sale of merchandise and really changes the ordinary relations between inn keeper and guest." To like effect see *Mowers v. Fethers*, 61 N. Y. 34; s. c., 19 Am. Rep. 244, 246; *Carter v. Hobbs*, 12 Mich. 52; s. c., 83 Am. Dec. 762, 765; *Neal v. Wilcox*, 4 Jones L. (N. Car.) 146; s. c., 67 Am. Dec. 266, 267.

4. The statute of Wisconsin, relating to the deposit of valuables in an iron

48. Inn Precincts—Bringing Goods Within Inn.—The general principle is well settled that an inn keeper is bound to keep safely the goods of his guest, which are in his custody, *infra hospitium*, but that he shall answer for nothing without the inn.¹ Thus, the liability of inn keepers does not attach unless the goods are brought within the inn or otherwise placed within their custody in some customary and reasonable way.²

Delivery Into Special Custody Unnecessary.—It is not necessary, however, that the goods should be placed in the special keeping of the inn holder,³ but it is sufficient if the goods are deposited in the house of the inn keeper or entrusted to the care of his family or servants.⁴

Inn Keeper's Liability for Goods Infra Hospitium.—If the goods are received into the care and keeping of the inn keeper, within the meaning of the terms of his common law liability,

safe, however, has been held not to alter the rule, though the inn keeper would be liable in any event for the negligence of either himself or his servants. *Myers v. Cottrill*, 5 Biss. (U. S.) 465, 472. Under the statute of Missouri, exempting the inn keeper from liability "for the loss of any merchandise for sale or sample belonging to a guest," unless written notice of the possession of such merchandise be given, it is not sufficient to fix full responsibility for the safety of such merchandise upon the inn keeper that he has actual knowledge of the possession of such merchandise by a guest, or consents to the use of a room for the display or sale of such merchandise. *Fisher v. Kelsey*, 121 U. S. 383, 386, 387; s. c., 16 Fed. Rep. 71, 74.

1. *Albin v. Presby*, 8 N. H. 408; s. c., 29 Am. Dec. 679, 680; citing *Calye's Case*, 8 Coke (Dub. ed.) 32.

2. *Norcross v. Norcross*, 53 Me. 163, 170.

3. See *Story Bailm.* (8th ed.), § 479. In *Burrows v. Trieber*, 21 Md. 320; s. c., 83 Am. Dec. 590, 591, *GOLDBOROUGH, J.*, says for the court that it is "well settled that a delivery of the goods into the custody of the inn keeper is not necessary to charge him with them, for although the guest does not deliver them, or acquaint the inn keeper with them, still the latter is bound to pay for them if they are stolen or carried away, even though the person who stole them or carried them away is unknown. See *Story on Bailments*, § 579, cited with approbation in *McDonald v. Edgerton*, 5 Barb. N. Y. 560, *supra*."

4. *Absence of Inn keeper.*—*Norcross v.*

Norcross, 53 Me. 163, 170. This case holds the inn keeper liable for the loss of the overcoat of a traveller and wayfarer, who was received and entertained at the inn as a guest, and hung up such coat on a hook in the office, which was the place in the inn allotted for that purpose. "It was not his fault," says *DICKERSON, J.*, in this case, that neither the inn keeper nor his servants were in the room at this time, nor was it his duty to guard his garment until they should come into the room, or to inform them where he had put it. His duty was discharged when he left his coat in the place established by the defendant for depositing such articles." In Georgia it is also not necessary to show actual delivery to the inn keeper, but depositing the goods in a public room set apart for such articles is a delivery to the inn keeper; and where an overcoat was deposited on a shelf in a reception room of the hotel, as directed by the person in charge thereof by the permission of the inn keeper, during his absence, this is sufficient to charge the inn keeper for the loss of the overcoat. *Rockwell v. Proctor*, 39 Ga. 105, 107. "It was the duty of the inn keeper," said *WARNER, J.*, in that case, "either by himself or competent servants or agents to take charge of the goods of his guests, and if he allowed persons to officiate in that capacity during his absence in his hotel he is responsible for their conduct, and for the loss of the goods deposited therein as directed by such servants or agents; and it is no sufficient answer for the inn keeper to say, after the goods are lost that the persons whom he permitted to officiate

that is, *infra hospitium*, he is liable therefor,¹ and the question of the negligence of the inn keeper or his servants is immaterial.²

Placing Goods in Appurtenant Out House.—In order that the goods should be within the inn, it is not necessary that they should be within the walls of the house or of the stables.³ Thus, where the guest put his sleigh, loaded with grain, into a wagon-house, where it was usual to receive loads of that description, it was considered that the bags of grain might be considered *infra hospitium*, and the inn keeper was held liable for the loss sustained by the guest, whose property was stolen during the night from such out house appurtenant to the inn.⁴

Putting Goods Near or On Highway.—An inn keeper is even responsible for the safe keeping of a load of goods belonging to a traveller who stops at his inn for the night, if the vehicle containing the goods be deposited in a place designated by the servant of the inn keeper, although such place be an open unenclosed space near the public highway.⁵

in that capacity, during his absence, were not *his* servants or agents.

1. In *Burrows v. Trieber*, 21 Md. 320; s. c., 83 Am. Dec. 590, 591, the court, through GOLDSBOROUGH, J., says: "By an examination of the authorities it is clear that inn keepers are liable for the goods of a guest which are brought by him within the inn, *infra hospitium*. See Story on Bailments, § 478; *Bennett v. Mellor*, 5 Term Rep. 273; 2 Kent's Com. 593, 594; *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560."

2. *Piper v. Manny*, 21 Wend. (N. Y.) 282, 283. This position is sustained by the rulings in *Calye's Case*, 8 Coke 32; *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 448; *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471. "The place therefore," it is further remarked, "when the goods are deposited, is not the test; it is whether they are *in the custody of the inn keeper or at the risk of the guest*. This must necessarily depend upon the particular circumstances of the case. *Prima facie* the inn keeper is liable, and the onus lies on him to show the contrary . . . And he cannot discharge himself from this common law liability without the concurrence of the guest." An illustration was taken from a case where the inn keeper was held liable for goods taken by direction of the guest to the commercial room, although it was the custom to take the luggage of travellers to their bedrooms, unless contrary orders were given. *Richmond v. Smith*, 8 Barn. &

C. 9, distinguishing *Burgess v. Clement*, 4 Maule & S. 306.

3. *Albin v. Presby*, 8 N. H. 408, 410; s. c., 29 Am. Dec. 679, 680. "When goods shall be said to be in the custody of the inn keeper, within the inn," says PARKER, J., in this case, "is sometimes a question of difficult solution. *Sadners v. Spencer*, 3 Dyer 266 b; *Farnsworth v. Packwood*, 1 Stark. 249; *Burgess v. Clements*, 4 M. & S. 306; *Richmond v. Smith*, 8 Barn. & Cress. 9 . . . It is not necessary that the goods should be within the walls of the house, or of the stables, in order to be within the inn."

4. *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 448, 449. But a shed in an open yard, under which the wagon of a guest is placed for the night, is not to be deemed a part of the inn, so as to charge the inn keeper for loss, unless he neglects, upon request, to put the goods in a place of safety. *Albin v. Presley*, 8 N. H. 408, 413; s. c., 29 Am. Dec. 679, 682. These cases are stated in *Norcross v. Norcross*, 53 Me. 163, 170. See also *Piper v. Manny*, 21 Wend. (N. Y.) 282, 283.

5. *Piper v. Manny*, 21 Wend. (N. Y.) 282, 283, where a sleigh load of butter was placed near an open shed in the yard of the inn, at the direction of the hostler of the inn, who, on being asked if there was a barn in which the load could be placed, answered that it was as safe in the yard as under lock and key.

Where a party coming on a fair day to an inn, with a horse and gig, orders

Parts of House to Which Liability Extends.—*Prima facie*, an inn keeper's responsibility extends to every part of his house, into which it is usual for such property to be taken.¹ But an inn keeper has been held not liable in damages for fatal injuries suffered by a guest in a part of the house to which he was not entitled or invited to go, as a "service room," used for the deposit of luggage, etc., and in which he lost his life by falling down the well of a lift.²

Putting Animal to Pasture, etc.—Nor is an inn keeper liable, in his character as such, if sheep be put to pasture under the direction of the guest, and they are injured by eating poisonous plants, though he may be responsible in damages if chargeable with negligence.³

Separate Bath House Along Sea Shore.—An inn keeper is likewise not responsible for valuables stolen from bath houses which are not bath rooms, such as are attached to hotels or kept within them, but separate buildings erected upon the sea shore and used as places in which those who bathe in the sea change their garments and leave their clothes and other valuables while so bathing.⁴

Transportation of Baggage to and from Hotel.—Where a traveller delivers his trunk or other personal property at a railroad depot to a porter to be taken to a hotel, he thereby impliedly contracts to become a guest of the hotel to which such servant is attached; and if he comply with such implied contract, the liability of the hotel keeper for the care of the goods begins from the time of the delivery to his servant, and that liability con-

the horse to be put into the stable, but gives no special directions as to the gig, and the horse is accordingly put into the stable, but the gig is placed with other carriages in the public highway, near the house, where it is the practice of the inn keeper to put carriages on fair days, the inn keeper is deemed responsible if the gig is stolen, though the case is admitted to be on the border line. *Jones v. Tyler*, 1 Ad. & E. 522, 524, 525; s. c., 3 Nev. & M. 576, 579, 580.

1. *Epps v. Hinds*, 27 Miss. 657; s. c., 61 Am. Dec. 528, 529.

2. *Walker v. Midland Ry. Co.*, 55 L. T., N. S. 489.

3. *Hawley v. Smith*, 25 Wend. (N. Y.) 642, 643.

But an inn holder receiving cattle, driven on the road, to keep over night, may be responsible as such for the safety of the place provided for them; and in the absence of any notice to the contrary from the inn keeper at the time, the jury have been held warranted in finding that it was to him as such inn

keeper that the property was delivered. *Hilton v. Adams*, 71 Me. 19, 20.

4. *Minor v. Staples*, 71 Me. 3, 6; s. c., 36 Am. Rep. 318, 319, where WALTON, J., says: "It seems to us that such an establishment is not as distinct from an inn as a wharf or a boat house would be; and that an inn keeper, as such, can no more be made responsible for property stolen from such a bath house than he could be for property stolen from a wharf or boat house, if he happened to be the keeper of the latter as well as the former."

In this case there was held to be a fatal variance between the allegations and the proof where the declaration was against the defendant as an inn keeper, and averred that he kept a common inn, and received the plaintiff into said inn, together with his money, and a watch, and a chain, and a ring, said property was wrongfully taken and carried away and wholly lost to him; but the evidence showed that the property was taken from a bath house, standing upon the sea shore or beach,

tinues until the goods be again delivered to the actual custody and control of the guest.¹

49. Duration of Inn Keeper's Liability—In General.—The beginning and termination of the liability of an inn keeper for goods of his guest must depend upon circumstances. Such responsibility begins from the moment the inn keeper receives the guest with his goods, and it ends when the relation between him and the guest is dissolved.²

When Liability Begins.—The liability of the inn keeper for the goods of his guest entrusted to his care or to the care of his servants begins from the time the goods are entrusted, and at the place where the inn keeper usually takes charge of the baggage of his guests.³ But the extraordinary liability of the inn keeper does not attach until he actually has a guest.⁴

Temporary Absence of Guest.—A person who is in fact a guest may leave the inn for a time and still leave his property under the safeguard of the landlord's liability; but how long he may stay away and leave his property without ceasing to be a guest seems not to have been determined, though it is said that he cannot, by leaving valuable property, aver an indefinite period, and staying away as long as he pleases, subject the landlord to the peculiar liability of an inn keeper.⁵

at a considerable distance from the inn, while the plaintiff was absent bathing in the sea.

1. *Sasseen v. Clark*, 37 Ga. 242, 250, 251. As to liability of inn keeper where trunk lost or stolen on the way to the hotels, see *Dickinson v. Winchester*, 4 Cush. (Mass.) 114; s. c., 50 Am. Dec. 760, 762.

2. *Sasseen v. Clark*, 37 Ga. 242, 250; *Edw. Bailm.* (1st ed.), p. 407, or 2nd ed., p. 342, §470. Thus, according to the case just cited, where a traveller delivers his trunk or other personal property to a hotel porter at a railroad depot the liability of the inn keeper for the care of the goods begins from the time of such delivery to his servant and continues until the goods are again delivered to the actual control and custody of the guest. Concerning continuance of relation of host and guest, see *Ross v. Mellin*, 36 Minn. 421, 422; *Whitemore v. Haroldson*, 2 Lea (Tenn.) 312, 314; *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 578.

3. *Sasseen v. Clark*, 37 Ga. 242, 250.
Loss of Trunk by Hack Driver on Way to Hotel.—In *Dickinson v. Winchester*, 4 Cush. (Mass.) 114; s. c., 50 Am. Dec. 760, 763, it was held that an inn keeper is liable for the loss of a trunk by a hack driver where such inn keeper has given public notice that he will furnish

free carriage to and from his house, and has engaged the owner of the hack to carry his guests, and a railway passenger, having notice of the arrangement and intending to put up at such house, enters the hack and entrusts his trunk to the driver at the station. *SHAW, C. J.*, said for the court: "Whether it be considered the defendants are to be considered as inn keepers, who assume the care of the guest and his baggage at the station, instead of waiting for his arrival at their own door or stable, or whether they are to be considered as common carriers of persons, who are responsible for the care of passengers' baggage, as incident, is perhaps immaterial. In either case the consideration for the undertaking is the profit to be derived by the inn keeper from the entertainment of the traveller as a guest, and an implied promise is founded upon such consideration."

4. See *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 667.

Concerning establishment of relation of inn keeper and guest, see *Gastenhof v. Clair*, 10 Daly (N. Y.) 265, 267; *Ross v. Mellin*, 36 Minn. 421, 422; *Read v. Amidon*, 41 Vt. 15; s. c., 98 Am. Dec. 560, 561; *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 576, 578.

5. *Whitemore v. Haroldson*, 2 Lea (Tenn.) 312, 314.

End of Relation and Responsibility.—According to various cases, which perhaps constitute a preponderance of authority, the relation of inn keeper and guest, with its attendant liabilities on the part of the former, no longer exists when the guest settles his bill and leaves the inn, though he entertains or even expresses an intention to return.¹

50. Liability for Goods of Departing Guest—In General.—It is said generally that after the relation of guest ceases, the inn keeper appears liable only as an ordinary bailee, gratuitous or otherwise, for the inanimate goods his departing guest may have left in his care, unless strict proof be furnished of a different understanding.²

As Gratuitous Bailee.—According to one view of the matter, the liability of the inn keeper in such cases is merely that of a gratuitous bailee who is responsible only for gross negligence.

Thus, it is considered that when the guest settles his bill and departs from the inn, leaving his baggage behind him and requesting the inn keeper to take care of it until his return, which he says will be in a few days, the relation of inn keeper and guest no longer exists, as the inn keeper has ceased to receive any profit from the entertainment of the guest, and the expectation to become a guest again at some future time does not continue the relation.³ In such a case the inn keeper is regarded merely as the gratuitous bailee of the baggage of the traveller, and is held responsible for its loss only when guilty of gross negligence.⁴

Consult further on temporary absence of guest, *Allen v. Smith*, 12 Com. B., N. S. 638, 644; *Day v. Butler*, 2 Hurl. & C. 14, 18, 19; *Lynar v. Mossop*, 36 Up. Can., Q. B. 230, 235; *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663, 666; *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560, 563; *Towson v. Havre de Grace Bank*, 6 Har. & J. (Del.) 47; s. c., 14 Am. Dec. 254, 256.

1. See *Miller v. Peeples*, 60 Miss. 819, 822; s. c., 45 Am. Rep. 423; *O'Brien v. Vaill*, 22 Fla. 627; *Lynar v. Mossop*, 36 Up. Can., Q. B. 230, 235. On termination of relation of inn keeper and guest, see further *Seymour v. Cook*, 53 Barb. (N. Y.) 451, 453; s. c., 35 How. Pr. (N. Y.) 180, 183, and *McDaniels v. Robinson*, 28 Vt. 387; s. c., 67 Am. Dec. 720, 722.

2. Sch. Bailm. 270, and cases cited. In *Murray v. Marshall*, 9 Colo. 482; s. c., 59 Am. Rep. 152, 153, after so citing this authority, quotation is made from another writer who cites as "not without weight" the case of *Adams v. Clem*, 41 Ga. 67; s. c., 5 Am. Rep. 524, and who says: "It is an interesting question how long, when a guest leaves his baggage

with the innkeeper, the inn keeper is liable as inn keeper for such. Judging from the analogy obtaining as to common carriers, we would conclude that the exceptional and owners' insurance liability of the inn keeper would not continue after the guest had permanently left the inn, allowing, of course, for a few hours which may be necessary for porters to effect a removal." *Whart. Negl.*, § 687.

3. *O'Brien v. Vaill*, 22 Fla. 627, 632, disapproving *Adams v. Clem*, 41 Ga. 65; s. c., 5 Am. Rep. 524, and *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560, and stating the latter case misconstrued the statements of JUDGE BRONSON in *Grinnell v. Cook*, 3 Hill (N. Y.) 485; s. c., 38 Am. Dec. 663. The opinion also cites, in support of the position taken, *Miller v. Peeples*, 60 Miss. 819; s. c., 45 Am. Rep. 423.

4. *O'Brien v. Vaill*, 22 Fla. 627, 632, 633, holding that there is nothing to show that the inn keeper was guilty of gross negligence, because, after the departure of the guest, he removed the baggage from the room occupied by the guest to the main hall of the hotel, from

Enlarged Liability.—But some of the cases show a tendency to enlarge the liability of the inn keeper, under such circumstances, beyond that of a bailee without compensation, and to hold him liable as a bailee holding property upon which he has a lien as security for a sum due, so as to be bound for ordinary care.¹

51. Inn Keeper's Negligence—Negligence Deemed Immaterial.—According to one line of cases, perhaps constituting a majority of the decisions, it is, as before explained, not necessary for the guest to prove negligence to support his action for the loss of his goods against the inn keeper;² nor will proof by inn keeper that he was guilty of no negligence be an excuse for him, unless he brings himself within those cases which are excepted.³

Want of Negligence Held to Exonerate.—But, according to a different line of cases, the *prima facie* liability of the inn keeper is based on the presumption of his fault or negligence,⁴ and that

which it was stolen, where it is in evidence that the only entrance to the hotel was through the office, and that while the hotel was open some person was always in charge of the office, and when it was closed a watchman was on duty.

1. See *Murray v. Marshall*, 9 Colo. 482; s. c., 59 Am. Rep. 152, 153, 154, where, after quoting *Adams v. Clem*, 41 Ga. 67; s. c., 5 Am. Rep. 524, and *Giles v. Fauntleroy*, 13 Md. 126, *ELBERT, J.*, says: "Departing guests not infrequently leave baggage in care of the inn keeper for a few hours or a few days, to be called for or to be forwarded to some designated destination. The great increase of modern travel creates an increased demand for more extensive accommodations in this respect. With a view of influencing travellers in selecting their hotels, inn keepers more or less generally respond to this demand and provide increased accommodations and assume voluntary duties respecting the baggage of guests thus left in their charge. In such case, if the liability of the inn keeper is that of voluntary bailee without compensation, guests are left with little or no protection. The case shows a tendency to enlarge it." It was accordingly held that when a guest, on leaving a hotel without the intention of returning as a guest, fails to pay his bill, but returned within forty-eight hours to get his valise, the inn keeper was bound to ordinary diligence and ordinary care, and the loss of the valise raises the presumption of negligence against him. Con-

sult also *Murray v. Clarke*, 2 Daly (N. Y.) 102, 103.

2. See *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 448, 449; *Compare Gile v. Libby*, 36 Barb. (N. Y.) 70, 74. In *Burrows v. Trieber*, 21 Md. 320; s. c., 83 Am. Dec. 590, 591, it is said by the court, through *GOLDSBOROUGH, J.*: "The authorities fully sustain the doctrine that it is not necessary, when goods are proved to be lost, to prove negligence in the inn keeper to make him liable for the loss. See *Cayle's Case*, 8 Coke 32; *Bennett v. Mellor*, 5 Term Rep. 273; *Clute v. Wiggins*, 5 Johns. (N. Y.) 177; s. c., 7 Am. Dec. 448; 2 Kent's Com. 594, 595; *McDonald v. Edgerton*, 5 Barb. (N. Y.) 562; *Shaw v. Berry*, 31 Me. 485; s. c., 52 Am. Dec. 628." For application of same doctrine to baggage of guest, see *Pettigrew v. Barnum*, 11 Md. 434; s. c., 69 Am. Dec. 213, 217.

3. See *Shaw v. Berry*, 31 Me. 478; s. c., 52 Am. Dec. 628, 630. Consult also full discussion of subject in *Sibley v. Aldrich*, 33 N. H. 553; s. c., 66 Am. Dec. 745. On view that inn keeper is strictly liable as insurer. See *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 663.

4. Thus in *Laird v. Eichold*, 10 Ind. 212; s. c., 71 Am. Dec. 323, it is said: "The authorities all agree that an inn keeper is *prima facie* liable for any loss or injury to the goods of his guest, not occasioned by the act of Providence, the public enemies or the fault of the guest, and the *prima facie* liability is based upon the presumption that the

he may exonerate himself by positive proof that he was not in any way negligent¹.

Degree of Care Required.—The general rule of diligence, on the part of inn keepers, is that of "uncommon care," as Lord HOLT has it, or "the extremest care," as some of the books have it.² But it has been laid down that public utility "requires that inn keepers be held liable for all losses which might have been prevented by ordinary care."³

loss or injury arose from the negligence or fault of the inn keeper. *Hill v. Owen*, 5 Blackf. (Ind.) 323; s. c., 35 Am. Dec. 124, *supra*; *Story on Bailm.*, § 472." But see suggested explanation of misconception in this view, made in *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303, 309.

1. See *Baker v. Dessauer*, 49 Ind. 28, 31, quoting *Story Bailm.* (8th ed.) § 472, note 5. In *Laird v. Eichold*, 10 Ind. 212; s. c., 71 Am. Dec. 323, 324, reference is made to the "*dicta* and decisions to the effect that an inn keeper is liable" for any loss or injury to the goods of his guest, "although it happened without his default." After quoting from *Washburn v. Jones*, 14 Barb. (N. Y.) 193 and *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, it is further said: In "*Shaw v. Berry*, 31 Me. 478; s. c., 52 Am. Dec. 628 and *Sibley v. Aldrich*, 33 N. H. 553; s. c., 66 Am. Dec. 745, it is *held* that proof by the inn keeper that there was no negligence in himself or his servants is not sufficient for his immunity. This doctrine, however, we think, is not in accordance with the weight of authority, nor are we entirely satisfied with the principle on which it rests." The cases regarded as fully establishing the different doctrine of the text are *Dawson v. Chauncey*, 48 Eng. Com. L. 164; *Kisten v. Hildebrand*, 9 B. Mon. 72; s. c., 48 Am. Dec. 416; *Metcalf v. Hess*, 14 Ill. 129; and in *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574.

2. See *McDaniels v. Robinson*, 26 Vt. 316; s. c., 62 Am. Dec. 574, 582. The duty of the inn keeper to exercise "extraordinary care" is laid down in *Shoecraft v. Bailey*, 25 Iowa 553, 555; *Weisenger v. Taylor*, 1 Bush (Ky.) 275; s. c., 89 Am. Dec. 626, 627. "More than ordinary care," is the expression used in this connection in *Treiber v. Burrows*, 27 Md. 130, 143.

3. *Newson v. Axon*, 1 McCord L. (S. Car.) 509; s. c., 10 Am. Dec. 685, 686.

In this case the horse of a traveller was put into a stable which was very open, although there was a bar to one door and a lock and key to the other. The servants of the guest made objections to letting the hostler lock the stable door. The inn keeper was *held* liable because the horse was stolen from the stable, as the question whether ordinary care was exercised by the inn keeper was for the jury, and their verdict was not to be disputed unless they had found very much against the weight of evidence. But the opinion declares that it "was a want of ordinary care to have such a stable," and that whenever it is doubtful whether ordinary care has been used or not, the presumption is against the bailee, and unless it be considered that the inn keeper was regarded as acting only in the capacity of a livery stable keeper, these expressions do not seem to be reconcilable with the usual view.

Charge Calling for Ordinary Care Only.—In *Clary v. Willey*, 49 Vt. 55, one count declared against an inn keeper as such, and the charge as given was stated in the opinion (p. 62) to have held the defendant, if found to be an inn keeper, to the use only "of such care as is ordinarily bestowed upon horses by inn keepers and livery stable keepers." It is thereupon remarked that the law "holds inn keepers to a stricter accountability for goods placed *in hospitium* to the exercise of the highest degree of care." 2 *Parsons Cont.* 624, 625; *McDaniels v. Robinson*, 26 Vt. 337; s. c., 62 Am. Dec. 574. On this and other points, therefore, the charge was regarded as being fully as favorable to the defendant as was proper.

Hostler Driving out Horse for Exercise.—In *Day v. Butler*, 2 Hurl. & C. 14, an hostler of an inn, for the alleged purpose of exercising a horse, drove it out, when it took fright at a locomotive and was injured, whereupon the inn keeper was sued by the guest

"Holding Out" Safety of Premises.—By letting a hall in his inn for public purposes, an inn keeper holds out that it is safe, and is bound to exercise proper care in providing safe arrangements for the entrance and departure of those invited to the hall; and matters held properly submitted to the jury are the question whether there was a breach of this duty, and also the question whether one who paid for admission to a dance in the hall, and was injured by walking off a piazza or wooden awning in front of the inn, was in such a state of intoxication as contributed to the injury.¹

Capacity of Ordinary Bailee.—A recovery in an ordinary action on the case against a bailee may be had against an inn keeper who is guilty of negligence in many instances, where he would not be liable in case on the custom, as in actions by boarders, and those putting animals to pasture, etc.²

Where property is delivered to the servant or agent of an inn keeper, and thus comes to the possession of the latter, and is afterwards delivered by him to a wrong person, or otherwise lost

owning the horse. MARTIN, B., in his opinion (p. 19), said that "the defendant having contracted to take reasonable care of the horse, and having employed a person to look after it, who did not take reasonable care of it, is responsible for the injury." POLLOCK, C. B., however, merely said on this point (at p. 18) that it "may be that it was proper to exercise the horse, but the liability of the defendant inn keeper does not cease on that account."

1. *Camp v. Wood*, 76 N. Y. 92, 96; s. c., 32 Am. Rep. 282, 285.

Exposing Guests to Infection.—Where the jury were warranted in finding that hotel keepers, with knowledge of the prevalence of smallpox in the hotel, kept it open for business, and permitted a party to become a guest without informing her of the presence of the disease, such inn keepers are liable to the party who became their guest under these circumstances, and contracted the disease while in their house, and who was herself guilty of no negligence contributing to the injury. *Gilbert v. Hoffman*, 66 Iowa 263; s. c., 55 Am. Rep. 263, 264.

2. See *Neal v. Wilcox*, 4 Jones L. (N. Car.) 146; s. c., 67 Am. Dec. 266, 267, where it is said by the court, through PEARSON, J., in regard to the ordinary action on the case against a bailee, that "a recovery in that action may be made against an inn keeper who is guilty of negligence in many instances where he would not be liable

in 'case' on the custom; for instance, one takes boarding at an inn on a special contract; his goods are lost, the inn keeper is not liable 'on the custom,' but is liable in a special action on the case, if negligence be proved. So if one leave a trunk or carriage to be kept by an inn keeper, or if one deliver a flock of sheep or a drove of mules or horses to an inn keeper to be pastured, he is only liable as bailee on proof of negligence." In *Manning v. Wells*, 9 Humph. (Tenn.) 746; s. c., 51 Am. Dec. 688, 689, it is *held* that an inn keeper is liable for the loss of the goods of a boarder only where he is proven to have been guilty of culpable negligence. In *Clary v. Willey*, 49 Vt. 55, one count declared against an inn keeper as a bailee for hire. It appeared that the defendant, by himself or servants, hitched the plaintiff's horse, which was in his care, next a horse that defendant or his servants knew to be in the habit of kicking other horses. As a result, plaintiff's horse was kicked and injured. It was *held*, that though plaintiff knew where his horse was hitched, and made no objection thereto, yet as he did not know of the vicious habit of the other horse, defendant would be guilty of actionable negligence as a bailee for hire in thus hitching plaintiff's horse, and therefore the court was justified in refusing a charge to the contrary, and in making the only ground of exemption the assumption of the sole control of the horse by the plaintiff.

by his gross negligence, he is liable, whether as inn keeper or not, and whether he is a gratuitous bailee, or a bailee for hire.¹

52. Contributory Negligence of Guest—In General.—The inn keeper may be exonerated by showing that the guest has taken upon himself exclusively the custody of his own goods, or has, by his own neglect, exposed them to peril.² Indeed, in general, it is competent for the inn keeper to show that the loss of the goods of the guest is attributable to the negligence of the guest.³

Want of Ordinary Care Sufficient.—It was formerly supposed that only gross negligence on the part of the guest would prevent

1. *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188, 193.

Where the valise of a departing guest was left behind by him, and on his coming back and presenting a return check which had been given him, the valise could not be found, it was *held*, that whether the property was regarded as the subject of an ordinary bailment, or as property in the inn keeper's hands, which they had a right to detain until the discharge of the lien upon it for the bill incurred by the guest for his entertainment, the inn keepers were bound to the exercise of ordinary care and diligence, and the burden was upon them to show the circumstances of the loss; and that in default of any such affirmative proof by them the presumption will arise that they were guilty of negligence. *Murray v. Clarke*, 2 Daly (N. Y.) 102, 103.

2. *Read v. Amidon*, 41 Vt. 15; s. c., 98 Am. Dec. 560, 561, *citing* Story on Bailments, §§ 478, 480, 482, 483; 2 Kent's Com. 593; *Richmond v. Smith*, 8 Barn. & C. 9; *Bennett v. Mellor*, 5 Term Rep. 273. "It is doubtless true," says GOLDSBOROUGH, J., for the court, in *Burrows v. Trieber*, 21 Md. 320; s. c., 83 Am. Dec. 590, 592, "that there are exceptions to the liability of inn keepers,—as inevitable accidents, the acts of public enemies, and of the owners of property or their servants. This last exception must be construed to mean a discharge of liability where the owner takes control of his property, though it be still *infra hospitium*, and its loss or injury may be attributed to his own neglect."

3. See *Spring v. Hager*, 145 Mass. 186; *Lanier v. Youngblood*, 73 Ala. 587, 592. In the latter case SOMERVILLE, J., said: "In addition to other defences which are authorized to be set up by an inn keeper in excuse of loss

of the guest's goods, is the fraud or negligence of the guest himself, which may be classed under the head of contributory negligence. This constitutes, according to the better view, an established exception engrafted upon the rule of liability in the case of common carriers. 1 Smith's Lead. Cases (7th Am. ed.) 411; Ala. etc. R. Co. v. Little, 71 Ala. 611. The reasons are just as forcible why it should also obtain in the case of the keepers of inns, hotels and other like houses of public entertainment. [Note to] *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 455; *Chamberlain v. Masterson*, 26 Ala. 371; *Purvis v. Coleman*, 21 N. Y. 111."

Statute Declaratory of Common Law.—In Massachusetts Pub. Stat., ch. 102, § 16, provides that "an inn holder against whom a claim is made for loss sustained by a guest may in all cases show that such loss is attributable to the negligence of the guest himself, or to his noncompliance with the regulations of the inn, if such regulations are reasonable and proper, and are shown to have been duly brought to the notice of the inn holder." "This provision," it is said in *Spring v. Hager*, 145 Mass. 186, "was first enacted in stat. 1853, ch. 405, § 3, which was soon after the decision in *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417, and although this statute made some changes in the law, the clause that it is competent for an inn keeper to show that the loss is attributable to the negligence of the guest is only declaratory of the common law. *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471; *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417, *supra*; *Oppenheim v. Hotel Co., L. R.*, 6 C. P. 515; *Cashill v. Wright*, 6 El. & Bl. 891; *Morgan v. Raney*, 6 Hurl. & N. 265; *Elcox v. Hill*, 98 U. S. 218."

a recovery, but it is now settled that a want of ordinary care contributing to the loss will have that effect.¹

Thus, an inn keeper will not be liable for the loss of the goods of his guest if the loss is occasioned by the want of that ordinary care, on the part of the guest, which a prudent man may be reasonably expected to take under all the circumstances of the case; and the question whether or not the guest has taken such ordinary care is always a question of fact for the jury.²

Confinement to Period While Party a Guest.—But in order to exempt an inn keeper from liability for the loss of property, evidence of the neglect of the owner of the property must be con-

1. *Jalie v. Cardinal*, 35 Wis. 118, 130.

"It is not every slight negligence on the part of the guest, of course," says *SOMERVILLE, J.*, in *Lanier v. Youngblood*, 73 Ala. 587, 592, "which will be held to excuse as coming within the principle [that fraud or negligence of the guest may excuse the inn keeper.] Nor is the rule perhaps sound as sometimes found to be intimated that the negligence required to be imputed must be gross negligence, or such as evinces a want of good faith on the part of the plaintiff. The true rule, in our judgment, and the one which seems to be sustained by the analogies of the law in other cases, is, that the want of ordinary care on the part of the guest, or of such as a prudent man may reasonably be expected to exercise under like circumstances, is sufficient to defeat a recovery against the inn keeper, where it appears that such negligence proximately contributed to the loss, and that the loss would not otherwise have happened. *Cashill v. Wright*, 6 El. & B. 891 [quoted in note to] *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 455."

2. *Hadley v. Upshaw*, 27 Tex. 547; s. c., 86 Am. Dec. 654, 656, where it is said that the rule thus announced, and believed to be the rule of the law, "was laid down by the court of queen's bench, in the case of *Cashill v. Wright*, 37 Eng. L. & Eq. 177" [s. c., 6 El. & B. 891, 900]; and that the "same rule was previously intimated by *LORD CAMPBELL* in the case of *Armistead v. White*, 6 Eng. L. & Eq. 349, and has been recognized in New York, in the case of *Fowler v. Dornon*, 24 Barb. (N. Y.) 384." In *Cashill v. Wright*, 6 El. & B. 891, 900, it is said: "We think the rule of law resulting from all the authorities is that . . . the

goods remain under the charge of the inn keeper, and the protection of the inn so as to make the inn keeper liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances."

Intoxication of Guest.—Where there was evidence tending to show that the plaintiff, who sued for the loss of money brought to an inn was intoxicated when he retired to his room about 11 o'clock in the day, and that he was negligent in not finding the key in his door, and in not locking the door, it was held that there was no error in submitting to the jury the question of negligence on his part. *Jalie v. Cardinal*, 35 Wis. 118, 130, *DIXON, C. J.*, said: "Negligence in cases of this nature, as in all others, is one of fact for the jury unless the evidence is too plain and positive to admit of doubt or controversy, when the court will be justified in taking the case into its own hands and directing a verdict. We cannot say, in view of the very stringent liability of inn keepers, and of the authorities, that the court would have been justified in doing so in this case, and hence cannot disturb the verdict as being against the evidence. If drunk, the plaintiff might still have claimed the protection of his host, as did Falstaff, when he fell asleep "behind the arras," and might say with him: "Shall I not take mine ease in mine inn but I shall have my pocket picked?" which seems to be a further proof, not noticed by the advocates of that theory, that Shakespeare was a lawyer, and therefore that Bacon wrote Shakespeare. In *Walsh v. Porterfield*, 87 Pa. St. 376, 378, it was held

fined to the period while he was a guest at the inn keeper's house.¹

Exposure of Goods to Unnecessary Peril.—In accordance with the general doctrine, the guest is not relieved from all responsibility in respect to his goods on entering the inn, but is bound to use reasonable care and prudence in respect to their safety so as not to expose them to unnecessary danger of loss.²

Failure to Comply with Rules of Inn.—Where an inn keeper, for the purpose of securing the safety of the goods of his guest, makes a reasonable and proper rule or requirement, to be observed by them, or he will not be responsible therefor, and the goods of a guest having knowledge of the rule are lost solely by reason of

that it was not error in the court to instruct the jury that if they believed that the guest was intoxicated at the time of the alleged robbery, and this contributed in any way to his loss, he could not recover. In *Rubenstein v. Craikshanks*, 54 Mich. 199; s. c., 52 Am. Rep. 806, 810, it is held that an inn keeper's liability for a guest's baggage placed in his charge is not diminished, but rather increased, by the fact that the guest has got too drunk at his bar to take care of it himself.

1. See *Burrows v. Trieber*, 21 Md. 320; s. c., 83 Am. Dec. 590, 592, holding that evidence tending to show neglect and inattention of the party previous to his becoming a guest or his subsequent conduct after leaving the hotel, could not be considered by the jury touching the merits of the case. The expression used in the opinion is "gross neglect," but this has been changed in the text to conform to the law as just stated.

2. *Read v. Amidon*, 41 Vt. 15; s. c., 98 Am. Dec. 560, 561. This case holds that the guest's carelessness, exonerating the inn keeper from liability for the loss of gloves, is a question of fact to be determined by the jury, in view of all the circumstances, where the guest laid his gloves down under his overcoat on a bench in the presence of the inn keeper, but without calling the inn keeper's attention to them. "What would be regarded as gross carelessness under one set of circumstances," said *PIERPONT, C. J.*, for the court, "might not be so considered under other circumstances; much would depend upon the place, the number of people present, the kind of property as to its value, and the ease with which it might be removed without detection, etc." A suggestion against unnec-

essary exposure of money, etc., is also contained in *Johnson v. Richardson*, 17 Ill. 302, 305; s. c., 63 Am. Dec. 369, 372.

Keeping Valuables in Room.—The leaving by a guest of a sum equal to \$2000 in gold coin, in his trunk in a room in a hotel, after personal notice that there was a safe in the office which was appropriated to the custody of valuables, is such negligence as to discharge the inn keeper from any liability. *Purvis v. Coleman*, 21 N. Y. 111, 115.

But the fact that a guest sleeping in a room at the hotel, occupied only by himself, retained the sum of nearly \$500 in money secured in a belt around his body, is not such conduct as should be deemed negligence as a matter of law, although the bolt of the door to his room could be opened with a wire from the outside. *Smith v. Wilson*, 36 Minn. 334, 336.

Failure to Deposit Watch and Travelling Money.—Nor is an inn keeper relieved from his common law liability for the loss of the watch and travelling money of his guest by the fact that such inn keeper has complied with statutory regulations by providing a safe and posting notice to deposit valuables. *Krohn v. Sweeney*, 2 Daly (N. Y.) 200, 202, 203; following *Gile v. Libby*, 36 Barb. (N. Y.) 70.

Unnecessary Display of Articles.—In *Armistead v. Wilde*, 17 Q. B. 261, a direction to the jury was sustained upon the ground that it must have been understood to mean that if the guest was guilty of gross negligence contributing to the loss the inn keeper was not exonerated, and this view was based on the facts in evidence that the guest showed his money ostentatiously in the presence of several persons, and then openly put it in an ill-secured box, whence it was stolen. In *Cashill v. Wright*, 6 El.

his neglect to comply therewith, the inn keeper is not liable for the loss thus occasioned by the negligence of the guest.¹

Theft by Fellow Guest Put Into Same Room.—The guest is not chargeable with negligence where the goods are stolen by a fellow guest, who is put into the same room with him, with or without his consent.²

53. Failure to Lock or Bolt Door—Merely Evidence of Negligence.—It seems to be the prevalent doctrine that the failure of the guest to lock or bolt the door of his room is not negligence as a matter of law,³ but is evidence of negligence for the jury.⁴

& B. 801, where the rule as to the use of ordinary care by a guest was laid down, the guest had shown some money in the commercial room of the hotel, and had afterwards placed his watch on the table in the bed room, leaving the door ajar. The court could not say that there was not some evidence of negligence on the part of the guest, on which the opinion of the jury ought to have been taken.

1. Fuller v. Coats, 18 Ohio St. 343, 352, "To hold otherwise," says DAY, C. J., in this case, "would subject a party without fault to the payment of damages to a party for loss occasioned by his own negligence, and would be carrying the liability of inn keepers to an unreasonable extent. Story's Bailm. §§ 472 and 483; Cashill v. Wright, 6 El. & Bl. 890; Purvis v. Coleman, 21 N. Y. 111, and Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417."

2. In Olson v. Crossman, 31 Minn. 222, 223, GILFILLAN, C. J., says: "While a theft from the guest by a companion whom he brings to the inn is imputable to the guest as his own negligence, he is not to be charged with negligence merely because the theft was committed by another guest of the inn whom he does not bring there, even though with his consent he is placed to sleep in same room with such other guest." Where the circumstances render it probable that the goods of a guest are stolen from his room by a fellow lodger with whom he is placed, notwithstanding his remonstrances, the fact of his neglecting to bolt the door of his room on retiring, as required to do, pursuant to the statute, by a notice posted in the room, will not avail the hotel keeper as a defence to an action to recover the value of the goods stolen. Gile v. Libby, 36 Barb. (N. Y.) 70, 77, 78. Compare further, Buddenburg v. Benner, 1 Hilt. (N. Y.) 84.

3. "In the absence of notice of a rule of the inn," it is said in Murchison v. Sergeant, 69 Ga. 206; s. c., 47 Am. Rep. 754, 756, "to lock and bolt the door, the failure to do so is not legal negligence at common law. Morgan v. Ravey, 6 H. & N. 265; Buddenburg v. Benner, 1 Hilt. [N. Y.] 84; Classen v. Leopold, 2 Sweeney [N. Y.] 707; Gile v. Libby, 36 Barb. [N. Y.] 70, 78. Our statutes have not altered this rule . . . So that, conceding that plaintiff did not lock and bolt his door, and that the lock and bolt were perfect, in the absence of a notice regulation published to him according to law, he would not be legally negligent in not doing so."

4. See Spring v. Hager, 145 Mass. 186, where FIELD, J., remarked: "It has indeed been said that 'in the absence of notice of a rule of the inn to lock and bolt the door, the failure to do so is not legal negligence at common law.' Murchison v. Sergeant, 69 Ga. 206; s. c., 47 Am. Rep. 754. It has often been decided that not locking or fastening the door of a bed room is not, as matter of law, negligence; but this fact, in connection with others, may be evidence of negligence for the jury; and the weight of modern authority is, we think, that the failure to lock or bolt the door of a lodging room at an inn, where there is a lock or bolt upon it, is evidence of negligence for the jury. Oppenheim v. Hotel Co., Law R., 6 Com. P. 515; Spice v. Bacon, 36 L. T., N. S. 896; Herbert v. Markwell, 45 L. T. 649."

Failure to Fasten Window.—In Bohler v. Owens, 60 Ga. 185, 188, it is laid down that negligence was a question for the jury, so that the court should not instruct the jury that the guest was bound to fasten a particular window of his room if he could have seen it by the use of ordinary diligence; and that it was for the jury also to judge of the effect of an admission of the guest that

Bare Failure to Bolt Door.—Nor is the single fact that the guest did not bolt his door, after having locked it on the inside, regarded as sufficient evidence of negligence.¹ Indeed, such failure to bolt the door has been considered not to be evidence of negligence at all where there are no regulations brought to the notice of the guest requesting him to bolt the door, and it is not known to the guest that there is a bolt, and his attention is not in any way called to it.²

Simple Omission to Use Key.—So the bare fact that the guest receives a key of his bed chamber and omits to make use of it, does not constitute such fault or negligence on his part as to

the loss occurred by his own fault.

Lock on Door out of Repair.—Where the lock on the door of the room furnished the guest was out of repair, and no other fastening was provided, contributory negligence cannot be imputed to him because he slept in the room without fastening the door, or because, knowing the condition of the door in this regard, he failed to notify the inn keeper thereof; and the guest being clearly free from negligence, and no doubt being raised by the undisputed facts in evidence, the question of negligence becomes one for the decision of the court, so that there is no error in withdrawing it from the consideration of the jury. *Lanier v. Youngblood*, 73 Ala. 587, 594, 595.

1. Thus in *Spring v. Hager*, 145 Mass. 186, it is said: "No case has been cited in which it has been held that the single fact that the plaintiff did not bolt his door, after having locked it on the inside, is sufficient evidence of negligence. In *Spice v. Bacon*, 36 L. T., N. S. 896; and in *Herbert v. Markwell*, 45 L. T., N. S. 649, the jury must have found that the door was left unfastened either by bolt or lock. In *Morgan v. Ravey*, 2 Fost. & F. 283, it is said that the plaintiff locked the door but did not bolt it. In the same case, in the court of exchequer (6 Hurl. & N. 265, 266), it is said that 'witnesses were, however, called on the part of the defendants to prove that the plaintiff had told them he had not locked the door.' It was admitted that he did not use the bolt. *Pollock, C. B.*, at *nisi prius*, left the question of negligence to the jury, but told them at the same time that the guest was not bound to lock his bed room door, etc. The verdict was for the plaintiff."

2. See *Spring v. Hager*, 145 Mass. 186, where the plaintiff was a guest at

defendant's hotel, and was taken by one of the defendants to the room assigned to him, a small hand lamp being left with him. He locked the door, the lock being a common mortised lock and went to sleep. In the morning he found that the lock had been picked and his valuables stolen. The inn keeper refused to pay the loss on the ground that plaintiff was negligent in failing to spring a bolt which was on the door about six feet from the floor, though his attention was not called to the bolt and the plaintiff said he had not seen it. There was no regulation or notice posted in the room requiring guests to lock and bolt the door. It was held that the plaintiff was not negligent and could recover. *FIELD, J.*, said: "It must often depend much upon the circumstances of the case, the customs of the age and country, and the usages of the place, whether the plaintiff has been guilty of such negligence that the loss can be attributable to it, and we cannot say, as matter of law, that on the facts appearing in this case, if the plaintiff saw the bolt and did not use it, this was not some evidence of negligence to be submitted to the jury. The delivery of a key to a guest may be held to be an intimation to him that he is to use it in locking his door. The lock, however, is the only fastening which the guest can use when not in the room. A bolt, if seen, may itself suggest that it ought to be used. If, however, there are no regulations brought to the notice of a guest requesting him to bolt the door, and if it is not known to the guest that there is a bolt, and his attention is not in any way called to it, we think the fact that, after locking his door with a key, he does not search for a bolt and find it, is not evidence of negligence on his part . . . See *Murchison v. Ser-*

relieve the inn keeper from liability for goods stolen from the room while the door was unlocked.¹

Supplementary Circumstances.—But there may be other facts, such as an unnecessary display and careless disposal of the property, which, taken in connection with a failure to bolt or lock the door, may be sufficient to constitute negligence on the part of the guest.²

gent, 69 Ga. 206, s. c., 47 Am. Rep. 754; *Batterson v. Vogel*, 10 Mo. App. 235."

1. *Classen v. Leopold*, 2 Sweeney, (N. Y.) 705, 711. But see comments on this case in note to *Dunbier v. Day*, 12 Neb. 596; s. c., 41 Am. Rep. 777, 778, where the opinion is quoted, and where it is said that it seems to be in the minority, as in the *Oppenheim* and *Spice* cases. *Oppenheim v. Hotel Co.*, Law R., 6 Com. P. 515, *Spice v. Bacon*, 36 L. T., N. S. 896. *Calye's Case*, 8 Coke 32, was also cited, but in both the fact was left to the jury. It is admitted, however, that this "was a peculiarly hard case, for the guest had at first locked his door at night, but finding it made him cold to get up in the morning to let in the porter to build his fire, he adopted the practice of leaving the door unlocked all night, and did not communicate this fact to the landlord." It is also conceded to be "true that *KELLY, C. B.*, in *Mitchell v. Woods*, 16 L. T. (N. S.) 676, at *miss prius*, directed a verdict for the plaintiff, holding that there was no duty on the guest to lock his door, and consequently it was not negligence on his part to omit to do so," but it is declared that "this must be considered overruled in *Spice v. Bacon*, 36 L. T., N. S. 896, where the court of appeal reversed a precisely similar ruling of the same judge."

In *Lanier v. Youngblood*, 73 Ala. 587, however, an action was brought against a hotel keeper to recover damages for the loss of money and jewelry alleged to have been stolen or wrongfully taken and carried away from plaintiff's room while he was a guest at the hotel. *SOMERVILLE, J.*, said: "The only ground upon which we can see that the plaintiff could, in the remotest degree, be chargeable with negligence, was either in sleeping in a room without a locked door or in failing to notify the proprietor of the hotel that the lock was out of order. If the lock had been in good condition, it is questionable whether a failure to use it would be

such contributory negligence on the part of the guest as to excuse the defendant's liability. It was so held, however, in *Oppenheim v. White Lion Hotel Co.*, L. R., 6 C. P. 515; but see *Herbert v. Markwell*, 45 L. T., N. S. 649; *Spring v. Hager*, 145 Mass. 186; although the contrary seems to have been intimated by *LORD COKE* in *Calye's Case*, more than two hundred years ago; 8 Coke's Rep. 203."

In Louisiana, in a case where the guest was intoxicated, it was laid down that if the keeper of the hotel provides with a lock the room where his guest lodges, which opens inside and does not open from outside, it would be in the power of the guest to protect himself and the hotel keeper would not be responsible unless it were shown he was guilty of gross negligence in other respects. *Profiel v. Hall*, 14 La. Ann. 424.

2. Thus in *Herbert v. Markwell*, 45 L. T., N. S. 649, as stated in note to *Dunbier v. Day*, 12 Neb. 596; s. c., 41 Am. Rep. 777, the action was against an inn keeper for loss of jewelry by robbery at night, from rooms of the plaintiffs, who were husband and wife, and were his guests. The defence was that the plaintiffs were negligent, first, in not bolting the door and in leaving the key on the outside; second, because the wife wore, the same evening, conspicuously at dinner in the hotel, some of the jewelry which was stolen; and lastly, because the articles themselves, instead of being deposited in some safe place, were left lying carelessly about the room. The court said that, assuming then that the door was not bolted in fact, was that *per se* evidence of negligence by the plaintiff? The cases which had been cited, *Oppenheim v. White Lion Hotel Co.*, L. R., 6 C. P. 515, and *Spice v. Bacon*, 36 L. T. (N. S.) 896, showed that such an omission on the part of a guest was not by itself negligence, but that it was an element to be considered with other facts which might be proved, and which, taken together, might amount to negligence.

54. Assuming Special Custody of Goods—Guest's Exclusive Custody Exonerates Inn Keeper.—The inn keeper's responsibility is co-extensive with his custody and control, and he may be exonerated by showing that the guest has taken upon himself exclusively the custody of his own goods.¹

Guest Taking Goods from His Room, etc.—Thus, where a guest at an inn takes his goods from his room or other proper depository in the house, and from the ordinary care and custody of the inn keeper, into his own exclusive custody and control, and they are lost from the inn while so in his custody, the inn keeper is not responsible for the loss.²

Retaining Money on Person.—Possession of money upon the person of the guest does not, however, constitute such exclusive control and custody on his part as will exonerate the inn keeper, unless under certain peculiar circumstances.³

Entrusting Money to Another Inmate.—But an inn keeper is not responsible for the loss or embezzlement of money of the guest entrusted to another guest or inmate for safe keeping.⁴

Here there were other facts, of the slenderest nature, no doubt, but still not such as should be excluded from the opinion of a jury—for instance, leaving the key in the lock outside, which was a temptation to thieves, and the wearing by the wife of her jewelry in a public room a few hours before. For these reasons he thought the rule should be discharged. Probably, if he had been on the jury, he should have found the other way, but what the court had to decide now was not whether the verdict was against the weight of evidence but whether there was any evidence in law to support it. He could not say there was not, and the rule therefore must be discharged. This case was affirmed on appeal. See *Weekly Notes of Cases* (1882), 112.

1. See *Vance v. Throckmorton*, 5 Bush. (Ky.) 41, 44; s. c., 96 Am. Dec. 327, where the court, through WILLIAMS, C. J., said: "In section 483, Story says the inn keeper may be exonerated 'by showing that the guest has taken upon himself exclusively the custody of his own goods;' and as said by this court in *Weisenger v. Taylor*, 1 Bush (Ky.) 276; s. c., 89 Am. Dec. 626. 'The inn keeper's responsibility is only coextensive with his custody and control, and his pledge of the integrity of his servants; and the question of custody and control depends on facts indicative of intention.'"

Guest Allowing Another to Exercise Acts of Ownership.—Inn keepers are lia-

ble for goods put in their charge when lost without any fault on the part of the owner. But if the owner on entering a hotel allows another to exercise acts of ownership over his baggage, without informing the landlord that the baggage is his, and it is afterwards carried away by such other person, this is gross negligence on the part of the owner, and releases the landlord from any liability for the loss. *Kelsey v. Berry*, 42 Ill. 469, 471.

2. *Fuller v. Coats*, 18 Ohio St. 343, 351. On effect of ordering goods into particular room, see *Packard v. Northcraft's Adm'r.*, 2 Met. (Ky.) 439, 442; *Epps v. Hinds*, 27 Miss. 657, 664; s. c., 61 Am. Dec. 528, 529.

3. *Jalie v. Cardinal*, 35 Wis. 118, 129. See also *Smith v. Wilson*, 36 Minn. 334, 336.

4. Where a guest deposits his money on the credit of the inn with a person who has authority to receive it, or who acts in such a capacity as would naturally lead guests to infer that he was the inn keeper's servant, the inn keeper is responsible for the embezzlement of such money, and is bound to make restitution thereof. *Houser v. Tully*, 62 Pa. St. 92, 96; s. c., 1 Am. Rep. 390. "But though an inn keeper is liable, on grounds of the soundest policy and public convenience, for whatever is deposited in his house by a guest, he is not responsible for the loss or embezzlement of his guest's money where he does not deposit it on the security of

55. Ordering Goods to Particular Room—Public Room of Inn.—Though the inn keeper may be exonerated by showing that the guest has taken upon himself exclusively the custody of his own goods, yet even a request by him that they shall remain in some particular place in the inn, where the place so designated is not in his exclusive possession, but under the control and supervision of the inn keeper, will not discharge the latter from his liability for the goods if they are lost.¹ Indeed, the inn keeper will be liable for the loss of goods left in the public room, unless he has given his guest notice that he will not be responsible for the goods if they are left there.²

Bed Room of Guest.—So where a father gave his son money to pay his travelling expenses on his way to college, and also to defray his expenses while there, and the son in going to college stopped at a public inn, where the money was stolen from him by a stranger who came into his bed room in the night, it was held that the fact of the son ordering his trunk to be taken to his bed room, did not exonerate the inn keeper from liability for the theft committed in such room.³

56. Limitation of Inn Keeper's Liability by Contract—Reasonable Rules of Inn.—An inn keeper is not liable for goods lost through the failure of the guest to comply with a reasonable or proper rule or requirement which is brought to his knowledge with the information that if such regulation is not observed by him, the inn keeper will not be responsible.⁴ But in the absence of an

the inn, but entrusts it to another guest or inmate for safe keeping, in whom he reposes his trust and confidence. *Sneider v. Geiss*, 1 Yeates [Pa.] 35; *Houser v. Tully*, 62 Pa. 92, 96; s. c., 1 Am. Rep. 390.

1. *Packard v. Northcraft*, 2 Met. Ky.) 439, 442.

Thus where a traveller went to an inn, and, at his desire, a package of his was taken into the commercial room to which travellers in general resorted, whence it was stolen, the inn keeper was held responsible for the loss, although it was the usual practice at that inn to take all the baggage of the guests into their bed rooms, unless orders to the contrary were given. *Richmond v. Smith*, 8 Barn. & C. 9, 11, distinguishing the case of *Burgess v. Clements*, 4 Maule & S. 306, because there the plaintiff asked to have a room which he used for the purposes of trade, and not merely as a guest in the inn.

2. *Packard v. Northcraft*, 2 Met. (Ky.) 439, 442. In this case an inn keeper, as his guest was about to go to bed, remarked to him that he had better take his valise to his room, to which

he replied it was not necessary, that it would be safe in the bar room, where it was allowed to remain, and on the next morning it was gone and could not be found. The inn keeper was held liable for its loss.

3. *Epps v. Hinds*, 27 Miss. 657, 664; s. c., 61 Am. Dec. 528, 529, where the court, through FISHER, J., said: "The son by such act only conformed to a general custom, and the inn keeper could only relieve himself by showing that he was to be responsible for the trunk and what might be put in it when left at a particular place. *Prima facie*, his responsibility for the property of his guests extends to every part of his house into which it is usual for such property to be taken. This is the general rule, which can only be limited by the inn keeper showing that there was a different understanding between him and his guest in regard to the property of the latter."

4. *Fuller v. Coats*, 18 Ohio St. 343, 351, where DAY, C. J., said: "The public good requires that the property of travellers at hotels should be protected from loss; and for that reason, inn

express contract to the contrary, an inn holder is liable for a loss by theft of the property of his guest, although the guest knowingly fails to comply with a reasonable regulation of the inn, if the loss is not, as the statute requires, attributable to the non-compliance with such regulation.¹

Posting Notice in Room.—It has been further held that the mere posting in the room of a guest, a notice limiting the liability of the inn keeper for losses unless certain requirements are observed, does not operate as notice to the guest of its contents.²

keepers are held responsible for its safety. To enable the inn keeper to discharge his duty and to secure the property of the traveller from loss while in a house ever open to the public, it may, in many instances, become absolutely necessary for him to provide special means, and to make necessary regulations and requirements to be observed by the guest, to secure the safety of his property. When such means and requirements are reasonable and proper for that purpose and they are brought to the knowledge of the guest, with the information that, if not observed by him, the inn keeper will not be responsible, ordinary prudence, the interest of both parties, and public policy, would require of the guest a compliance therewith; and if he should fail to do so, and his goods are lost, solely for that reason he would justly and properly be chargeable with negligence. . . . Nor does the rule thus indicated militate against the well established rule in relation to the inability of carriers to limit their liability; for it rests upon the necessity that, under different circumstances of the case, requires the guest to exercise reasonable prudence and care for the safety of his property." Concerning requirement by host that guest shall put his goods in a particular chamber, under lock and key, see *Bac. Abr.*, Inns and Inn keepers, C. Reference to the liability of the inn keeper, where the guests "have complied with all reasonable rules of the inns," is made in *Sasseen v. Clark*, 37 Ga. 242, 248.

1. *Burbank v. Chapin*, 140 Mass. 123, 124, 125. "In this case the guest had failed to leave his key in the office, as a reasonable regulation of the inn required, and in passing upon a ruling of the lower court it was said: "The question is not whether an inn holder may make an express contract with a guest limiting his liability, but what

contract will the law imply against the guest who fails to comply with a known regulation of the inn. The law will not imply a contract more extensive than the terms of the statute; and in a case like the one before us, in the absence of any express contract, an inn holder is relieved from liability for a loss only when, in the words of the statutes, (Mass. Pub. Stats., ch. 102, § 16), such loss is attributable to the noncompliance with the regulations of the inn."

Unreasonable Regulation.—For construction of Georgia statutes relative to compliance with rules and regulations of inn, see *Murchison v. Sergeant*, 69 Ga. 206, 210; s. c., 47 Am. Rep. 754. It is there suggested that a notice, printed on the register under which a guest writes his name, that "all moneys, jewels, coats, valises, and other valuables must be left at the office, and checks received for them, otherwise the proprietor will not be responsible for any loss," is not a reasonable regulation, even if it were thus properly published. CHIEF JUSTICE JACKSON says that "it cannot be that such a notice is applicable to guests in a room in a hotel. Is the guest to deposit his valise there and go or send after it to get out a clean shirt to put on? Is he to leave his coat there, go to his room in his shirt sleeves, or send it down and get a check for it after he goes to bed? Is he to deposit there his watch and pocket change and get a check for them? The whole regulation, if meant for guests in their rooms, is on its face not only unreasonable but absurd."

2. *Bodwell v. Bragg*, 29 Iowa, 232, 234. But it seems, according to this case, that the liability of the inn keeper will not be affected by the notice unless it be shown that the guest read it or his attention was called to its contents or that he wilfully avoided learning the same; though it was said that it may be admitted that if through negligence the guest failed to see and read the no-

Printed Heading in Register.—Nor is it sufficient to constitute a contract between the inn keeper and the guest that the guest enters his name in the register under a notice in the form of a printed heading, not shown to have been seen by the guest, or assented to by him, which required valuables to be placed in the office, or else the proprietor would not be responsible for any loss.¹

57. Limitation by Custom or Usage—Sometimes Favored.—It is sometimes suggested that local usage or custom may affect the liability of an inn keeper for the goods of his guest.²

Custom Altering Express Agreement.—But in an action upon an account for board, lodging, washing, etc., it is not competent to meet evidence on the part of the defendant tending to show an express agreement that absences should be deducted from the charges for board, by proof that it is the custom of hotels not to allow such deductions.³

Knowledge or Notice of Usage.—Nor is a usage at inn, for the guests to leave their money or valuables at the bar, or with the keeper of the house or his clerk, binding upon a guest, unless he has actual knowledge or notice of it; and whether he has such knowledge or notice is for the jury.⁴

Custom of Other Individual Inn Keepers.—So, in an action brought against an inn keeper by his guest for the loss of money stolen from the apartment of the guest, it is not competent to offer evidence of the custom of other individual inn keepers and their guests in regard to depositing the money of the guests in safes kept for the purpose.⁵

58. Limitation by Statute—Scope of Statutory Provisions.—The inn keeper's right of lien, his duties and his liability are the subject of statutory regulation in various States,⁶ and under such

tice, he ought to be chargeable with knowledge thereof.

1. *Bernstein v. Sweeney*, 33 N. Y. Super. Ct. 271, 274. To the same effect see *Olson v. Crossman*, 31 Minn. 222, 223; compare *Murchison v. Sergeant*, 69 Ga. 206, 210; s. c., 47 Am. Rep. 754.

2. Thus where the goods were left in an open yard it was said that "as the inns in this country are not generally furnished with accommodations for the protection of the carriages of all guests who may lodge at the inn, and the custom of permitting them to remain in open yards, where they cannot be protected but by a guard, is so universal, and well known, it is deemed "a sound position that the assent of the traveller is to be presumed in such case unless he makes a special request that his carriage shall be put in a safe place." *Albin v. Presby*, 8 N. H. 408; s. c., 29 Am. Dec. 679. Reference to a

difference between city and country hotels in regard to evidence that the guest had failed to use means of securing the goods, is made in *Oppenheim v. White Lion Hotel Co.*, Law R., 3 Com. P. 515, 322. Concerning custom to make delivery of baggage at the cars, see *Sasseen v. Clark*, 37 Ga. 242, 251.

3. *Stebbins v. Brown*, 65 Barb. (N. Y.) 274, where it was said: "The claim of the defendant, as well as his right to the deduction, stood upon the alleged express agreement, and such agreement, if made, could neither be disposed of nor altered by the proof of custom."

4. *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417, 420.

5. *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417, 422, discussing the requirement that a usage must be general and uniform.

6. See *Stims. Stat. Law*, §§ 4390, 4394, and First Supplement, p. 58, § 4393,

enactments an inn keeper may generally relieve himself from the common law liability for money or valuables of his guests lost or stolen, which have not been delivered to him for safe keeping, by posting a notice that he keeps a safe for that purpose.¹

Thus, in New York it has been enacted that whenever the proprietor or proprietors of any hotel shall provide a safe in the office of such hotel, or other convenient place, for the safe keeping of any money, jewels or ornaments belonging to the guests of such hotel, and shall notify the guest thereof by posting a notice (stating the fact that such safe is provided in which such money, jewels or ornaments may be deposited) in the room or rooms occupied by such guest, in a conspicuous manner, and if such guest shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments, sustained by such guest by theft or otherwise;² and similar acts have been passed in New Jersey,³ in Wisconsin,⁴ and in California,⁵ as well as in Georgia⁶ and Louisiana.⁷

Strict Construction.—Such statutes are sometimes regarded as being in derogation of the common law, so that they must be strictly construed, and cannot be extended in their operation and effect by doubtful implication.⁸

Compliance with Statute in Giving Notice.—An inn keeper, to avail himself of the statutory protection against claims for loss by his guests, must make substantial compliance with the statute in giving notice.⁹

Violation of Inn Rules Causing Loss.—So an inn holder is liable for a loss of the property of his guest by theft in the

Murchison v. Sergeant, 69 Ga. 206, 209; s. c., 47 Am. Rep. 754.

Statute Against Frauds on Hotel Keepers.—A statute against frauds on hotel keepers (Minn. Gen. Stats. 1878, ch. 124, § 3) has been held not to be unconstitutional as attempting to imprison for debt, as it imposes a penalty not because of the debt, nor for the purpose of collecting it, but because of the fraud, and where a prosecution and punishment under the act in no way affects the debt. State v. Benson, 28 Minn. 424, 426.

1. See Stims. Stat. Law, § 4392; and Ramaley v. Leland, 43 N. Y. 539; s. c., 3 Am. Rep. 728; Wilkins v. Earle, 44 N. Y. 172; s. c., 4 Am. Rep. 655; Elcox v. Hill, 98 U. S. 218; Murchison v. Sergeant, 69 Ga. 206, 209; s. c., 47 Am. Rep. 754.

2. N. Y. Laws of 1855, ch. 421; construed in Purvis v. Coleman, 21 N. Y. 111, 112; in Ramaley v. Leland, 43 N. Y. 539; s. c., 3 Am. Rep. 728, 729; and

in Wilkins v. Earle, 44 N. Y. 172; s. c., 4 Am. Rep. 665; Giles v. Libby, 36 Barb. (N. Y.) 7076; Bendetson v. French, 44 Barb. (N. Y.) 3137; s. c., 46 N. Y. 266; Rosenplänter v. Pöessle, 54 N. Y. 262; Clute v. Wiggins, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 448.

3. N. J. Act of April 6, 1865, construed in Hyatt v. Taylor, 42 N. Y. 258, 260.

4. Wis. Laws of 1864, ch. 318; construed in Stewart v. Parsons, 24 Wis. 241, 242.

5. Cal. Civ. Code, § 1860.

6. See Murchison v. Sergeant, 69 Ga. 206, 209; s. c., 47 Am. Rep. 754.

7. La. Act of Jan. 16, 1860, mentioned in Woodworth v. Morse, 18 La. Ann. 156, 157.

8. Lanier v. Youngblood, 73 Ala. 587, 593; Ramaley v. Leland, 43 N. Y. 539; s. c., 3 Am. Rep. 728, 730.

9. Chamberlain v. West, 37 Minn. 54. Exact compliance with the terms

absence of contract to the contrary, although the guest knowingly fails to comply with a reasonable regulation of the inn, such as one requiring the guest to leave the key of his room at the office when going out, if the loss is not, as the statute requires, attributable to the noncompliance with such regulation.¹

Failure to Deposit Valuables in Safe.—But, where a safe for the keeping of specially valuable articles is provided by the hotel keeper, and the notice required by the statute is given, a loser failing to take the benefit of the protection thus furnished him must bear his own loss.²

Negligence of Inn Keeper or His Servants.—Statutes exempting the inn keeper from liability where he has given notice that he keeps a safe for the deposit of valuables, sometimes make an

of the statute is required by *Lanier v. Youngblood*, 73 Ala. 587, 593, concerning notice which is not such as the statute prescribes. See *Olson v. Crossman*, 31 Minn. 222, 223.

1. *Burbank v. Chapin*, 140 Mass. 113, 124, 125. In this case MORTON, C. J., said, after stating the common law liability of inn holders as insurers: "Our statutes have, in some respects, limited this extreme liability. Pub. Sts., ch. 102, §§ 12-16. Among other things they provide that an inn holder, against whom a claim is made for loss sustained by a guest, may in all cases show that such loss is attributable to the negligence of the guest himself or to his noncompliance with the regulations of the inn, if such regulations are reasonable and proper, and are shown to have been duly brought to the notice of the guest by the inn holder. Pub. Sts., ch. 102, § 16. The statute exonerates an inn holder from his common law liability for a loss sustained by a guest who has knowingly failed to comply with a reasonable regulation of the inn, if the loss is attributable to such noncompliance. The ruling of the superior court went further, and held that an inn holder is exonerated by the fact of such noncompliance, without any enquiry into the question whether the loss is attributable to the noncompliance." This was held erroneous because the law would not imply a contract more extensive than the terms of the statute.

No Publication by Printing on Register.—In Georgia it has been held that sections 2117 and 2120 of the Code, which provide for the liability of the inn keeper, where a guest at an inn has complied with all reasonable rules

thereof, and that the inn keeper may adopt reasonable regulations for his own protection, the publication of which to the guests binds the latter to a compliance therewith, are to be construed in connection with § 2119 of the Code, prescribing the posting of notice that an iron safe or other place of deposit is provided for valuable articles, and that, therefore, there was no publication by placing on the register on which the guest wrote his name a notice that "all moneys, jewels, coats, valises and other valuables must be left at the office and checks received for them, otherwise the proprietor will not be responsible for any loss." *Murchison v. Sergeant*, 69 Ga. 206, 210; s. c., 47 Am. Rep. 754. It was considered in this case that if the statute authorized any different mode of publication than by posting, it was of other regulations than those concerning the safe, or other place of deposit, and it was further held that the regulation printed on the register was not a reasonable one.

2. *Elcox v. Hill*, 98 U. S. 218, 224; citing *Hyatt v. Taylor*, 42 N. Y. 258, and *Stewart v. Parsons*, 24 Wis. 241. The statute of Illinois, considered in the first named case, made one exception to this rule, to the effect that if the loss occurs by the hand or through the negligence of the landlord, or by a clerk or servant employed by him in the hotel or inn, the liability remains. But the judge submitted that question to the jury, and the jury found against the plaintiffs, who were manufacturing jewelers, and sued to recover the value of a stock of jewelry lost from one of their travelling bags, which had been left unlocked in the coat room of the hotel over night.

exception of cases where the loss is due to the negligence of the inn keeper or his employees.¹

Design to Protect Inn Keeper.—Where it is provided that the keeper of a public inn or hotel in a city, complying with the requirements of the statute, may relieve himself from liability for the loss of money, jewelry, watches, etc., within the inn or hotel, not occurring through his fraud, or the fraud of some clerk or servant employed by him,² it has been considered that such statute is for the benefit of the inn keeper, intended to afford him the opportunity of protecting himself from losses to which his fraud, or that of his servants, does not contribute.³

Territorial Scope of Statute.—A statute relieving an inn keeper from liability when he has posted notice to deposit valuables, etc., which, by its terms, is limited to the keepers of inns or hotels in a city, cannot be extended to towns or villages, or to inns or hotels situated in the country.⁴

Opportunity to Make Deposit.—Where the statute provides that the proprietor of any hotel shall not be liable for the loss of money, jewels or ornaments of guests, when he has posted notice in the rooms of the guests that he has provided a safe for keeping such valuables, if such guests shall neglect to deposit their money, jewels or ornaments in such safe, the statutory exemption applies to every case where the guest has time and opportunity to make the deposit, and his omission to do so is a neglect within the meaning of the statute.⁵

59. Enactments Concerning Loss by Fire—In New York.—The rigorous common law liability of inn keepers for loss of the property of guests by fire occurring without the inn keeper's fault or negligence,⁶ was modified and limited by statute in New York;⁷ and under this statute the burden is upon the inn keeper claiming the benefit of the enactment to show that the fire occasioning the loss of the goods of the guest was an incendiary one, and the absence of negligence on his part connected with the transaction.⁸

1. Thus the statute of Illinois on this subject makes one exception whereby the liability remains if the loss occurs "by the hand or through the negligence of the landlord, or by a clerk or servant employed by him in such hotel or inn." *Elcox v. Hill*, 98 U. S. 218, 224.

2. As under Ala. Code of 1876, §§ 1549-51.

3. *Beale v. Posey*, 72 Ala. 323, 331. So in *Rosenplaenter v. Roessle*, 54 N. Y. 262, 268, it is said of the rule there laid down that it is the duty of the guest to make the deposit of his valuables whenever he has time and opportunity to do so. "This rule may be inconvenient to guests, but the statute was not intended for their benefit. It was manifestly enacted for the protection of the hotel keepers."

4. *Beale v. Posey*, 72 Ala. 323, 331.

5. *Rosenplaenter v. Roessle*, 54 N. Y. 262, 266-268. In this case the guests were in their rooms nearly an hour before going to dinner, but failed to deposit their valuables, and during their absence at dinner, lasting about twenty minutes, their room was unlocked, the trunk broken, and various articles of jewelry worn in ordinary dress abstracted. The opinion discusses and distinguishes *Bendetson v. French*, 46 N. Y. 266.

6. As declared in *Hulett v. Swift*, 33 N. Y. 571; s. c., 88 Am. Dec. 405.

7. N. Y. Laws of 1866, ch. 638.

8. *Faucett v. Nichols*, 64 N. Y. 377, 380, 381, stating that the negligent omission by a bailee, like an inn keeper, to take reasonable and prudent precau-

In Maine.—In Maine, effect has been given to an enactment¹ which provides that "in case of loss by fire, inn holders shall be answerable to their guests only for ordinary and reasonable care in the custody of their baggage and their property."²

60. Enactments Concerning Goods for Sale, etc.—*Enforcement of Written Notice.*—Where a statute provides that no inn keeper shall be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall give him written notice of having such merchandise for sale or sample in his possession after entering the inn, and furthermore provides that the inn keeper shall not be compelled to receive guests with merchandise for sale or sample in their possession,³ a notice in writing is absolutely necessary to fix an inn keeper's responsibility, and he waives nothing by admitting a guest whom he knows has merchandise for sale or sample in his possession.⁴

Delivery for Safe Keeping.—The statutes of Massachusetts exempt inn holders from liability for the loss of goods which are not personal baggage and effects, unless such goods shall be delivered by the traveller to the inn holder, for safe keeping;⁵ and, under such statutes, the inn keeper has been held not liable for the loss of a trunk, and containing goods for sale, and belonging to a commercial traveller who stopped at the inn and delivered to the clerk a paper which he said was a check for his trunk, which would shortly arrive, where such trunk was, according to custom left on the sidewalk in front of the inn by the agent of the express company after he had summoned the porter by ringing a bell.⁶

61. Statutory Notice Limiting Liability—Need of Compliance with Terms of Statute.—The posting of notices in the manner prescribed by the statute must be shown to exempt the inn keeper from liability for the loss of goods of his guest.⁷

tions to guard against an incendiary fire, as by failing to keep closed the window of a hay loft, is such negligence as would deprive him of the benefit of the act.

1. Me. Acts of 1874, ch. 174, § 2.

2. *Burnham v. Young*, 72 Me. 273, 274.

3. As is done by Rev. Stats. Me., § 5786, Laws of 1872, p. 55, § 1.

4. *Fisher v. Kelsey* (Mo.), 16 Fed. Rep. 71, 74; affirmed on appeal, 121 U. S. 383, where the subject is more fully discussed.

5. Mass. Pub. Stats. ch. 102, § 12.

6. *Becker v. Haynes* (Mass.), 29 Fed. Rep. 441.

7. *Chamberlain v. West*, 37 Minn. 54, where MITCHELL, J., said, in an action to recover the value of a diamond scarf pin alleged to have been stolen from the room of plaintiff while he

was a guest at defendant's hotel: "The defendant sought to relieve himself from his common law liability as inn keeper by showing compliance with Minn. Gen. Stats. 1878, ch. 124, §§ 21, 22 (Gen. Laws 1874, ch. 52). This statute requires the inn keeper, in order to bring himself within its provisions, to keep in his hotel an iron safe suitable for the custody of money, jewelry or other valuables, and to keep posted conspicuously at the office, also on the inside of every entrance door of every public sleeping, reading, bar, sitting and parlor room of the hotel a notice to the guests that they must leave their money, jewelry and other valuables with the landlord for safe keeping. It is incumbent on an inn keeper claiming the benefit of this statute affirmatively to show a substantial compliance with all its requirements. Much of the evi-

Printed Heading in Register.—Notice to the guest to deposit valuables with the landlord, where not such as the statute prescribes, as by a mere printed heading in the register, does not relieve the landlord from liability, unless it be brought to the knowledge of the guest, so that his assent to limiting the liability of the landlord may be presumed.¹

Place of Posting Notice.—Under the very strict construction deemed proper to be given to a statute providing that an inn keeper may protect himself from liability to his guest for loss of valuables by keeping an iron chest or other safe depository for such valuables, and by posting on his door, and other public places in his house of entertainment, notices to his guests that they must leave their valuables with him for safe keeping, etc., the notices must be posted on all the doors of rooms occupied by guests.²

62. Actual Notice—Insufficiency of.—According to various authorities, the statutes limiting the liability of inn keepers being in derogation of the common law, must be strictly construed so

dence on this point was so vague and indefinite, and mere impressions not within the personal knowledge of the witnesses, that it cannot be said that the posting of any such notices in the manner required was conclusively or even satisfactorily proven anywhere, even in the sleeping room occupied by plaintiff. No actual notice was brought home to plaintiff. Under these circumstances, defendant cannot complain that the court left it to the jury to determine from the evidence whether he had posted notices as required by the statute."

1. *Olson v. Crossman*, 31 Minn. 222, 223. In this case, in an action by a guest against an inn keeper to recover for money stolen from the former in the inn, it was in evidence that the statutory notice for exemption from liability was not posted, but it appeared that at the top of the page in the register where plaintiff signed his name (and at the top of each page in the book) there was a printed notice that "all moneys, jewels and other valuables must be left at the office; otherwise the proprietor would not be responsible." GILFILLAN, C. J., said: "The statute (Gen. Stat. 1878, ch. 124, §§ 21, 22) enables an inn keeper to limit his liability as to certain property of a guest, by keeping an iron safe and posting certain notices. The evidence does not indicate that defendant had complied with this. A notice at the head of the register of guests, or a verbal notice to the guest, not being

such notice as the statute prescribes, is of no avail unless the guest consent to it so as to constitute a contract limiting the inn keeper's liability. Of course it would not amount to such a contract unless the guest's attention was called to it, so that he might be presumed to have understood and assented to it." See to like effect *Bernstein v. Sweeny*, 33 N. Y. Superior Ct. 271, 274. Compare *Murchison v. Sergeant*, 69 Ga. 206, 210; s. c., 47 Am. Rep. 754.

2. *Lanier v. Youngblood*, 73 Ala. 587, 593, construing Ala. Code of 1876, §§ 1549-1551, and saying of the statute: "Its purpose is constructive notice which conclusively imputes knowledge to the guest, where there has been an exact compliance with the requirements of the statute, but not otherwise. *Beale v. Posey* [72 Ala. 323]."

Posting on Single Door Insufficient.—Where the keeper of a public inn or hotel in a city, complying with the requirements of the statute (Ala. Code of 1876, §§ 1549-51) may relieve himself from liability for the loss of money, jewelry, watches, etc., within the inn or hotel, not occurring through his fraud, or the fraud of some clerk or servant employed by him, the inn keeper is not entitled to the benefit of the statute unless he gives notice to the guest that a safe depository for his money or other valuables is provided; and the mere posting of notice on a single door of the hotel, however public it may be, is not a compliance with the

as to exclude the sufficiency of actual notice to the guest requiring deposit of valuables, etc., where there is no express provision for such notice.¹

Sufficiency of.—But the position is sometimes maintained that where the guest has actual notice of the facts intended to be imparted by the written or printed notice which was omitted to be posted upon the door of his room, this is sufficient, and must be taken to be a substitute for the constructive or statutory notice required.²

Notices in Other Rooms Within a Year.—Yet this principle has been considered inapplicable, even if admitted to be sound at all, where the actual notice which the guest is shown to have had was acquired by his having observed and read the contents of printed notices in other rooms of the hotel, at some time within the twelve months previous to the loss of the goods for which the action was instituted.³

63. English Inn Keeper's Act—Provisions of Enactment.—The English inn keeper's act of 1863 declares that no inn keeper shall be liable to make good to any guest any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, to a greater amount than £30, except (1), where such goods or property shall have been stolen, lost or injured through the wilful act, default or neglect of such inn keeper or any servant in his employ. (2) Where such goods or property shall have been deposited expressly for safe custody with such inn keeper, provided, always, that in the case of such deposit it shall be lawful for such inn keeper, if he think fit, to require, as a condition of

statute, and will not justify the inference of notice to the guest. *Beale v. Posey*, 72 Ala. 323, 331.

1. In *Lanier v. Youngblood*, 73 Ala. 587, 594, SOMERVILLE, J., said: "The sounder reasoning, perhaps, is that the statute prescribes the exact manner in which the common law liability may be escaped, and, being in derogation of the common law rule, it must be strictly construed; and a strict construction excludes actual notice by failing to expressly provide for it. This view is adopted in *Batterson v. Vogel*, 8 Mo. App. 24, and seems to be sustained by the general current of decisions, at least so far as the reasoning of the adjudged cases extends. *Porter v. Gilkey*, 57 Mo. 235; *Beale v. Posey*, 72 Ala. 323. . . . *Wilkins v. Earle*, 44 N. Y. 172; s. c., 4 Am. Rep. 655; *Ramaley v. Leland*, 43 N. Y. 539; s. c., 3 Am. Rep. 728; *Clute v. Wiggins*, 14 Johns. (N. Y.) 175; s. c., 7 Am. Dec. 457, note."

2. This was the view taken by the court of New York in *Purvis v. Coleman*, 21 N. Y. 111. It was shown in

that case (according to the opinion in *Lanier v. Youngblood*, 73 Ala. 587, 593) that while no notice was posted on the door of the room assigned to the plaintiff, as required by the New York statute, yet that full notice in fact was given to him at the time of his arrival at the hotel, and of the occupancy of his room. It was held by five out of the eight judges who sat, that the actual notice proved to have been given the guest was "far more satisfactory and ample than the constructive notice required by the statute," and that the object and purpose of the statute had been "more than complied with." Three of the judges, however, including CHIEF JUSTICE COMSTOCK, dissented from this construction, as adopted by a majority of the court. The case is also fully stated in *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 665.

3. *Lanier v. Youngblood*, 73 Ala. 587, 594, where it is said: "It may be that the knowledge thus imputed may have lapsed from his memory, or that the absence of the notice from the

his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same; and it is further made obligatory on the inn keeper to receive his guest's property under these conditions.¹

Omission in Copy of Portion of Act.—A further provision of the act (section 3) required the inn keeper to exhibit a copy of the first provision thereof (section 1) in a conspicuous part of the hall or entrance to the inn, and enacted that he should be entitled to the benefit of the act only as to goods brought to the inn while such copy was exhibited; and where a copy so exhibited was unintentionally misprinted so as to omit the word "act" before "default or neglect," it was held that it did not protect the inn keeper.²

64. Valuables Covered by Statutes Limiting Liability.—*Statutes Concerning Safe Deposit of Valuables.*—Statutes frequently permit a proprietor of a hotel to relieve himself from his strict common law liability, in respect to certain classes of property, upon compliance with prescribed conditions, such as providing a safe in the office or other convenient place, and posting notice to the guests to deposit their valuables therein, or be precluded from holding the inn keeper liable therefor.³

Limitation of Exemption to Specified Species of Property.—But it has been considered that the exemption is limited to the particular species of property named, and that as such a statute is in derogation of the common law, it cannot be extended in its operation and effect by doubtful implication, so as to include property not fairly within the terms of the act.⁴

Construction of Special Phraseology.—The construction given to such a statute depends, however, in general, on the special phraseology used in regard to the articles required to be de-

door [of his room] may have induced the belief that the defendant has ceased his compliance with the statute."

1. Act 26 & 27 Vict. ch. 41, §§ 1, 2, as quoted in Schouler Bailm. (2nd ed.), § 312.

2. *Spice v. Bacon*, L. R., 2 Ex. D. 463, 465, 466; s. c., 21 Eng. Rep. 558, 560, 561, holding that there was an omission of the substantial part of the notice.

3. See *Ramaley v. Leland*, 43 N. Y. 539; s. c., 3 Am. Rep. 728, 729; *Wilkins v. Earle*, 44 N. Y. 172; s. c., 4 Am. Rep. 655, 658. In the former case ALLEN, J., however, said: "The rules of the common law touching the liability of inn keepers, common carriers and the like, have not been relaxed by the courts, and are in full force, except as expressly changed by statute, or as they may be modified by special contract."

4. *Ramaley v. Leland*, 43 N. Y. 539; s. c., 3 Am. Rep. 728, 729, 730, where it was said of a statute mentioning "money, jewelry or ornaments:" "Certain property particularly valuable in itself, taking but small space compared with its value for its safe keeping, easy of concealment and removal, holding out great temptation to the dishonest, and not necessary to the comfort or convenience of the guest while in his room, is made the subject of the statutory exemption. Property of a different description, including that which is useful or necessary to the comfort and convenience of the guest, that which is usually carried and worn as a part of the ordinary apparel and outfit, or is ordinarily used and is convenient for use by travellers, as well in as out of their rooms, is left, as before the statute, at the risk of the inn keeper."

posited;¹ and the same observation applies to exceptions in

1. Money, Watch, etc., Not Deposited in Safe.—An inn keeper has been held liable for the theft from a guest's room of a watch, but not for the sum of \$50 in money so stolen, where the statute requires the deposit by the guest, upon posted notice, of "money, jewels, ornaments" in a safe in the office of the hotel. *Ramaley v. Leland*, 43 N. Y. 539; s. c., 3 Am. Rep. 728, 729. In regard to the money the court said: "The defendants [in the action by the guest against the inn keepers] were exonerated from liability for the money, if they had provided a safe in the office of the hotel for the safe keeping of money, jewels and ornaments, and a notice stating the fact was conspicuously posted in the room occupied by the plaintiff. Laws of 1855, ch. 421; *Hyatt v. Taylor*, 42 N. Y. 258." In regard to the watch it was said: "The words of the statute must be taken in their ordinary sense in the absence of any indication that they were used either in a technical sense, or in a sense other than that in which they are popularly used. A watch is neither a jewel nor ornament, as these words are used and understood either in common parlance or by lexicographers. It is not used or carried as a jewel or ornament, but as a time piece or chronometer, an article of ordinary wear by most travellers of every class, and of daily and hourly use by all. It is as useful and necessary to the guest in his room as out of it, in the night as the day time. It is carried for use and convenience and not for ornament. But it is enough that it is neither a jewel nor ornament in any sense in which these words have ever been used." But where the statute provided for the exemption of an inn keeper who should constantly have in his inn an iron safe in good order and suitable for the safe custody of money, jewelry and articles of gold and silver manufacture, etc., and who complied with the requirements of the act, it was *held* that this enactment was applicable to a gold watch and chain worn by the guest about his person, as articles worn upon the person were not specially excepted, and the articles in question came within the very language of the statute. *Stewart v. Parsons*, 24 Wis. 241, 242, 243.

Necessary Amount of Money.—Where the statute provides for exemption from liability for losses of money, plate and

jewelry, this was *held* not to cover a watch, watch guard, or pocket book, as these articles were of a class not within the provisions of the statute; nor ninety dollars in money, as this was money necessary for the personal expenses of the traveller. *Maltby v. Chapman*, 25 Md. 310, 316. The opinion follows on the last point the construction given to a similar statute in *Gile v. Libby*, 36 Barb. (N. Y.) 70, 76. The latter case is also followed, upon a construction of the same statute, in *Koohn v. Sweeny*, 2 Daly, 200, 203, where it is *held* that an inn keeper is not relieved from his common law liability for the loss of his guest's watch and a small sum of money, amounting to about \$50, by providing a safe and posting notice, as required by the statute. But in *Hyatt v. Taylor*, 42 N. Y. 258, 260; s. c., 51 Barb. (N. Y.) 632, it is *held* that the protection to inn keepers given by a similar statute of another state is held not limited to money or valuables in excess of what the guest may reasonably require for his travelling expenses or personal convenience, but to embrace all "money, jewels or ornaments" which the guest brings with him, without reference to the amount or value.

Money Deposited in Sealed Envelopes.—Under the same statute, where a guest at a hotel delivered a sealed envelope to the inn keeper's authorized clerk, stating that "it contained money," whereupon the clerk, without further enquiry, deposited it in the safe, and the package contained over \$20,000, but had no endorsement of the amount upon it, it was *held* that the inn keeper was liable for the whole amount of money in the package thus deposited, which was stolen from the safe. *Wilkins v. Earle*, 44 N. Y. 172; s. c., 4 Am. Rep. 655; the court were of the opinion that the question of the sufficiency of the label was not before the court, and also that the liability stood as under the common law, and that, therefore, as shown by a full review of the authorities, it was not limited to such an amount of money as was necessary for the reasonable expenses of the guest. Omission to disclose the contents of a package had, however, been held one ground to relieve the inn keeper of liability for valuables, as inducing a failure to exact their deposit, in *Bendetson v. French* 44 Barb. (N. Y.) 31, 37. The last named case of *Hyatt v.*

statutes limiting the liability of inn keepers.¹

Valuables Regarded as in Custody of Guest.—It has been held that the inn keeper who has posted the notice to deposit valuables in the safe, as prescribed by statute, is liable for losses occurring only when he has the actual possession and custody of the articles by their being placed in the safe provided for them, and not when they are out of the safe, so as to be regarded as within the personal care and custody of the guest.²

Taylor, 51 Barb. (N. Y.) 632, and 42 N. Y. 258, is followed as disapproving *Gile v. Libby*, 36 Barb. (N. Y.) 70; in *Rosenplaenter v. Roessle*, 54 N. Y. 262, 266, where it is said: "The law is thus settled in this State, that if a guest, on retiring to bed at night, removes a watch or jewelry from his person, or leaves money in his pocket, and neglects to deposit the same in the safe provided for the purpose, he cannot hold the landlord liable for the loss of the same, provided the notice required by the statute has been posted in his room."

Under a statute of Maine (Stat. 1874, ch. 174) it is held that where an amount of money taken for a journey is no more than is reasonably prudent for the payment of expenses, including liabilities to accident, delays and sickness, it is exempted from the provisions of the statute, and may properly be carried as baggage, for the loss of which an inn holder would be liable after delivery to him. *Noble v. Milliken*, 74 Me. 225, 229. DANFORTH, J., says on this point: "The statute referred to does, in certain cases, relieve inn holders from their common law liability unless the property is specially delivered to the inn keeper or his servants. But from its operation, among other things, "personal baggage and money necessary for travelling expenses and personal use" are excepted. Such necessary amount of money is classed as personal baggage and may be carried as such baggage. *Dunlap v. Steamboat Company*, 98 Mass. 371. For such money the liability of the inn holder is the same as before the statute. The word "necessary" in this connection is not to be construed as in its restricted meaning, but rather as indicating an amount of money which a man of common prudence would deem it proper to take for such a journey, including the ordinary expenses as well as the liabilities on account of sickness, accidents and necessary delays. *Merrill v. Grinnell*, 30 N. Y. 594. That the amount of money

taken in this case was no more than reasonable prudence would dictate is sufficiently shown by the fact that in consequence of the loss the plaintiff found it necessary to borrow before reaching his journey's end."

1. *Jewelry Taken Along for Personal Use.*—In Maine, in a case where a guest at a hotel lost from her trunk a gold watch, a pair of gold bracelets, a gold thimble, three gold rings and a gold neck pin, all of which she had taken along for her personal use, and altogether of the value of \$158, the inn keeper was held liable for the value of these articles, as they came within the exceptions in the statute limiting the liability of an inn holder for losses sustained by his guest (Me. Rev. Stats., ch. 27, § 7), specifying "wearing apparel, articles worn or carried upon the person to a reasonable amount, personal baggage and money necessary for travelling expenses and personal use." *Noble v. Milliken*, 77 Me. 359, 360. EMERY, J., said: "From the case it seems that all these articles were taken along by the plaintiff for her personal use, and for no other purpose. They were not merchandise nor business articles. They were not taken along simply for transportation of them. They were such articles as she might properly use daily while travelling or resting. The amount does not appear to be unreasonable in view of the plaintiff's situation. Such articles we think are within the exception. *Macrow v. Great Western R. R. Co.*, L. R., 6 Q. B. 612; *Benty v. Grand Trunk R. Co.*, 32 Upper Canada [Q. B.] 66, and cases there cited."

2. *Bendetson v. French*, 44 Barb. (N. Y.) 31, 36, 37. This was held where a package was taken to the room of the guest by the latter at the suggestion of the clerk of the hotel, who was considered to have been misled into supposing that the package was not valuable by the failure to disclose that it contained jewelry.

65. Inn Keepers as Ordinary Bailees—Different Liability in General.—While “ordinary bailees are held responsible only on proof of loss arising from some fault on their part, such as negligence or want of diligence,” the inn keeper is, as before shown, strictly and perhaps generally “held liable without proof of any negligence or fault; and except in special cases, cannot discharge himself by showing that the loss occurred without his fault, or that of those in his employ.”¹

Liability as Ordinary Bailee to Boarders and Others.—But there are various circumstances under which the inn keeper is held to act only in the capacity of an ordinary bailee, and to be liable only as such.² Thus, where a party lives as a regular boarder, by the month, at a fixed price, he is in no sense a guest, so as to hold the proprietors liable as inn keepers, but in such case they are liable only as boarding house keepers, and are merely held to ordinary diligence.³

1. *Carter v. Hobbs*, 12 Mich. 52; s. c., 83 Am. Dec. 762, 764.

2. See *Mateer v. Brown*, 1 Cal. 221; s. c., 52 Am. Dec. 303, 311, 312, and cases next cited.

3. *Lawrence v. Howard*, 1 Utah 142, 143.

Goods Kept for Show and Sale.—Furthermore the particular responsibility imposed upon inn keepers at common law does not extend to goods lost or stolen from a room in a public inn furnished to a person for purposes distinct from his accommodation as a guest, such as the display and sale of goods. See *Fisher v. Kelsey*, 121 U. S. 383, 385; s. c., 16 Fed. Rep. 71, 74; *Myers v. Cottrill*, 5 Biss. (U. S.) 465, 471. To like effect see *Mowers v. Fethers*, 61 N. Y. 34; s. c., 19 Am. Rep. 244, 246; *Carter v. Hobbs*, 12 Mich. 52; s. c., 83 Am. Dec. 762, 765; *Neal v. Wilcox*, 4 Jones L. (N. Car.) 146; s. c., 67 Am. Dec. 266, 267.

Attending Firemen's Ball on Inn Premises.—So where a party attends a firemen's ball given at another inn from which he stops, buying his ticket of the firemen's company, to whom the keeper of the inn supplies the dancing room, supper and dressing room at a certain price per head, the relation of inn keeper and guest does not exist between such party and the host, and the latter does not receive the garments of the visitor in his capacity of inn keeper, but merely as an ordinary bailee. *Carter v. Hobbs*, 12 Mich. 52; s. c., 83 Am. Dec. 762, 764, 765. The court laid down the rule that to hold a party sued liable as an inn keeper, it must appear not only

that he kept an inn, and that the goods were lost there, but that he was acting in the capacity of inn keeper on the occasion when the goods were received, and that the plaintiff was his guest; or in other words, that the plaintiff visited the inn for purposes which the common law recognizes as purposes for which inns are kept.

Arrangement for Stallion to Serve Mares.—Again, where a party did not come to an inn for entertainment as an ordinary wayfarer, but under an arrangement for his stallion to serve mares, the inn keeper was not subject to his common law responsibility for the preservation of the animal, but in such the utmost limit of his liability was that of an ordinary bailee for hire. *Mowers v. Fethers*, 61 N. Y. 34; s. c., 19 Am. Rep. 244, 247.

Care Required of Sleeping Car Companies.—While it is well settled that sleeping car companies are to be regarded neither as inn keepers nor common carriers, nor subject to the onerous liabilities of either in respect to the property of those enjoying their accommodations, it is equally well settled that it is their duty to exercise ordinary care for the security of passengers' valuables. *Durgan v. Pullman Palace Car Co.*, 26 Am. & Eng. R. R. Cas. 149, 151. To same effect see *Lewis v. New York etc. Car Co.*, 143 Mass. 267; s. c., 28 Am. & Eng. R. R. Cas. 148, 150. Where, however, a passenger on a night train entered a sleeping car, having in a pocket of his overcoat a sum of money, and gave the overcoat to the porter without mentioning the money,

Depository Liable for Gross Negligence.—An inn keeper who gratuitously receives a deposit of valuables, is responsible in case of their loss only for gross negligence; that is, for the omission of that care which the most inattentive and thoughtless never fail to take of their own concerns.¹

Presumption of Want of Ordinary Care.—The doctrine that whenever it is doubtful whether ordinary care has been used or not, the presumption is against the bailee, and that he is responsible if he does not rebut the presumption of a want of ordinary care, arising from the loss of the goods bailed, has, however, been laid down, as if applicable to an inn keeper in whose stable horses of a traveller were placed, and from which one of them was stolen.²

Liability for Goods of Departing Guest.—When the guest settles his bill and departs from the inn, leaving his baggage behind him, the relation of inn keeper and guest no longer exists,³ and, according to some of the cases, the inn keeper is then merely the gratuitous bailee of the baggage of the traveller, and in case of its loss, is responsible only if he is guilty of gross negligence;⁴ but, according to other cases, his liability is greater than that of a bailee without compensation, and he is responsible for want of ordinary care.⁵

66. Liability of Boarding House Keepers—English View of Liability of Keepers of Boarding and Lodging Houses.—In England, it has been held that a boarding house keeper, though not bound to keep baggage safely to the same extent as an inn keeper, is yet bound, as a hired bailee, to take such care of a boarder's baggage as a prudent person would take of his own property.⁶

and the porter hung the coat in the passenger's berth, it was held that the money was in his own custody, and at his risk; and the fact that soon afterwards an accident overturned the car, and on the passenger making his way out, he told the porter and the brakemen of the railroad company that the money was in the car, put no liability for the money on the company as gratuitous bailee or otherwise. *Hillis v. Chicago etc. R. Co.*, 72 Iowa 228; s. c., 31 Am. & Eng. R.R. Cas. 108.

1. *Wiser v. Chesley*, 53 Mo. 547, 549, 550, holding also that a depositor makes out a *prima facie* case when he shows a deposit made, and a demand and refusal of the thing deposited, and that the onus is then upon the depository to exonerate himself from the liability which attached when he assumed the custody of the article.

Valise Left in Office of Hotel.—If a party stopping at a hotel left a valise in the office without calling attention

thereto, and the clerk, without knowing who the owner was, took it into a room where baggage was kept, the landlord would be a naked depository, and would be liable, under the Code of Georgia, only for gross negligence, and not for ordinary neglect. *Stewart v. Head*, 70 Ga. 449, 452, 453.

2. *Newson v. Axon*, 1 McCord (S. Car.) L. 509; s. c., 10 Am. Dec. 685.

3. See *Miller v. Peeples*, 60 Miss. 819; s. c., 45 Am. Rep. 423.

4. Consult discussion of subject in *O'Brien v. Vaill*, 22 Fla. 627, 632. Compare *Whitemore v. Haroldson*, 2 Lea (Tenn.) 312, 314, 315. But see *contra*, *Adams v. Clem*, 41 Ga. 65; s. c., 5 Am. Rep. 524, 525.

5. *Murray v. Marshall*, 9 Colo. 482; s. c., 59 Am. Rep. 152, 154.

6. *Dansey v. Richardson*, 3 El. & B. 144, 148, 171, where the court was, however, divided on the question whether a boarding house keeper is liable for the negligence of his servant, as

But in a later case in the same country, it was held that the law imposes no obligation upon a lodging house keeper to take care of the goods of his lodger.¹

American View of Inn Keeper's Liability to Boarders.—In this country it has been laid down that the responsibilities of landlords towards those who are, in a legal sense, not guests, but boarders, are of a different character from those which ordinarily exist towards guests, and are not to be regulated by the rigid rules which, as matters of public policy, both the civil and common law have adopted in regulating the liabilities of inn keepers to their guests.²

It has further been declared that if the goods lost belong to a boarder, he would be required, in order to charge the inn keeper, "to show that the loss was owing to the failure on his part to discharge the duties which his situation as boarding house keeper, or the special contract with the other party, imposed on him," and that "these duties must be measured by the analogies of the law applicable to other species of bailments."³

Boarding House Keeper's Liability in This Country.—In regard merely to boarding house keepers, it has been held, in New York, that it is incumbent on a boarding house keeper to exercise due and proper care of the baggage or property of his boarder, comprising such care as a prudent person would take of his own property.⁴

67. Remedies Concerning Inn Keepers—Master's Recovery for Loss of Servant's Goods.—If a servant is robbed of his master's money

where the latter leaves a door ajar and thus facilitates the theft of goods. This case very fully discusses these points in every respect.

1. *Holder v. Soulbey*, 8 Com. B., N. S. 254, 264, 270, where upon ample consideration it was held that a lodging house keeper was not responsible for the loss of certain property of a lodger who was about to quit, which had been stolen by a stranger who in the absence of such lodger was permitted by the occupier of the house to enter the rooms for the purpose of viewing them.

2. *Vance v. Throckmorton*, 5 Bush (Ky.) 41; s. c., 96 Am. Dec. 327, 328, 329. See to like effect *Manning v. Wells*, 9 Humph. (Tenn.) 746; s. c., 51 Am. Dec. 688, 689, where it is said of the boarder that it "is sufficient to give him a remedy when he shall prove the inn keeper has been guilty of gross negligence." In *Chamberlain v. Masterson*, 26 Ala. 371, 378, it is said that "there is a distinction between the liability of inn keepers toward guests and boarders, which was taken at an early

day. *Calye's Case* [8 Coke 32] *supra*; *Baron's Abr., Inns and Inn Keepers*, C. 5; *Story on Bailm.* (4th ed.), § 477 (3)."

3. *Chamberlain v. Masterson*, 26 Ala. 371, 378. See further *Lawrence v. Howard*, 1 Utah 142, 143. But compare *Wiser v. Chesley*, 33 Mo. 547, 548, 549; *Johnson v. Reynolds*, 3 Kan. 251.

4. *Smith v. Read*, 52 How. Pr. (N. Y.) 14, 18; s. c., 6 Daly (N. Y.) 33, 37, following the doctrine laid down in England in *Dansey v. Richardson*, 3 El. & B. 144, and giving a very complete consideration to the point under discussion. In this case it is further held, following the general rule of the liability of a master to third persons for the negligence of his servants, and adopting the views expressed by CHIEF JUSTICE CAMPBELL and JUSTICE COLERIDGE in the English case just cited, that a boarding house keeper is liable for the loss of his guest's goods, occasioned through the negligence of his own servants while they are acting within the scope of their employment.

or goods while a guest at an inn, the master may maintain an action against the inn keeper.¹

Where Guest is Bailee of Goods.—A guest at a hotel can likewise recover from the inn keeper the full value of property lost, though the guest was only a bailee thereof.²

1. *Towson v. Havre de Grace Bank*, 6 Har. & J. (Del.) 47; s. c., 14 Am. Dec. 254, 256, 257, holding that one receives notes of a bank with the request to pass them off for the bank, is, *quoad hoc*, a servant of the bank. The opinion makes reference to a case in Yelverton [*Bedle v. Morris*, Yelv. 162], where it is said that "if A sends his money by a friend who is robbed in the inn at which he is a guest, A shall have the action," and remarks that there is no reason why it should not be so, the inn keeper being chargeable, not on the ground that he entertains the owner of the money, or other goods, but because he receives, no matter by whom paid, a compensation for the risk." So the principle that the owner may maintain an action against the inn keeper for property left by a servant with the inn keeper, has been applied where a horse and chase were hired from the owner and entrusted to the inn keeper. *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, 474.

Liability to Corporations for Loss of its Agent's Goods.—So an inn keeper is liable to a corporation if the agent of the corporation, engaged in their business, becomes the guest of the inn keeper, and, while such guest, is robbed in the inn of money delivered to him by his principals to be expended in their behalf. *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417, 424, 426; fully considering actions against inn keepers for property lost by servants, agents, etc., and citing *Bedle v. Morris*, Yelv., 162; s. c., Cro. Jac. 224; *Bac. Abr.*, Inns and Inn Keepers, C. 5; *Towson v. Havre de Grace Bank*, 6 Hon. & J. (Del.) 47, 53 [s. c., 14 Am. Dec. 254]; and referring also to *Bennett v. Mellor*, 5 Term Rep. 273. The opinion further relies on *Mason v. Thompson*, 9 Pick. (Mass.) 280; s. c., 20 Am. Dec. 471, in regard to the lack of necessity of the personal presence of the guest, and refers to other cases on that point. See also, on the same point, *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188, 190.

2. *Chamberlain v. West*, 37 Minn.

54, where in an action brought to recover the value of a diamond scarf pin alleged to have been stolen from plaintiff's room while a guest at defendant's hotel, it was shown that the plaintiff was not the owner of the pin, but that it had been lent him by a friend some time before, for ten years. *MITCHELL, J.*, said: "Nothing is better settled than that, in actions for torts in the taking or conversion of personal property against a stranger to the title, a bailee, mortgagee or other special property man is entitled to recover full value, and must account to the general owner for the surplus recovered beyond the value of his own interest, but as against the general owner or one in privity with him he can only recover the value of his special property. 1 *Sedgwick on Dam.*, note a; 1 *Sutherland on Dam.* 210; *Jellett v. St. Paul etc. R. Co.*, 30 Minn. 265; *Russell v. Butterfield*, 21 Wend. (N. Y.) 300; *Mechanics' etc. Bank v. Farmers' etc. Bank*, 60 N. Y. 40; *Atkins v. Moore*, 82 Ill. 240; *Fallon v. Manning*, 35 Mo. 271. A mere depositor or gratuitous bailee may maintain such an action. The bailee may maintain it, although not responsible to the general owner for the loss. This he may do, not only against one who has tortiously converted the property, but also against one through whose negligence or failure of duty it has been lost; as for example, a common carrier or inn keeper. *Edwards on Bailm.* § 37; *Faulkner v. Brown*, (N. Y.) 13 Wend. 63; *Moran v. Portland etc. Co.* 35 Me. 55; *Finn v. Western R. Co.*, 112 Mass. 524; *Kellogg v. Sweeney*, 1 Lans. (N. Y.) 397, 46 N. Y. 291."

When Owner Not Guest.—But it has been held that the owner is not constructively a guest where the goods are left by a bailee to whom he has lent them and who is not there in his employment or as a member of his family; and that in such case the owner can claim only his ordinary rights as such, and not the special rights of a guest, not expressly transferred to him by his bailee, as against an inn keeper acting either in that capacity or as a compen-

Father's Recovery for Loss of Son's Property.—Where means provided by a father for the support of his minor son while travelling and attending college are stolen from the room of the son while he is stopping at an inn, the father may maintain an action against the inn-keeper to recover the amount so stolen.¹

Company Liable as Inn Keeper.—Where the plaintiff's goods were stolen at a hotel, of which a company was the proprietor, and he sought to recover their value in an action against the paid manager, in whose name the licence had been granted, it was held that the company was the real inn keeper, and that, therefore, the action was not maintainable.²

Judgment in Gold Coin and Other Matters.—In an action against an inn keeper for the loss of gold coin occurring while plaintiff was his guest, and during the period of the late civil war, when the legal tender act had been enacted, and there were two currencies in the United States established by law, it was held that the judgment should be for gold, and not for its value in paper currency at the time of the loss.³

sated or gratuitous bailee. *Coykendall v. Eaton*, 55 Barb. (N. Y.) 188, 191.

1. *Epps v. Hinds*, 27 Miss. 657; s. c., 61 Am. Dec. 528, 529, where it is said that the son "was merely invested with a discretion as to the expenditure of the money," and that "the loss necessarily fell upon the party who was bound to furnish other means for the same purpose."

Baggage and Clothing.—So a father may recover for the loss of the baggage of his minor son by an inn keeper or common carrier, where the son is not emancipated and is sent on a journey by his father, and the baggage belongs to the father. *Dickinson v. Winchester*, 4 Cush. (Mass.) 114; s. c., 50 Am. Dec. 760, 761, 764, holding that the plaintiff need not himself be the traveller or guest, but may recover though the traveller or guest be his agent or servant, or a party standing in that relation. In this case it is also ruled that clothing purchased by a father for a minor son belongs to the father, and that he may recover for its loss by an inn keeper or carrier, unless it appears to have been given to the son, or unless the son has been emancipated, but that clothing purchased by an infant with money furnished by his father for general purposes on sending him to a distant place to reside as a clerk, belongs to the infant, and he may sue for its loss.

2. *Dixon v. Birch*, Law R., 8 Ex. 135, 136; s. c., 5 Eng. Rep. 330, 331.

3. *Kellogg v. Sweeney*, 46 N. Y. 291; s. c., 7 Am. Rep. 333. So in California it has been held that good coin deposited by a guest with an inn keeper was received by the latter in a fiduciary capacity, and that accordingly, in case of loss, the guest was entitled, under the Specific Contract act of that state, to recover judgment payable in gold coin. *Pinkerton v. Woodward*, 33 Cal. 557; s. c., 91 Am. Dec. 657, 669.

Drummer's Hotel Bill.—In an action by an inn keeper against a merchant for his drummer's hotel bill, in the absence of evidence sufficient to justify an inference upon the point in issue that plaintiff notified defendant of the drummer's failure to pay cash, according to custom, or that the case is an exception to such general custom, the issue should not be submitted to the jury, but verdict directed against the plaintiff. *Covington v. Newberger*, 99 N. Car. 523.

Trover Against Inn Keeper.—To maintain trover against an inn keeper for goods entrusted to him by a guest, an actual conversion must be shown, and it is not sufficient to show refusal or failure to deliver on demand. *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547; s. c., 24 Am. Dec. 88, 89, and note.

Authorities for Inns and Inn Keepers.—Story on Bailm. (9th ed.) 1878; Edwards on Bailm. (2nd ed.) 1878; Schouler on Bailm. (2nd ed.) 1887; Bacon's Abr., tit. Inns and Inn Keepers; Wandell on Inns, Hotels

INNUENDO—INQUEST OF OFFICE—INVOICE.

INNUENDO—(See SLANDER and LIBEL).—The office of an innuendo in pleading is to explain, not to enlarge, and is the same in effect as "that is to say." It is used almost exclusively in practice in actions for defamation.¹

INQUEST OF OFFICE—(See also DENOUNCEMENT).—Sometimes simply termed office, as in the phrase "office found." In English practice an enquiry made by the king's officer, his sheriff, coroner or escheator, either *virtute officii*, or by writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels.²

INVOICE—(See INVENTORY).—A written account of the particulars of merchandise shipped to a purchaser, factor or consignee, with the value or prices and charges annexed.³

and Boarding Houses; 1888; Rogers' Law of Hotel Life, 1879; Jones' Index to Legal Periodicals, title, Inns and Inn Keepers, 1888; Stimson's American Statute Law, Index. 1886.

1. Whitsett v. Womack, 8 Ala. 482.

2. As to inquire whether the king's tenant for life died seised, whereby the reversion accrues to the king; whether A who held immediately of the crown, died without heir, in which case the lands belong to the king by escheat; whether B be attainted of treason, whereby his estate is forfeited to the crown; whether C, who has purchased land, be an alien, which is another cause of forfeiture. These inquests were more frequent in practice during the continuance of the military tenures than at present; and were devised by law as an authentic means to give the king his right by solemn matter of record. Burrill's Law Dict.; 3 Blk. Com. 258.

3. Pipes v. Norton, 47 Miss. 61. It was here decided that a statement of amounts of invoices was not sufficient in a bill of particulars. "An 'invoice' of goods is merely another term for 'bill rendered.'"

Evidence is admissible to show the meaning among underwriters of "invoice and five per cent." in an application for marine insurance. "Literally it means, after supplying the word price or cost as understood, the amount stated as price or cost in the invoice of the goods and would imply the existence of a paper properly called an invoice. The word is used, however, to denote other meanings. As is often the case in the use of words, the word invoice is sometimes used to

designate things of which it is the frequent accompaniment or evidence. An invoice accompanies goods and states price or cost. Consequently an invoice of goods sometimes means the goods themselves, and invoice price or cost means the prime price or cost of goods although there was no invoice in fact. On the trial, therefore, the defendant had a right to show in what particular manner those words were used in the business of underwriting." Sturm v. Williams, 6 J. & S. (N. Y.) 325.

"In the case of Mumford v. Broome, (1 Ins. Ca. 120) it is said to be a settled rule that in an open policy on goods the invoice price is the value which, upon a total loss, the insured is entitled to recover . . . The invoice price, as here understood, is evidently the prime cost, this being a fixed and certain criterion, which is the reason assigned for the rule . . . Although an invoice, strictly speaking, may be a document transmitted from the shipper to his factor or consignee, containing the particulars and prices of the goods shipped; and when understood in this sense, and made out without regard to the prime cost of the articles, it might be objectionable as a rule of evidence by which to estimate the value of the subject; yet invoice is sometimes used and understood as containing an account of the prime cost of the article specified. Thus, in *Marshall*, it is said, the loss is estimated according to the *prime cost*, that is the *invoice cost*. And in *Magens* (vol. 1, p. 37) it is laid down that the invoice of the cost is the rule by which the loss is to be computed" (Burns on Ins. 158). *LeRoy v.*

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1. **Definitions**—(a) *Insane Person*.—An insane person is one whose mind is affected by general imbecility, or is subject to one or more specific delusions.

(b) *Lunatic*.—At common law, a lunatic was one "who hath had understanding, but by disease, grief or other accident, hath lost the use of his reason."¹

(c) *Idiot*.—An idiot was one "who hath had no understanding from his nativity."²

Mut. Ins. Co., 7 Ins. (N. Y.) 354.

In an action for commissions upon an agreement to consign goods to be sold upon commissions on the invoice price, it is not necessary to produce the invoice, and the value of the goods may be proven. The invoice may not have been sent, or may have misrepresented the price. *Plank v. Gavila*, 3 C. B., N. S. 807.

"Invoice value," in a customs act, means cash value, where cash has been paid. *Arthur v. Goddard*, 96 U. S. 145.

1. 1 Blackstone Com. 304; *Ex parte Barnsley*, 3 Atk. 168.

2. 1 Blackstone Com. 303. In *Browning v. Reane*, 2 Phill. 69, idiocy was defined as "total fatuity from birth." In Iowa it was *held* that a person who was ordinarily termed an idiot, but who only became imbecile after reaching the age of nine years, was not an "idiot" but an "insane person" under Iowa Code, § 1434, which restricts the term "idiot" to persons foolish from birth. *Speedling v. Worth Co.*, 68 Iowa 152. In *Perrine's Case*, 41 N. J. Eq. 409, it was

(d) *Non Compos Mentis*.—The words *non compos mentis* seem to have been used as a generic term including both idiocy and lunacy.¹ They had, in the earlier cases both in *England* and the *United States*, a more restricted meaning than they bear at present, and were held to impart a total deprivation of sense, and not to include mere imbecility or weakness of mind.² In the more modern cases they are held to include not only cases of idiocy and lunacy as strictly defined at common law, but all cases of imbecility where the subject is incapable of conducting the ordinary affairs of life and liable to become the victim of his own weakness.³

held that a person born deaf and dumb, but not blind, is not an idiot.

1. *Rochford v. Ely*, *Ridgway* 528; *Ex parte Collins*, 3 C. E. Green (N. J.) 253; *Co. Litt.* 246 b.

2. *Non Compos Mentis*.—In *Beaumont's Case*, 1 *Wharton* (Pa.) 52 (1835), the earlier English view was explained by *KENNEDY, J.*, as follows: "Littleton, § 405, speaks of a man of *non sane memory* as one who is *non compos mentis*, upon which *LORD COKE*, in his commentary (*Co. Litt.* 246 b, 246 a), says 'here Littleton explaineth a man of no sound memory to be *non compos mentis*. Many times (as here it appeareth) the Latin word explaineth the true sense and calleth him not *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus*, *stultus*, or the like, for *non compos mentis* is the most sure and legal.' Now, it is obvious that *LORD COKE* considered *non compos mentis* not only the legal but the sure term, and not *amens*, *demens*, etc. He also divides *non compos mentis* into four sorts: '1st, An idiot who, from his nativity, by a perpetual infirmity, is *non compos mentis*; 2nd, He that by sickness, grief or other accident wholly loseth his memory and understanding; 3rd, A lunatic, who hath sometimes his understanding and sometimes not, *alequando gaudet lucidus intervallis*, and, therefore, is called *non compos mentis*, so long as he hath not understanding; lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken. And this last kind of *non compos mentis* shall give no privilege or benefit to him or his heirs.' And in *Beowleg's Case*, 4 *Co.* 124, a *non compos mentis* of the second sort is described to be 'he who was of good and sound memory, and by the visitation of God lost it.' Now, it must be admitted that there are various degrees of memory and understanding, from that of the most powerful and vig-

orous down to that of the most abject and imbecile, yet it is perfectly manifest that *LITTLETON* and *LORD COKE* did not consider a *non compos mentis* as embraced within any of the several grades of mind, but as one wholly destitute of it, at least occasionally, that is, of both memory and understanding. But such, I apprehend, was the prevailing sentiment down to the time of *LORD HARDWICKE*, who, in 1745, decided the case of *Barnsley*, already mentioned, in conformity to it. In 3 *Atk.* 173 he says: 'Being *non compos mentis*, of unsound mind, are certain terms in law, and import a total deprivation of sense. Now weakness does not carry this idea along with it. But courts of law understand what is meant by *non compos*, or insane, as they are words of a determinate signification.' Then he gives *LORD COKE* for authority 'that they are persons of *non sane memory*,' and adds, '*non compos mentis* is used in the statute of limitations, so that it is legitimated now under several acts of parliament.' Hence, it would appear that *non compos mentis* had become a technical term in the English law of fixed and determinate import, denoting a person entirely destitute or bereft of his memory and understanding." In accordance with these views, *JUDGE KENNEDY* held that the return of an inquisition that *Beaumont* "by reason of old age and long continued sickness, has become so far deprived of reason and understanding as to be wholly unfit to manage his estate," was not a sufficient finding that he was *non compos mentis*.

Crazy.—The word "crazy," in a popular sense, imports a broken, shattered or deranged mind, rather than one enfeebled by age or disease. *Shaver v. McCarthy*, (Pa.) 1 *Cent. Rep.* 142.

3. *Modern Rule as to Meaning of Non Compos Mentis*.—The latter view is stated by *LORD ELDON* in *Ridgway*

(e) *Delusions or Illusions as a Test of Insanity*.—Except in cases of general imbecility, which did not formerly fall within the definition of lunacy, the test of insanity is the presence of delusion in the mind of the subject.¹ A delusion is a belief in

v. Darwin, 8 Vesey 65, as follows: "I have reason to believe the court did not in Lord Hardwicke's time grant a commission of lunacy in cases in which it has since been granted. Of late the question has not been, whether the party is absolutely insane, but the court has thought itself authorized to issue the commission provided it is made out that the party is unable to act with any proper and provident management; liable to be robbed by anyone; under that imbecility of mind, not strictly insanity, but as to the mischief calling for as much protection as actual insanity." See also *Mannin v. Ball*, Smith & Batty 183.

In *McElroy's Case*, 6 W. & S. (Pa.) 451, the supreme court of Pennsylvania modified the ruling in *Beaumont's Case*, 1 Whart. (Pa.) 52, holding that the question for the jury on a traverse of an inquisition finding the party *non compos mentis* was "whether the mind is deranged to such an extent as to disqualify the traverser from conducting himself with personal safety to himself and others, and from managing his own affairs and discharging his relative duties." *McElroy's Case* was subsequently affirmed and followed in *Commonwealth v. Schneider*, 59 Pa. St. 328. In *Barker's Case*, 2 Johns. Ch. (N. Y.) 232, CHANCELLOR KENT, in refusing to follow the earlier English rule, said: "I should imperfectly discharge my trust if I crippled the jurisdiction of this court by confining it to the strict common writ of lunacy." See also *Nailor v. Nailor*, 4 Dana (Ky.) 339.

In *New Jersey* an inquisition finding the alleged lunatic "of unsound mind, so that he is not capable of the government of his lands, tenements, goods and chattels," was *held* to be sufficient, though it did not state that the alleged lunatic was also incapable of governing himself. *Re James*, 35 N. J. Eq. 58. In the same state an inquisition was set aside which found that a deaf mute sixty-five years old, who had been such since she was two or three years old, who was ignorant, and could neither read nor write, nor communicate her ideas to others by signs or otherwise, and who could not be made to under-

stand an ordinary business transaction, was "of sound mind and capable of controlling her property by her own selection of a proper person to act for her." *Perrine's Case*, 41 N. J. Eq. 409. These cases seem to materially modify the earlier view in *Vanauken's Case*, 2 Stockt. (N. J.) 186, where it was *held* that in order to justify a jury in finding a man a lunatic, they must be satisfied that he suffers from a total deprivation or suspension of the ordinary powers of the mind.

The rule laid down in *McElroy's Case*, 6 W. & S. (Pa.) 451, has been generally adopted in the more recent cases in the United States. *Hale v. Hills*, 8 Conn. 39; *Greenwade v. Greenwade*, 43 Md. 313; *Dennett v. Dennett*, 44 N. H. 531; *In re Carmichael*, 36 Ala. 514; *Commonwealth v. Haskell*, 2 Brewst. (Pa.) 491; *Nailor v. Nailor*, 4 Dana (Ky.) 339; *Hovey v. Chase*, 52 Me. 304; *Rawdon v. Rawdon*, 28 Ala. 565; *Kenworthy v. Williams*, 5 Ind. 375; *Willett v. Porter*, 42 Ind. 250; *Meurer's Appeal*, 119 Pa. St. 115; *Robertson v. Lyon*, 24 S. Car. 266; *Cochran v. Amsden*, 104 Ind. 282.

"Unsound Mind."—The words "unsound mind" as used in the *Indiana* statutes relating to guardianships, include every species of insanity or mental unsoundness. *McCammon v. Cunningham*, 108 Ind. 545.

In *Jackson v. Jackson*, 37 Hun (N. Y.) 306, it was *held* error to charge that to render one a fit subject for guardianship, his mind must be so far impaired that he has no more intelligence than an idiot.

1. *Delusions*.—"All writers and jurists agree that an immovable delusion as to facts past or present is not merely a symptom of insanity, but is in fact insanity or the effect of an unsoundness of mind." *McElroy's Case*, 6 W. & S. (Pa.) 451, 463; see also *Dew v. Clark*, 3 Add. Ecc., 79; *Stanton v. Wetherwax*, 16 Barb. (N. Y.) 259; *Mullens v. Cottrell*, 41 Miss. 201; *Forman's Will*, 54 Barb. (N. Y.) 274; *Merrill v. Rolston*, 5 Redf. (Vt.) 220; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500; *Regina v. Higginson*, 1 Car. & K. 129; *MacNaghten's Case*, 10 Cl. & Fin. 200; *Regina*

facts the existence of which no rational person would believe.¹ Such delusions, in order to be a test of insanity, must be delusions of the senses, or such as concern certain facts. Mere

v. Burton, 3 F. & F. 772; *Nichols v. Binns*, 1 Sw. & Tr. 239; *Waring v. Waring*, 6 Moo. P. C. C. 341; *Creogh v. Blood*, 2 J. & La T. 509; *In re Dyre Sombre*, 1 Mac. & G. 116; *Dew v. Clark*, 3 Addams, 79; *Gass v. Gass*, 3 Humph. (Tenn.) 278; *Commonwealth v. Meredith*, 14 W. N. C. (Pa.) 188.

But an instruction requested to be given to a jury, that "the only legal test of insanity is delusion," cannot properly be given as a rule of law. *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121.

1. If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion, and a delusion in that sense is insanity. *Seamen's Friend Society v. Hopper*, 33 N. Y. 619; *Riggs v. American Home Missionary Soc.*, 35 Hun (N. Y.) 656. A peculiar form of delusion is illustrated in an incident in the life of *Erskine*. An indictment had been brought against the keeper of an insane hospital by the keeper's brother for false imprisonment. *Erskine*, who was for the defence, had not been informed of the nature of the insanity of the prosecutor. The prosecutor was placed upon the stand and *Erskine* cross examined him for more than an hour, and left no means untried which his knowledge or experience could suggest; and when the jury and judge and audience were satisfied that it was a most flagrant case of oppression and injustice, the physician who had attended the patient came in and stated to the counsel the nature of the malady, on which *Erskine*, with great apparent humility, begged forgiveness for his rudeness, as he had not known the witness. Immediately the prosecutor replied with great gravity, "I forgive you—I am the Christ," and the trial ended.

In *Commonwealth v. Meredith*, 14 W. N. C. (Pa.) 188, on a traverse of an inquisition on lunacy, the court in the charge described the defendant as follows: "Mr. Meredith is possessed of great intellectual ability, and has been carefully educated; his life has been that of a close student, and his attainments

are those of a ripe scholar. He has an accurate and retentive memory; his mind is capable of close and logical thought, of clear and forcible expression; the powers of memory, of reasoning, of expression, he enjoys to day to their fullest extent, unimpaired in any way. His life has been honorable and without reproach, and in his relation to others he has been uniformly kind, considerate, gentle, commanding the respect and winning the affection of all who knew him . . . It is clearly established that since 1877 Mr. Meredith has believed that he is the object of a secret and mysterious persecution; that he, at times, hears voices of persons who are not near him, but who are planning danger to him; that he has invisible foes, who, through some scientific agency, make their voices audible to him. He does not claim to understand this, or attempt to account for it, except to attribute it to some secret invention in electricity and acoustics, by means of which unknown persons, of evil intent, are persecuting him. He believes this to be a fact; accepts it as such. He does not regard the voices as imaginary or spiritual, but as the real voices of real people, who communicate with him through some unknown means. The means of communication he does not ascribe to a supernatural agency, but to natural causes." The judge left it to the jury to decide under the evidence, which was conflicting, whether the defendant was capable or not of managing his affairs. The verdict was for the defendant.

In *Norton's Case*, 45 Leg. Intel. (Pa.) 434, the delusions were of a remarkable character. *Lysander S. Norton* was a member of the bar. His mind becoming deranged he was placed for treatment in the Pennsylvania Hospital for the Insane. He procured a writ of *habeas corpus* and conducted his own case at the hearing, though represented by counsel. He displayed marked ability and made an earnest appeal for his discharge from the hospital. The court, in an opinion dismissing the writ, said: "No one who was present at the hearing of this case, and who had been unacquainted with the past history of *Lysander S. Norton*, would for a mo-

ment have suspected that he was a man of unsound mind. He conducted his case with a degree of professional skill and ingenuity which would have been creditable to any member of the bar, exhibiting throughout the whole ordeal, which must have been to him a most trying one, great self-control, moderation and propriety, with no trace of the excitement and incoherence which are usually associated with unsoundness of mind. He told the story of his arrest and confinement in a connected, dignified and pathetic manner, which appealed most strongly to the sympathies of every one who heard it, and argued his case with a logical ability and acuteness which seemed successfully to challenge the charge of mental unsoundness upon which he had been committed to the hospital. Mr. Norton had been for some years a prominent and successful practitioner of the Erie bar. In the latter part of March, 1888, in consequence of certain evidences of insanity then apparent in his conduct, he was examined by Dr. Edward Cranch and Dr. J. C. M. Drake, of Erie, who certified that he was of unsound mind, and he was thereupon, at the request of his wife, Mrs. Mattie C. Norton, sent as a patient to the Pennsylvania Hospital for the Insane. The testimony of Dr. John B. Chapin, the physician in chief at the hospital, and of the other physicians there, under whose care he has been since March last, was that Mr. Norton is of unsound mind; that he is afflicted with that form of disease known as *parésis*, a disease which is attended with mental delusions, and is characterized by a tendency to commit acts of violence and aggression; that for some weeks past Mr. Norton has improved in health and is now much better than when he came to the hospital; that these vicissitudes of condition are characteristic of the disease, the patient at intervals appearing to be quite well and restored, but soon again relapsing into his former condition of mental unsoundness. The physicians were all of opinion that Mr. Norton still required restraint and medical care and treatment, and that he could not with safety be permitted to go at large at present. Their statements with regard to his mental condition since he has been an inmate of the hospital were fully corroborated by numerous letters written by Mr. Norton himself since his confinement. These letters contain indubitable evidence that his mind has

been filled with the most absurd delusions. For example, in a letter to Mr. Merchant from the hospital, he says: 'Major General Henry Heintz, the Baron von Rothschild, who was in all the wars of Germany since 1831, is here for treatment and has taken a wonderful fancy to me. He is worth in his own right five hundred thousand millions of dollars. He expressed his love and admiration of me by giving me last Sunday vouchers representing one hundred million dollars. I have bought me a private drawing room car and a dining car, and expect the last of this week to start with some of my friends as my guests for a month's trip to Florida, Old Mexico and California. Would you like to go along with your family?' It will be a very delightful trip, and I would dearly love to have you all go. I expect the president and several of his cabinet, and also several judges and senators to go with us, but there is yet room for more. You might bring your own car if you wish to do so. We will have the Washington Marine Band along, and also Thomas's or Gilmore's. Will probably start either Friday or Saturday. Please let me hear from you by telegraph.' In a postscript he adds: 'I forgot to mention to you that I lately discovered that I am of royal descent and am a grandson of King Henry VIII, of England.' The letter is signed 'L. S. Norton, Lord Norton Norval, the Duke of Brandega.' In a letter to his former partner he repeats the same hallucinations, with the addition that 'he intends to stop for one day on his trip at Washington to be confirmed as Chief Justice of the United States Supreme Court' and 'to be made General in Chief of the United States Army, and to have his son, who is 11 years old, made a Major General, to be attached to his staff as chief aid-de-camp.' 'I will have you,' he adds, 'made Attorney General, or I will get my friend George A. Jenks, who is now Solicitor General, to resign and take a foreign mission until I get ready to take a trip of one year to Europe, when I will have you exchange places with Jenks and be accredited as Envoy Extraordinary and Minister Plenipotentiary. I have castles now on the Rhine [the building of one cost over \$5,000,000] and on the Danube, and in every country in Europe. The Baron de Rothschild gave me last Sunday \$100,000,000. He will spend the rest of his life as a member of my family. Al-

though he has a wife and six children living, he says he loves me better than all of them put together. He gives me \$100,000,000. I think the reason of his strange infatuation is that I can talk with him in Latin, Greek, French, German, Italian, Spanish, Hebrew and English, in all of which languages he is *au fait*. If you can get ready to join me you can come to Cincinnati and join me. I expect the president and his cabinet and the senators, and the Judges of the Supreme Court, and the heads of the departments, and officers of the army and navy, and some of the congressmen and the diplomatic corps, to go with me. Come one, come all, and see the elephant go round. Telegraph L. S. Norton, *alias* Lord Norvall, the Duke of Brandega.' On the 4th of August, 1888, he wrote to his wife: 'If you do not take me out not later than Tuesday, just as soon as I do get out I shall go straight to Elmira and deliberately murder you in cold blood; and if I find you flown from there, I will follow you to the ends of the earth, if need be, and when I find you, be it days, weeks, months or years from now, I will take your life. I would think no more of killing you than I would to kill a deadly scorpion, which has stung me with its murderous fangs. No jury in the world would convict me of murder, because you have sworn to my insanity and sent me to a mad house. I would, at the trial, enter a plea of insanity and the verdict of the jury would be 'not guilty, by reason of insanity.'" To his son, a little boy of 11 years old, he wrote on August 8th, 1888: 'When I get out, God only knows what will become of myself and of you and your mother. Your mother has made me a perfectly reckless and desperate man and I care not what, in my reckless desperation, I may do. I fear the very worst.'

"I have quoted these passages from the recent letters of the relator, in order that it may clearly be seen that, notwithstanding the sane appearances at the time of his hearing before me, and notwithstanding the ability and propriety with which he conducted his own case on that occasion, the evidences of his insanity at a very recent day are so numerous and so strong that the fact of that insanity at the time the letters were written is indubitable and beyond the possibility of denial. Many such letters as those which I have already quoted from are in my hands. The relator, at

the hearing, admitted that he wrote them all, and confessed to the only inference which is fairly deducible from them, but insisted that he was now quite well and in his proper mind again, and the only question for the court was what is his present condition. This argument he pressed upon the court with great force and with all that eloquence with which infinite misfortune and misery appeal to pity. Mr. Norton is undoubtedly at the present time much better than he has been. This is apparent from his conversation and demeanor, and is the evidence of his physicians. It may be the beginning of a complete restoration of his health, bodily and mental. That it may turn out to be so will, I am sure, be the sincere and earnest hope of any person who has heard the story of his great misfortune. If the present improvement shall continue and develop into a perfect cure of the disease with which he has been afflicted, he will in a few months go forth from his present seclusion freed from the painful ailment which it has been his misfortune to suffer, and which for a time has withdrawn him from his friends. The great writ of habeas corpus will always be at his command to test his right to freedom from restraint. At present it must be obvious to every one acquainted with the facts, and will, upon reflection, probably be seen by himself, that a further period of probation is absolutely requisite before he can be pronounced recovered, and that it is a duty which the court owes to him, as well as to his relatives and friends, and to the public, to leave him under medical treatment until such time as his recovery shall be no longer a doubtful question, but a demonstrated fact. That that time may arrive speedily no one can more earnestly hope than the judge who heard his unhappy case. I have but a single suggestion to add, and that is that, in view of the deeply seated dislike which the relator has conceived to his present place of residence and the strong antipathy which he has shown to his present surroundings, it would perhaps be as well for his wife and relatives to consider whether, on the whole, it would not be better to transfer Mr. Norton to some other place for treatment. The court has no power to do so. This remark is not to be considered in any degree as a reflection upon the management of the institution which is his present abode, but it seems highly

beliefs on questions of opinion, however absurd, are not a proper test.¹ Where a person is affected with a delusion upon one specific subject, but is rational in other respects, he is to be considered insane upon that subject, but not upon other subjects.²

(f) *Imbecility*.—Imbecility is a general weakness of the intellect which may be *ex nativitate*, as in the case of idiots, or may be caused by disease or old age. As distinguished from lunacy, it is without delusions, and is rarely, if ever, attended by lucid intervals. The test of this form of insanity is the inability of the subject to transact the ordinary affairs of life, to understand their nature and effect, and to exercise his will in relation to them.³

probable that, under the circumstances, and in view of the strong feelings of Mr. Norton upon this subject, a change of his residence would be beneficial to him. The present writ of habeas corpus is dismissed."

In a recent case in Wisconsin a man whose health had been impaired by excessive drinking, and who for twenty years had lived happily with his wife, suddenly and without cause became convinced of her infidelity and insisted on it at all times and places; he became morose, neglected his business, refused to take medicine under a belief that he was in danger of being poisoned, and changed his abode, leaving his family. The court held that he was insane. *Barbo v. Rider*, 67 Wis. 598.

1. *Matters of Opinion*.—In the Chafin Will Case, 32 Wis. 557, the court said: "If a man really believes that he is made of glass, or that he is the Christ, or that he is dead, and persists in the opinion, we readily conclude that he is the victim of hallucination or insane delusion, because such opinions are inconsistent with the condition of sanity. But we can draw no such conclusion from the mere belief in witches, ghosts, dreams or spiritual manifestations, or in strange or absurd views on scientific or religious subjects, because such opinions are consistent with sanity." Thus in *Bonard's Will*, 16 Abb. Pr., N. S. (N. Y.) 128, a belief that the souls of men after death passed into animals was held not inconsistent with sanity.

2. *Partial Insanity*.—In *Blakely's Will Case*, 48 Wis. 294, a medical witness testified that in his opinion there was no such thing as partial insanity, that a man was either sane or insane. The court held that this might be true in the light of medical science, but was not true in the law. This decision is fully borne out by the authorities. In *Jenkins*

v. Morris, L. R., 14 Ch. D. 674, a lessor, at the time he made the lease of a farm, labored under the delusion that it was impregnated with sulphur. On an issue directed as to the capacity of the lessor to make the lease, rational letters by the lessor relating to the lease were put in evidence. The trial judge directed the jury that it was a practical question whether the lessor was so insane as to be incompetent to dispose of his property, though he believed it to be full of sulphur. The jury found that the lease was valid. In refusing a motion for a new trial *BAGGALLY, L. J.*, said: "Assuming that Price [the lessor] was subject to certain insane delusions, as to which I think there can be no doubt, having regard to the admitted evidence in this case, that is not a sufficient reason, in my opinion, why he should be held to have been incompetent to execute the lease in question, if the jury were satisfied that the delusions to which he was subject had not so far affected the general faculties of his mind as to render him incompetent to deal with the property which was the subject of the lease." Citing *Smee v. Smee*, L. R., 5 P. D. 84. See also *Banks v. Goodfellow*, L. R., 5 Q. B. 549; *State v. Spencer*, 1 Zab. (N. J.) 196; *Forman's Will*, 54 Barb. (N. Y.) 274; *Dew v. Clark*, 3 Add. Eccl. 79.

3. *Mannin v. Ball, Smith & Batty*, 183; *Wright v. Jackson*, 59 Wis. 569; *Hovey v. Chase*, 52 Me. 304.

Although the mind of a person may be to some extent impaired by age or disease, still, if he be capable of transacting his ordinary business—if he understands the nature of the business in which he is engaged and the effect of what he is doing, and can exercise his will with reference thereto—his acts will be valid and binding. *English v. Porter*, 109 Ill. 285.

(g) *Lucid Interval*.—A lucid interval is such a restoration to reason as will enable a subject to comprehend and do an act with such reason, memory and judgment, as to make it a legal act.¹

(h) *Moral Insanity* is a morbid perversion of the moral feelings without illusion or erroneous conviction.²

2. Confinement of Persons Alleged to be Insane.—Where a person is insane to such a degree that it would be dangerous both to himself and others to permit him to remain at liberty, he may be confined by anyone, but only so long as it may be necessary to institute proper proceedings to determine his insanity.³

1. *Frazer v. Frazer*, 2 Del. Chan. Rep. 260. The party must be in a condition of mind, freely and voluntarily, and without any design of pretending sanity, to confess his delusion. *Waring v. Waring*, 6 Moo. P. C. C. 341.

Lunacy being once established, the burden is on the party claiming through some act of the lunatic, to show that it was done in a lucid interval, and, a return to sanity being proved, the burden is upon the party claiming a relapse into insanity. *Wright v. Jackson*, 59 Wis. 569.

An act done in a lucid interval by one who has been found to be a lunatic is binding on him, but the proof of the lucid interval in which it was done must be clear. *Gangwere's Estate*, 14 Pa. St. 417; *Hall v. Warren*, 9 Ves. 605; *Towart v. Sellers*, 5 Dow. 231.

Temporary Insanity.—In *Overall v. State*, 15 Lea (Tenn.) 672, where the proof showed that the defendant was subject to occasional or temporary attacks of insanity, and was visited by one of such attacks shortly before the commission of the offence, and was not shown to have recovered, it was *held* that the law presumed the insane condition to remain as last shown.

In *Physio-Medical College v. Wilkinson*, 108 Ind. 314, it was *held* that where it appears that a person was, at any given time, of unsound mind, unless from some temporary or transient cause, the legal presumption is that the state of mind continues, until the contrary is made to appear. This rule does not apply to cases of occasional or intermittent insanity, but it does to all cases of apparently confirmed insanity, of whatever nature. It was consequently decided that a woman eighty years old, who was so physically and mentally prostrated as to be of unsound mind, and incapable of comprehending the nature of a contract, would not be

presumed from lapse of time to have recovered her reason.

2. The weight of modern authority is, that moral insanity is of itself insufficient to invalidate a civil act or excuse a criminal act. *Boardman v. Woodman*, 47 N. H. 120; *Frere v. Peacock*, 1 Rob. Ecc. 442. Moral insanity, not proceeding from or accompanied with insane delusion, is insufficient to set aside a will. *Forman's Will*, 54 Barb. (N. Y.) 274; *Boyd v. Eby*, 8 Watts (Pa.) 66. Moral debasement is not necessarily insanity. *Mayo v. Jones*, 78 N. Car. 402. In *State v. Spencer*, 1 Zab. (N. J.) 197, the court said: "I cannot yield to the doctrine which has been suggested, founded upon what is called moral insanity. Every man, however learned and intellectual, who, regardless of the laws of God and man, is guilty of murder, or other high and disgraceful crimes, is most emphatically insane. Such doctrine would lead to the most pernicious consequences, and it would very soon come to be a question for the jury, whether the enormity of the act was not in itself sufficient evidence of such insanity, and then the more horrible the act, the greater would be the evidence of such insanity. See also *Com. v. Mosler*, 4 Pa. St. 266; *Boswell v. State*, 63 Ala. 307.

3. In *Colby v. Jackson*, 12 N. H. 526, Colby being insane, and it being dangerous to permit him to be at liberty, Jackson, one of the selectmen of the town, confined him. He then, with the other selectmen, applied to the judge of probate for an inquisition upon Colby. A warrant was issued and the selectmen made an inquisition, and declared their opinion to be that Colby was insane, but made no return of the inquisition to the judge of probate, and no further proceedings were had. Colby subsequently brought

Where, however, neither the welfare of the insane person nor the safety of others requires that he shall be confined, the person who arrests and detains him becomes liable in damages to the person arrested.¹

Where a person actually sane is arrested and detained, the per-

an action against Jackson for false imprisonment. The evidence was clear that Colby was insane at the time of his arrest. The court instructed the jury that the burden was upon the defendant to prove that the plaintiff was insane and that it was dangerous to suffer him to be at large; that if the plaintiff were so insane that it was dangerous to himself and others to permit him to be at liberty, the defendant might confine him until application could be made to the proper authority and a guardian appointed; that such an application must be made in a reasonable time; that the defendant had no right to confine him for an indefinite time, as long as he should think proper, without making any application for and procuring the appointment of a guardian, even if he were dangerous. A verdict was rendered for the plaintiff. The supreme court sustained the judgment, saying: "As soon as the defendant, by abandoning the legal proceedings which had been commenced, and still continuing the imprisonment, asserted the right of a confinement of indefinite duration, he abused his authority and became a trespasser *ab initio*." Under the Revised Statutes of New Hampshire, ch. 9, § 16, selectmen are protected where they act in good faith and at the request of the friends of the lunatic. *Davis v. Merrill*, 47 N. H. 208.

Arrest of Insane Persons.—In *Lott v. Sweet*, 33 Mich. 308, the court said: "It is just as competent for a magistrate, as conservator of the peace, to order into custody an insane man who is committing a breach of the peace in his presence, as to order the arrest of a sane person under like circumstances; though an insane person may not be guilty of crime, he may lawfully be prevented from doing harm." See also *Anderdon v. Burrows*, 4 C. & P. 210; *People v. Turner*, 55 Ill. 280; *Look v. Dean*, 108 Mass. 116; *Underwood v. People*, 32 Mich. 1; *Paetz v. Dain*, 1 Wilson (Ind.) 149; *In re Oakes*, 8 Law Rep. (Mass.) 122; *Re Ross*, 38 La. An. 523.

1. "No man can be deprived of his

liberty without the judgment of his peers, and it matters not to the law whether the alleged cause of detention is insanity or crime. Unless there is danger to the public or to the patient or to his estate, he should not be in duress pending the investigation, nor indeed after its conclusion, though adverse to him." *Commonwealth v. Kirkbride*, 2 Brewst. (Pa.) 419. The danger of a contrary rule is shown by *JUDGE BREWSTER in Commonwealth v. Kirkbride*, 2 Brewst. (Pa.) 400, where he says: "A man is sent to an insane asylum by his relatives and family physician. He is there for many months. They institute no proceeding in lunacy, but deprive him of his liberty and property without any direct sanction of the law. Even correspondence itself is under surveillance. At last he is able to sue out a writ of *habeas corpus*, and comes before a judge, who cannot be expected to be an expert upon such a question, and who, looking at the evidence, concludes that the man is insane and remands him. It is then *res adjudicata*, and it might be that no other judge would review the decision. Thus, without a finding of lunacy, without the right of traverse to a jury, and an appeal to the supreme court to correct errors in the proceeding, a man may be detained for life. It is surely no answer to all this to say that he is no longer put in a dungeon, or chained, or waist-coated and tortured, as of old. . . . Imprisonment is none the less a wrong because the place of confinement is a palace." In *Look v. Dean* and *Look v. Choate*, 108 Mass. 116, actions for false imprisonment were brought by Look against Dean, a constable, and Choate, the keeper of an insane asylum. Look was arrested without warrant at a camp meeting while addressing a crowd. It did not appear that he was violent or dangerous. The court held that the mere fact that a man is insane does not authorize his arrest and confinement without a warrant, if he is not dangerous to himself and others, and that in this case Look was entitled to recover. See also *Hall v. Semple*, 3 F. & F. 337; *Anderson v. Burrows*, 4 C. & P. 210;

sons arresting and detaining him will be responsible in damages.¹

Where a person is arrested or confined as a lunatic, whether he is sane or insane, he is entitled to a writ of *habeas corpus* that the legality of his confinement may be inquired into.²

3. Jurisdiction Over Insane Persons.—In *England*, a lunatic is regarded as a ward of chancery, not of its own general jurisdiction, but by virtue of a royal commission issued to the chancellor. The king, as *parens patriæ*, is considered to be intrusted with the care and custody of his insane subjects, but to avoid applications to him in person, the royal authority is delegated to the chancellor.³

In the absence of legislation, it has been held that the American courts of equity derive a similar right from the commonwealth.⁴

Force v. Probasco, 43 N. J. 539; *Abbot v. Fremont*, 34 N. H. 432; *Keleher v. Putnam*, 60 N. H. 30.

1. In *Van Deusen v. Newcomer*, 40 Mich. 90, JUDGE COOLEY said: "But I understand the defence to go further and insist that even if Mrs. Newcomer was really sane, Dr. Van Deusen, if he has acted in good faith, is not responsible in damages for her confinement. What in that case is the alternative is not very clearly pointed out by the defence. It cannot be that no one is responsible. The law of no free country can tolerate a condition of things under which a person innocent of crime, and threatening no injury to himself or to others, can be restrained of his liberty, and no person be responsible for the injury he suffers. To admit the possibility would be to concede that arbitrary imprisonment under some circumstances is lawful; and that would be to concede that regulated and protected freedom does not exist. But if the superintendent is not responsible, we look in vain for adequate responsibility anywhere."

If the supposed insane person makes no objection at the time of his imprisonment, he cannot complain of it afterwards. *Van Deusen v. Newcomer*, 40 Mich. 90.

2. *Commonwealth v. Kirkbride*, 2 Brewst. (Pa.) 419; *Norris v. Seed*, 3 Exch. 782; *Com. v. West Penn. Hosp.*, 3 Pitts. (Pa.) 299; *Underwood v. People*, 32 Mich. 1; *Territory v. Gallatin Co.*, 6 Mont. 297; *Red v. Turlington*, 2 Burr. 1115; *ex parte Greenwood*, 24 L. J., Q. B. 148.

Right to Jury Trial.—In *England* a person alleged to be insane is entitled to have the question of his insanity

tried by a jury. Lunacy Regulation Acts, 16 & 17 Vict., ch. 70, § 40; *In re Crompe*, L. R., 4 Ch. App. 653. The same right has been recognized in the United States. See *In re Dey*, 1 Stockt. (N. J.) 181; *Smith v. People*, 65 Ill. 375; *State v. Baird*, 47 Mo. 301; *Black Hawk Co. v. Springer*, 58 Iowa 417.

3. Before the statute *de prerogation regis* (17 Ed. II, ch. 9), the custody of persons and lands of such idiots as were possessed of lands was in the lord of the fee. By this statute such custody was taken from the lord and entrusted to the king. The statute (17 Ed. II, ch. 10) prescribed the duties of the king as to lunatics, and constituted him a trustee.

Origin of Chancellor's Jurisdiction Over Lunatics.—In *Meurer's Appeal*, 119 Pa. St. 115, the court explained the manner in which the chancellor's jurisdiction in lunacy was exercised: "In early times, commissioners to enquire into the fact of lunacy were issued directly by the crown to the sheriff, coroner, escheator, or to any private citizen by whom the inquest was made, assisted as in other cases by a jury of the county." Subsequently they were issued to the chancellor, who acted *not virtute officii*, but by virtue of the special commission from the crown." See 3 Blackstone's Com. 427; *Eyre v. Shaftesbury*, 2 P. Wms. 118; *Burford v. Lenthall*, 2 Atk. 553.

4. Jurisdiction in the United States.—In *Nailor v. Nailor*, 4 Dana (Ky.) 339, the court said: "So far as the powers exercised by him [the chancellor] were for the benefit, security and safety of that unfortunate class of individuals, as *subjects* of England, they

4. The Inquisition—(a) The Petition and Commission.—It is the ordinary practice, both in *England* and the *United States*, to issue commissions out of chancery in the nature of writs *de lunatico inquirendo*, to enquire into cases of alleged insanity. The commission is issued on petition, which must be made by a person related by blood or marriage to the alleged lunatic, or interested in his estate, and must be accompanied by an affidavit of the truth of the facts therein stated. The issuing of the commission is discretionary with the court.¹

(b) Notice.—The party alleged to be insane is usually entitled to notice of the execution of the commission, and, except in cases of dangerous madness, is entitled to be present at the proceedings.²

are equally necessary for the protection, security and safety of the same class of individuals as *citizens* of the colonies, and as citizens of this commonwealth; and the laws in force there are applicable here as to the rights of individuals; and remedy should be afforded by some tribunal. And, although those powers were exercised by the chancellor there, as a prerogative power of the king, and as his ministerial agent, acting under his special grant, the powers have been assumed and exercised by our courts of equity, and their assumption of the power sanctioned by legislative enactment, and it is now too late to question the jurisdiction of the court over the subject." In *Corrie's Case*, 2 Bland's Ch. (Md.) 467, the court said: "Here it has always been admitted that . . . the chancellor of Maryland was invested with all the powers with which the chancellor of England had been clothed, as founded on an obvious necessity that the law should place somewhere the care of individuals who could not take care of themselves." The same doctrine has been upheld in *Latham v. Wiswell*, 2 Ired. Eq. (N. Car.) 294; *Dodge v. Cole*, 97 Ill. 338; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15. But it was doubted in *Oakley v. Long*, 10 Humph. (Tenn.) 254. In many of the states of the Union the care of persons *non compos mentis* is confided to special tribunals, as to the probate courts in *Massachusetts*, and is not made a part of equitable jurisdiction.

1. Who may sue Out Commission.—The commission cannot be sued out by a mere stranger. *Covenhoven's Case*, Saxt. ch. 19. A petition for a commission against a husband cannot be made by his wife in her own name, but must be made by her next friend. *Campbell v. Campbell*, 39 Ala. 312.

Affidavit in Support of Petition.—In *Lincoln's Case*, 1 Brewst. (Pa.) 392, the objection was raised that the petition was not supported by an affidavit. The court, however, refused to sustain the objection, because the defendant waived the defect by going into a hearing on the merits. It has also been held that the proceedings upon a commission will not be void because the petition was unsupported by an affidavit. *Bethea v. McLennon*, 1 Ired. (N. Car.) 523; *Plank's Case*, 10 Penn. L. J. 519.

Where it appears that the lunatic does not need protection for himself or his property, the court may refuse a commission. *In re Clare*, 2 J. & La. T. 571; *Owing's Case*, 1 Bland's Ch. (Md.) 290; *Colvin's Case*, 3 Md. Ch. 206.

Under the *Michigan* statutes, on the petition for the appointment of a guardian on the ground of extreme old age and incapacity of managing property, mental incapacity must be alleged and proved in order to give the court jurisdiction. *Re Storick*, (Mich.) 7 West. Rep. 882.

2. When Notice May be Dispensed with.—In *Tracy's Case*, 1 Paige (N. Y.) 580, the chancellor said that it was the privilege of a party against whom a commission of lunacy is issued to have notice and to be present at its execution. If there are any circumstances in the case which render it improper or unsafe to give notice to the party, as in some cases of furious madness, the facts should be stated in the application to the court, so that a provision might be inserted in the commission dispensing with the necessity of notice. See also *Hutts v. Hutts*, 62 Ind. 214; *Vanauken's Case*, 2 Stock (N. J.) 186; *Whitenack's Case*, 2 Green Ch. (N. J.) 252.

Notice must be made upon the party in person.¹ Want of notice has in some cases been held to render the proceedings void.² It is largely within the discretion of the court as to what parties other than the alleged lunatic shall have notice of the commission and be entitled to be present at its execution.³

(c) *Execution of the Commission.*—The commissioners address a precept to the sheriff requiring him to summon a jury of good and lawful men of his county to appear before them and inquire into the question of the alleged lunacy of the person mentioned in the petition.⁴ The commissioners have the power to issue

Presence of the Party.—In *Lincoln's Case*, 1 Brewst. (Pa.) 392, it was *held* that the party should be present and have all the rights of a defendant, but that the commissioner and jury were not required to examine him. See also *Child's Case*, 1 C. E. Green (N. J.) 498; *Medlock v. Cogburn*, 1 Rich. Eq. (S. Car.) 477; *Commonwealth v. Kirkbride*, 2 Brewst. (Pa.) 419. In *Nyce v. Hamilton*, 90 Ind. 417, it was *held* that where the subject was produced in court and was present during the trial, the proceedings being in all respects according to the statute, the court had jurisdiction, no other notice to him being necessary. See also *McAfee v. Commonwealth*, 3 B. Mon. (Ky.) 305; *In re Demeet*, 27 Hun (N. Y.) 480. But in *Morton v. Sims*, 64 Ga. 298, it was *held* that a commission issued without the requisite notice, and neither preceded nor followed by the appointment of a guardian *ad litem*, is not aided by the presence of the imbecile and his representation by counsel, even where the counsel gives his consent to the judgment appointing the guardian, it appearing that the commission was executed on the next day after it was issued, and that the judgment followed immediately. The object of the notice is that there may be due warning to make objection for legal cause to the commission or any of the commissioners, as well as to prepare for adducing evidence on the main question.

1. *Morton v. Sims*, 64 Ga. 298; *Chase v. Hathaway*, 14 Mass. 222; *Segur v. Pellerin*, 16 La. 63; *Ex parte Dozeir*, 4 Baxt. (Tenn.) 81. Notice must be given even to a nonresident. *In re Petit*, 2 Paige (N. Y.) 174.

2. **Effect of Want of Notice.**—*Eslava v. Lepreler*, 21 Ala. 504; *Molton v. Henderson*, 62 Ala. 426.

In *Kimball v. Fisk*, 39 N. H. 110, it

was *held* that want of notice rendered the proceedings voidable and not void. An inquisition of lunacy cannot be avoided collaterally for want of notice of the holding of the inquest. *Rogers v. Walker*, 6 Pa. St. 371; *Willis v. Willis*, 12 Pa. St. 159; *Arrington v. Short*, 3 Hawks (N. Car.) 71. Want of notice is cured by a traverse. *Rogers v. Walker*, 6 Pa. St. 371.

3. **Notice to Relatives.**—*In re Nesbitt*, 2 Phillips 245.

In *Ex parte Hinchman*, 4 Clark (Pa.) 184, it was *held* that such relations and friends as counsel a finding against the alleged lunatic are excluded from the list of persons competent to receive notice of the execution of the commission. In *Rogers' Case*, 9 Abb. N. Cas. (N. Y.) 141, it was *held* that failure to give notice of an application for a commission to one of the heirs of the lunatic is, at most, only an irregularity, as he has no absolute right to notice. See also *In re Scarlett*, L. R., 8 Ch. App. 739; *In re Brown*, 1 Mac. & G. 201; *In re Clements*, 2 Cooper 166.

In *Morton v. Sims*, 64 Ga. 298, it was *held* that if the nearest adult relatives of the alleged imbecile are themselves the petitioners for the appointment of a guardian, the ten days' notice provided for in section 1855 of the Georgia Code, should be given to three of the next nearest, or if there be no adult relatives within this state except the petitioners, then, in order that the spirit of the section as well as of the general law may be observed, the ordinary should either require ten days' notice to be given to the alleged imbecile himself, or else designate by order a guardian *ad litem* to receive the notice for him.

4. **Jury of Inquisition.**—In Pennsylvania the number of jurors must not be more than twelve nor less than six. Act of June 13th, 1836, § 7. In England the number of jurors is not limited to

subpœnas, and to compel the attendance of witnesses.¹ They also have the power to compel the production of the alleged lunatic by those having charge of him.² The return should be made in a reasonable time.³

(d) *Finding of the Inquisition.*—The inquisition must find that the party is of unsound mind, and is mentally incapable of governing himself, or of managing his affairs.⁴ The court may, in its discretion, set aside the finding and order the issue of a new commission.⁵ A writ of error does not lie to the inquisi-

twelve, but the concurrence of twelve out of a greater number summoned is sufficient. *Ex parte* Wragge, 5 Vesey 450. It is the duty of the sheriff to summon the jurors without the interference of the commissioners. *Ex parte* Wager, 6 Paige (N. Y.) 11.

Inquisition in Forma Pauperis.—In *Pennsylvania*, under the act of June 13th, 1836, if the estate of the alleged lunatic is so small that the costs of an inquisition will be an undue burden upon it, the court may direct an inquest to be empanelled from the jurors attending the court, and that the inquest be held by one of the judges thereof, at such convenient time and place as shall be ordered. This was allowed *In re* Cusick, 15 W. N. C. (Pa.) 469, where the lunatic's estate amounted to \$1,300.

1. *Ex parte* Lund, 6 Vesey 781. In *Ex parte* Plank, 5 Clark (Pa.) 35, it was held that it was the duty of the commissioners to subpœna witnesses on the application of the alleged lunatic and that a refusal to do so would invalidate the proceedings.

2. *Ex parte* Child, 1 C. E. Green (N. J.) 498; *In re* Wenman, 1 P. Wms. 701.

3. **Return Day of Commission.**—Anon, 2 Atk. 52. In *Lincoln's Case*, 1 Brewst. (Pa.) 392, the court held that the commission should have a return day named therein. See also *In re* Plank, 5 Clark (Pa.) 35. In *England* the commission must be returned within a month. Shelf. Lun. 106.

4. *In re* Morgan, 7 Paige (N. Y.) 236; *In re* Rogers, 9 Abb. N. Cas. (N. Y.) 141. What is a sufficient finding has been discussed under the heading **DEFINITION, supra.**

5. *Ex parte* Atk., Jac. Ch. 333; *In re* Lasher, 2 Barb. Ch. (N. Y.) 97. *Contra*, *Carter Hinchman's Case*, Bright. (Pa.) 181.

On a hearing upon the return to a writ of *habeas corpus* for the discharge of a person adjudged insane, it appeared that the jury who examined the relator

failed to certify upon oath that the charge was correct, and that only two jurors qualified to do so signed the verdict. The relator was accordingly discharged from custody. *Territory v. Gallatin Co.*, 6 Mont. 297.

In *Weaver's Appeal*, 116 Pa. St. 225, the Common Pleas set aside an inquisition finding the fact of lunacy, upon the ground that the evidence was insufficient to sustain the finding. The Supreme Court, in reversing the decree, said: "It cannot be doubted that if there are objections to the regularity or validity of the proceedings, such as the appointment of improper persons as commissioners or jurors upon the inquest, or misbehavior in office by those functionaries; or if the formalities required by law have been disregarded; or if the alleged lunatic is not within the jurisdiction of the court, for these and other like causes doubtless the court may interfere, and if necessary set aside the inquest. But that is a very different kind of authority from the power to review the facts found by the inquest and determine them upon the merits, as those merits appear to the court. That kind of authority is not conferred by any law, and therefore we cannot hold it to exist. . . . To allow the court to review the testimony taken before the inquest and decide upon its merits, is practically to supersede the traverse which is the remedy provided by law. Nor do we understand how the court can have access to the testimony in order to review it. It is no part of the record and there is no provision for its return by the inquest or by the commissioner. The inquisition must be returned because the commission so directs, but not so as to the testimony. There is no provision for its reduction to writing, nor for bills of exception to bring it on the record. Moreover, if the court has power to examine and decide upon it finally, this court necessarily has power to review

tion,¹ but the proceedings are reviewable by *certiorari*.²

(e) *Traverse of the Inquisition*.—In England, and in those of the United States in which no right to notice of the execution of the commission is recognized in the alleged lunatic, a right to traverse the inquisition is accorded.³ In States where notice of the time and place of holding the commission is allowed to the alleged lunatic as a matter of right, a traverse is only allowed within the discretion of the court.⁴ A party in interest with the alleged lunatic may be permitted to traverse the inquisition.⁵

Upon the trial of a traverse, the inquisition is *prima facie* evidence, and casts upon the traverser the burden of proof.⁶ The

the action of the court below, but has no means of exercising that power, because the testimony cannot be brought before us for want of a bill of exceptions. Upon every view of the subject we are of opinion that the learned court below was in error in making absolute the rule to set aside the inquisition."

1. *Ex parte* Gest, 9 S. & R. (Pa.) 317.

2. *Commonwealth v. Beaumont*, 4 Rawle (Pa.) 367.

3. *In re* Cummings, 1 De G. Mac. & G. 537; *Walker v. Russell*, 10 S. Car.; 82; *Covenhoven's Case*, Sax. (N. J.) 19.

4. In *New York* a traverse is not allowed as a matter of right, but is within the discretion of the court. In *Christie's Case*, 5 Paige (N. Y.) 242, the court said: "In this case, as it appears that the alleged lunatic, in consequence of his age and other infirmities, cannot be brought before the court to be examined personally, I should not grant the traverse upon his application, without first having him examined privately by one of the masters of this court." See also *Ex parte* Tracy, 1 Paige (N. Y.) 580; *Clapp's Case*, 20 How. Pr. (N. Y.) 385; *In re* Russell, 1 Barb. Ch. (N. Y.) 38. In *Pennsylvania* the act of June 13th, 1836, § 12, provides that every person aggrieved by the inquisition, may traverse the same upon or after return thereof, and have the like remedy and advantage as in other cases of traverse upon untrue inquisitions, or office found. But the traverse must be taken and filed in the prothonotary's office within three months after the return of the inquisition, unless the court, on special cause shown, shall extend the time for so doing. Act of May 8th, 1874. See *Commonwealth v. Haskell*, 2 Brew. (Pa.) 491; *McGinnis v. Commonwealth*, 74 Pa. St. 245; *In re* Mary S. Perrine,

41 N. J. Eq. 409; *Eckstein's Case*, 1 Pars. (Pa.) 59; *Commonwealth v. Beaumont*, 4 Rawle (Pa.) 366.

5. *Who may Traverse an Inquisition*.—A grantee whose conveyance is invalidated by the inquisition will be permitted to traverse it, on stipulating to be bound by the final decision therein. *Yanger v. Skinner*, 1 McCart. (N. J.) 389; *Ex parte* Christie, 5 Paige (N. Y.) 242; *Medlock v. Cogburn*, 1 Rich. Eq. (S. Car.) 477. And where such a person has joined in a traverse, and consented to be bound by its results, the other parties cannot abandon it without his consent. *Ex parte* Giles, 11 Paige (N. Y.) 243.

The petitioner may traverse an inquisition in favor of sanity. *In re* Dickinson, 1 W. N. C. (Pa.) 96.

In *Fust's Case*, 1 Cox 418, the court refused leave to a husband to traverse an inquisition where there were circumstances which raised a question as to the validity of the marriage.

Mere strangers will not be permitted to traverse an inquisition. *Rorback v. Van Blarcom*, 5 C. E. Green (N. J.) 461.

6. *Effect of the Finding as Evidence*.

—In *McGinnis v. Commonwealth*, 74 Pa. St. 245, the traverser gave evidence to disprove the finding. The commonwealth then offered to rebut by evidence in support of the finding, to which it was objected that such evidence was in chief, and ought to have been given before the traverser began his evidence. The supreme court held that the evidence was properly admitted, saying: "The finding of the inquisition stands until it is set aside or disproved, and it may be unnecessary for the commonwealth to give any evidence. This effect of the finding is *prima facie*, according to many decisions, throwing the burden of disproof upon the lunatic.

trial is conducted and bills of exception taken to the evidence as in other trials before a jury, according to the course of the common law, and a writ of error lies to the rulings and charge of the court.¹

(f) *Supersedeas*.—The court to which an inquisition has been returned may, on petition of the lunatic setting forth that he has recovered, grant a *supersedeas* of the commission.² The usual practice in the United States is to refer the petition to a master to take proofs as to the state of mind of the petitioner, and to report the proofs and his opinion thereon.³ In England, the chancellor hears the petition in person, without a reference.⁴

or habitual drunkard." In *Rogers v. Walker*, 6 Pa. St. 371, it was contended that after defendant's proofs were given in rebuttal, the finding was to be laid out of the case; but GIBSON, C. J., denied this, saying: "Like legal presumption, an inquisition continues to operate till overpowered; and standing as full proof till then, it necessarily remains before the jury till the question of sanity has been decided by them. It consequently stands as a particular in the proofs." See also *Ludwick v. Commonwealth*, 18 Pa. St. 175; *Lecky v. Cunningham*, 56 Pa. St. 373; *Hill v. Day*, 34 N. J. Eq. 150.

1. *McGinnis v. Commonwealth*, 74 Pa. St. 245. In *Iowa* a person found by the commissioners of insanity to be insane may appeal to the circuit court within ten days after the finding is filed; but the statute does not provide for a rehearing before the commissioners; and from a refusal by them to grant a rehearing an appeal will not lie. *Wilson v. State*, 66 Iowa 487. In *Illinois* there is no right of appeal in a proceeding to enquire into the insanity of a person, under Rev. Stat. 1874, ch. 85; *People v. Gilbert*, 115 Ill. 59.

2. *Ex parte Rogers*, 1 Halst. Ch. (N. J.) 46; *Ex parte Bampton*, *Moseley* 78; *Ex parte Harks*, 3 Johns. Ch. (N. Y.) 567.

The court will not supersede a commission where the testimony shows that the petitioner is liable at any moment to become excitable beyond control. *Ex parte Helmbold*, 35 Leg. Intelligencer (Pa.) 291. In *Ex parte Ferrars*, *Moseley* 332, the court suspended the commission for several months to see if the petitioner was perfectly recovered. The chancellor may order the petitioner to be brought before him for examination. In *re Rogers*, 1 Halst. Ch. (N. J.) 46; *In re Dyce Sombre*, 1 Phillips

436; and he may discharge the committee at his discretion, or order an issue to try the question. *In re Weis*, 1 C. E. Green (N. J.) 318.

In *Dyce Sombre's Case*, 1 Mac. & Gor. 116, LORD CHANCELLOR COTTENHAM said: "There is often great difficulty in ascertaining whether there exists unsoundness of mind of a character to subject the party to the operation of a commission; but, when the jury have affirmed that proposition by a verdict unquestioned, the Great Seal has been most cautious in superseding it. Cases continually arise in which it is done; but although delusions and even general insanity may exist, and yet the Great Seal may withhold a commission if not required for the protection of person or property, upon application for a *supersedeas* very different conditions regulate the discretion of the court. There may be no proof of the disease at the time, but it may be likely to recur; it may still exist, but the patient may have the power to conceal it; the permanence of the restoration may be doubtful; and time is then taken for the proof of experience. . . . I have not in my recollection any case in which a commission has been superseded when any declared illusion continued." In this case, as it did not appear that the lunatic was competent to manage his estate, and as no application had been made to discharge the committee, the *supersedeas* was refused.

3. *Ex parte Rogers*, 1 Halst. Ch. (N. J.) 46; *Weaver's Appeal*, 116 Pa. St. 225.

4. *In re Weis*, 1 C. E. Green (N. J.) 318.

Costs.—In *Hassenplug's Appeal*, 106 Pa. St. 527, upon petition of A alleging that B was *non compos mentis*, the court awarded a commission in the

(g) *Costs*.—As a general rule, the whole subject of costs in lunacy proceedings is within the discretion of the court. Where the proceedings are undertaken upon probable cause and in good faith, the costs are regarded as necessary expenses incurred for the benefit of the party, and are payable out of his estate.¹

5. *Committees and Guardians*—(a) *Who May be Appointed*.—On the return of an inquisition finding a person a lunatic, the court may, in its discretion, commit the custody of the lunatic's per-

nature of a writ *de lunatico inquirendo*, and the return found B to be a lunatic. B traversed the return, and obtained a verdict and judgment that he was sane. Subsequently the court, being of opinion that the original application of A was not without probable cause, imposed all the costs of the proceedings upon B, who appealed. The supreme court affirmed the decree. See also *In re Beckwith*, 3 Hun (N. Y.) 443; *In re Root*, 8 Paige (N. Y.) 625; *In re Arnhout*, 1 Paige (N. Y.) 497; *In re E. S., L. R.*, 4 Ch. D. 301; *In re White*, 2 C. E. Green (N. J.) 274.

When Paid Out of Lunatic's Estate.

—Costs may be ordered to be paid out of the alleged lunatic's estate before final decree, where there is no certificate of the absence of probable cause. *Clark's Case*, 22 Pa. St. 466. But costs are not payable out of the proceeds of the sale of a lunatic's real estate until the costs of the sale and the debts of creditors having a prior lien are satisfied. *Malone's App.*, 79 Pa. St. 481.

In *Weaver's Case*, 116 Pa. St. 225, it was decided that where the common pleas had set aside an inquisition finding the fact of lunacy upon the ground that the evidence was insufficient to sustain such finding, it was error to impose the costs of the proceedings upon the petitioner.

In *Dyce Sombre's Case*, 1 Mac. & G. 116, where a petition for a *supersedeas* was presented in the name of a lunatic and was dismissed, the court refused to make any order as to costs; although it was apparent that the petition originated with third parties, the court considering that it had no power to make those parties pay the costs.

In *Folger's Case*, 4 Johns. Ch. (N. Y.) 169, where on petition of a relative of a lunatic who had received from him a deed of a farm a few days before the finding of the inquisition of lunacy, an issue was awarded to try the fact of lunacy, and the party on trial was found to have been a lunatic for several

years preceding, the party traversing the inquisition was ordered to pay the costs. See also *In re Crosbie*, 11 Ir. Ch. 432; *In re Clapp*, 20 How. Pr. (N. Y.) 385; *In re Lytle*, 3 Paige (N. Y.) 251.

In *Indiana* it was *held*, that where a proceeding to set aside a guardianship of an insane person is unsuccessful, the costs should be taxed on the plaintiff, and not upon the guardian or estate of the insane person. *Cochran v. Amsden*, 104 Ind. 282.

The costs of an inquisition should be taxed by the court having jurisdiction over the proceedings. *Gulick v. Conover*, 3 Green (N. J.) 420.

1. *Counsel Fee*.—The estate of the lunatic is liable in the hands of the committee for the professional services of the attorney who conducted the lunacy proceedings. *Weir v. Myers*, 34 Pa. St. 377; *Brownlee v. Switzer*, 49 Ind. 221. In *New York* it was *held* that where an inquisition was found in favor of the alleged lunatic, the court could not grant an allowance for counsel fees, witnesses, etc., to him, and charge the same upon the petitioner. *In re McAdams*, 19 Hun (N. Y.) 292.

In *Indiana* in a proceeding to have a person adjudged to be of unsound mind and to secure the appointment of a guardian for such person, it is the duty of the guardian, under section 5, 2 R. S. 1876, p. 600, to pay, out of the assets or property of the ward, reasonable attorney's fees to the attorney employed to conduct the inquest; but it was *held* that no specific contract in relation thereto, made before the determination of the inquest, could bind the estate of the ward beyond the reasonable value of the services thus rendered; and, in an action therefor by the attorney against the guardian, where the complaint was so framed as to permit a recovery of what such services were worth, it was *held* that it was not necessary to prove an alleged agreement to pay a particular sum. *State v. Newlin*, 69 Ind. 108.

son or estate, or both, to some suitable person or persons.¹ The lunatic's next of kin or heir-at-law are preferred in the appointment of the committee;² but, as a general rule, such person will be appointed as will be most likely to protect the property from loss, without regard to the question of relationship.³

(b) *Management of the Estate.*—A committee appointed by a court of equity in the exercise of ordinary equity powers, is a mere officer of the court, responsible to the court, and acts only under its order and authority.⁴ He is entitled to the control and

1. An order making appointment of committee after inquisition, is not subject to appeal. *Willis v. Lewis*, 5 Ired. (N. Car.) 14. Except in states where the care of insane persons and their estates is given to the probate court. *McDonald v. Martin*, 1 Mass. 543.

2. *Ex parte Livingston*, 1 Johns. Ch. (N. Y.) 436; *In re Colvin*, 3 Md. Ch. 278; *Ex parte Le Heup*, 18 Ves. 221; *Ex parte Cockayne*, 7 Ves. 591.

3. In *Taylor's Case*, 9 Paige (N. Y.) 610, there was a contest over the validity of a marriage between the lunatic and a woman with whom he had lived for many years. The marriage having been established, a question arose as to whether a committee named by the children of a former marriage or one named by the children of the second marriage should be appointed. On this question the court decided as follows: "Although it is not a matter of course to commit the guardianship of the property of a lunatic to those who would be entitled to it at his death, as his heirs or next of kin, there are in this case several reasons why the committee named by those who have supported and established the validity of the second marriage should be preferred to the committee proposed by the adverse parties. *Timpson*, one of the committee thus named, having married a daughter of the first wife, has a common interest with the other three children of that marriage in protecting the property against any unreasonable charges thereon for the maintenance of the second wife or her children. And he having also been well acquainted with the situation of the lunatic's property and affairs for the last twenty-five years, and his wife having a contingent interest in the estate, he will be more likely to protect the property from loss than a mere stranger. The other person named to act with him is the son of the

lunatic by the last wife. He is therefore interested in protecting the property from loss. And being a lawyer, he will be able to save considerable expense to the estate in the way of legal advice in the management of the property." See also *Ex parte Colab*, 3 Daly (N. Y.) 529; *In re Owens*, 5 Daly (N. Y.) 288.

In *Coleman v. Commissioners*, 6 B. Mon. (Ky.) 239, the father of the lunatic was appointed as the committee. In *Owen's Case*, 5 Daly (N. Y.) 288, the clerk of the court was appointed. In *Gibson's Case*, 1 Bland's Ch. (Md.) 138, the wife was appointed; and in *Drew's Appeal*, 57 N. H. 181, the husband was appointed.

In *New York* it has been held that a stranger cannot be appointed committee without the consent of the next of kin, except after a reference, of which they are entitled to notice. *Ex parte Lamoree*, 32 Barb. (N. Y.) 122; s. c., 11 Abb. Pr. (N. Y.) 274; *Ex parte Owens*, 47 How. Pr. (N. Y.) 150. In *Owen's Case*, 5 Daly (N. Y.) 288, a mother made application to have a committee of the person and estate of an idiot appointed, and upon her consent the clerk of the court was appointed. A sister of the idiot thereupon applied to have the order of appointment vacated, on the ground that no notice of the proceedings had been served upon her. The court held that the proceedings were regular without the consent of the sister, and refused to vacate the order. See also *In re Lord Bangor*, 2 Molloy 518.

A nonresident will not be appointed. *Boarman's Case*, 2 Bland's Ch. (Md.) 89; *Morgan's Case*, 3 Bland's Ch. (Md.) 332. Nor a person who has acted as solicitor under the commission of lunacy. *Ex parte Pincke*, 2 Mer. 452.

4. *The Committee Is the Bailiff of the Court.*—"The committee is the mere bailiff or servant of the court, and as such is subject to its direction in every-

management of the estate of the lunatic, and, under the direction of the court, applies the income to the support and maintenance of the lunatic.¹ The paramount consideration in regard to all expenditures is the comfort and ease of the lunatic himself, and this is always superior to the rights of those who are entitled to the estate after the lunatic's death.²

Where the estate is sufficient to maintain him and his household in the manner he had chosen for himself before his lunacy, and such maintenance is best adapted for his comfort and ease after his lunacy, the court will authorize the committee to expend a sufficient amount of the estate for that purpose.³

thing that pertains to the management of the lunatic's estate, and the maintenance of himself and family." *Shaffer v. List*, 114 Pa. St. 486; see also *Bolling v. Turner*, 6 Rand. (Va.) 584; *In re Fitzgerald*, 2 Sch. & Lef. 432.

In states where the probate courts have jurisdiction over lunatics, the duties of committees are the same as those of guardians of minors. *Anderson v. Anderson*, 42 Vt. 350.

In New York it was held that a lunatic is not divested of his property by the appointment of a committee, the committee not holding the title as trustee. *People v. Comrs. of Taxes*, 99 N. Y. 154.

Where a committee of a lunatic expends money of the corpus of the lunatic's estate in the repair of real estate, without obtaining an order of court authorizing him to do so, he runs the risk of having his action disapproved, and of being surcharged. But where the court subsequently approves such expenditure as reasonable and necessary, the ratification is equivalent to a previous order. *Frankenfeld's Appeal*, 102 Pa. St. 589; see also *Patton v. Thompson*, 2 Jones Eq. (N. Car.) 411; *Kennedy v. Johnson*, 65 Pa. St. 451.

1. Conflict Between a Trustee and the Committee.—Where, however, the legal title in the lunatic's estate is already vested in another as trustee, such a trust will not be superseded by the appointment of a committee. In *Rudy's Appeal*, 20 W. N. C. (Pa.) 241, where a testamentary trustee had active duties to perform, it was held that he would not be required to pay over either the principal or income of the lunatic's estate to the committee. But in *Royer v. Meixel*, 19 Pa. St. 240, where real estate was devised to a lunatic, and the executors were merely to take charge of it in order to prevent its alienation,

it was held that the committee had the right to receive the income. See also *Earp's Estate*, 2 Pars. (Pa.) 178; *Canada v. Hopkins*, 7 Bush. (Ky.) 108; *Wagner's Estate*, 18 W. N. C. (Pa.) 430; *Wilson's Estate*, 2 Pa. St. 325.

2. Comfort of the Lunatic Only to be Considered.—In *Oxenden v. Complin*, 2 Ves. Jr. 69, LORD LOUGHBOROUGH said that in the management of the estate "the benefit of the lunatic only is to be considered, not that of the representatives." See *Ex parte Baker*, 6 Ves. 8; *Dormer's Case*, 2 P. W. 262; *Ex parte Whitbread*, 2 Meriv. 99; *Kendall v. May*, 10 Allen (Mass.) 59. In May v. May, 109 Mass. 256, the court said: "The guardian is appointed for the welfare, comfort and security of the ward; and not for the increase of the estate in his hands by accumulations from the income, in order to enlarge the wealth of remote or collateral relatives, who may ultimately succeed to the inheritance. It is no part of his duty to diminish the reasonable comforts of his ward, or to prevent him from enjoying such luxuries, or indulging such tastes, as would be allowable and proper in the case of a man similarly situated in other respects, but in full possession of his faculties." In this case the guardian of the lunatic, whose estate was worth \$200,000, spent four hours three times a week in visiting and driving with his ward, and superintending the management of his house and grounds, and the ward's spirits and condition was much improved by these visits, it was held that a monthly charge of \$100 for personal services should be allowed to the guardian in addition to his commissions.

3. Maintenance of the Lunatic's Household.—Thus in *Hambleton's Appeal*, 102 Pa. St. 50, an old man, a widower and without children, having a large estate,

The personal estate is primarily liable for the lunatic's support, and the real estate cannot be sold until the personal estate is exhausted.¹ The real estate may be sold to pay debts, but an order for sale will not be made where the effect of the sale would

took a nephew and his family to live with and take care of him and his estate, paying the nephew a salary, and supporting the nephew and his family as part of his household. Subsequently he became afflicted with senile dementia, though retaining sound physical health, and he was adjudged a lunatic. A committee of his estate was appointed by the court, and the nephew was appointed committee of the person. The latter fulfilled his duties satisfactorily, and, by order of court, received from the committee of the estate a sufficient monthly allowance to continue the household in the same manner as before the lunacy, and also to pay his salary as before. Upon the audit of his account, the auditor and the lower court surcharged him with one-half the cost of food for the household and the wages of one servant. On appeal the supreme court held that the committee had done what it might reasonably be supposed the lunatic would have continued to do if he had retained his sanity; and what was apparently best adapted for the peace and comfort of the lunatic; and that it was, therefore, error to surcharge the committee with any cost of so maintaining the lunatic's household, including the committee and his family. In *Frost's Case*, L. R., 5 Ch. App. 699, allowances were made out of a lunatic's estate to needy collateral relatives for whom the lunatic, while sane, had expressed an intention to make provision. In *Haycock's Case*, 5 Russ. Ch. 154, an allowance was made to illegitimate children of the lunatic. In *Whitbread's Case*, 2 Mer. 99, to brother and sisters. In *Caryfort's Case*, Craig & Phil. 76, to an old personal servant as a retaining pension. In *Willoughby's Case*, 11 Paige (N. Y.) 257, to adult children of the lunatic.

Contributions to Charity by Lunatic.—The lunatic, if sufficiently competent to make a proper judgment, may be allowed to make reasonable contributions to charitable objects. In *re Strickland*, L. R., 6 Ch. App. 226; In *re Heeney*, 2 Barb. Ch. (N. Y.) 326. He may also, under proper circumstances, make gifts. In *re Gilbert*, 3 Abb. N. Cas. (N. Y.) 222.

Travelling Expenses.—Reasonable travelling expenses will be allowed. In *re Hackett*, 3 Ir. Ch. 375. In *Ex parte Colah*, 15 Abb. Pr., N. S. (N. Y.) 209, where a native of Bombay, temporarily resident in New York, became insane and a committee of his person and estate was appointed, it was held that the court had power, on it being made to appear that the mental and physical condition of the lunatic would be improved, by placing him in the custody of his family in his native land, to send him home in charge of his committee, and to direct the payment of the expenses thereof, out of the estate of the lunatic. See also *In re Jones*, 1 Phillips 461, where leave was granted the lunatic to reside in Scotland.

Where a lunatic, before he became insane, provided a home for his wife and children, his committee cannot maintain ejectment against the wife for possession of the house. *Shaffer v. List*, 114 Pa. St. 486.

1. *Ex parte Taylor*, 9 Paige (N. Y.) 611; *In re Pettit*, 2 Paige (N. Y.) 596; *In re Hoag*, 7 Paige (N. Y.) 312.

Payment of Lunatic's Debts.—In *Pennsylvania* the act of June 13th, 1836, provides that if the lunatic's personal estate is insufficient to pay his debts, the court may make an order for the sale or mortgage of the real estate. *Eckstein's estate*, 1 Pars. (Pa.) 59.

In *Illinois* the court of chancery may order the sale of the lunatic's lands to provide for his support. *Dodge v. Cole*, 97 Ill. 338. In this case it appeared that at the time of the entering of a decree for the sale of the land of a lunatic, by her conservator, there was no statute which in terms authorized courts of chancery to entertain applications for the sale of real estate belonging to idiots or insane persons, yet it was held that the court of chancery, under its general powers over the estates of infants and lunatics or distracted persons, had jurisdiction to order the sale of a lunatic's land for her support and maintenance, on a proper application by her conservator, or to pay the conservator for moneys expended by him in supporting such ward; he having no remedy at law.

be to reduce the lunatic to a condition of want.¹ A sale of a lunatic's real estate does not ordinarily convert it into personalty;² but this rule is not uniformly applied by the courts, and is subject to numerous exceptions.³

(c) *Suits by Lunatics or Their Committees.*—As a general rule, the rights of a person who has been adjudged insane must be enforced by his committee or guardian. In most of the States, if the insane person is of full age, suits at law must be brought in

The supreme court of the *District of Columbia*, sitting in equity, has jurisdiction to direct a sale of a lunatic's real estate for his support and maintenance. *In re Brent*, (D. C.) 5 Cent. Rep. 449.

Sale of Lunatic's Real Estate for Payment of Debts.—In *Dorney's Estate*, 59 Md. 67, the trustee of the estate of a lunatic died, and a new trustee was appointed in her place, who filed his petition verified by affidavit, asking that a part of the real property of the lunatic might be sold for the payment of taxes in arrear or his property, and of a debt incurred for his support. The petition set forth the facts showing the necessity for a sale, and designated the property which the trustee deemed it most advisable for the lunatic to sell. *Held*, (1st) That taxes were a necessary incident attaching to the property of the lunatic, and were a part of the necessary expenses which his trustee was bound to pay. (2nd) That this petition presented a case that warranted the court below in ordering a sale, without the formalities prescribed by section 83 of article 16.

In *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525, it was *held* that the filing of a petition showing the existence of a valid outstanding debt against the insane person, which requires the disposition of his real estate to enable his committee to pay, vests the court with jurisdiction of the subject matter under the New York act, and such jurisdiction is not divested by subsequent irregularities unless steps are taken in violation of some express provision of the act. It was accordingly *held*, in an action to foreclose a mortgage executed by the committee of a lunatic, to raise money to pay the claim of an asylum for his support and maintenance, that, in the absence of a finding to support it, the court might not, for the purpose of subverting the order authorizing the execution of the mortgage, presume that there were other debts of the lunatic outstanding which were not provided

for, or, as the order recited the necessary jurisdictional facts, that the petition presented to the court failed to show any of the facts necessary to give jurisdiction.

In the above case it was stated that notice of the petition for sale was not required to be given to the lunatic.

1. *Ex parte Dikes*, 8 Ves. 79; *Adams v. Thomas*, 81 N. Car. 296; *In re Latham*, 4 Ired. Eq. (N. Car.) 231.

2. **Sale of Lunatic's Real Estate Under Proceedings in Partition.**—The sale of a lunatic's real estate under proceedings in partition does not convert it into personalty; nor does a taking it for public use on compensation made. *Cutting v. Lincoln*, 9 Abb. Pr., N. S. (N. Y.) 436. In *Barker's Case*, L. R., 17 Ch. D. 241, by an order made in a partition suit, a share of real estate belonging to a lunatic was sold, and the proceeds paid into court to the credit of the matter of the lunacy, but they were not carried to a real estate account. The lunatic died intestate and his administrator claimed the money as part of the personal estate. It was *held* that the money retained the character of real estate and passed to the lunatic's heir at law. See also *In re Wharton*, 5 DeG. Mac. & G. 33; *Audley v. Audley*, 2 Vern. 192; *In re Pares*, L. R., 2 Ch. D. 61.

3. **Conversion.**—A conversion of personalty into realty or realty into personalty will take place where it is for the benefit of the lunatic himself. Thus, if it is for the interest of the lunatic timber may be cut and sold. *In re Salisbury*, 3 Johns. Ch. (N. Y.) 347. Unproductive real estate may be improved out of the personal estate. *In re Livingston*, 9 Paige (N. Y.) 440. And real estate may be repaired out of the personal estate. *In re Badcock*, 4 Myl. & C. 441. See also *In re Colvin*, 4 Md. Ch. 90; *Clarke v. Ruttan*, 11 Grant's Ch. (Canada) 416; *In re Gist*, L. R., 5 Ch. D. 881; *Smith v. Bagwright*, 7 Stewart Eq. (N. J.) 424.

his name;¹ if not of full age, it must be brought in the name of his committee.² Equity suits must be brought in the name of both committee and lunatic.³

1. In *Petrie v. Shoemaker*, 24 Wend. (N. Y.) 85, ejectment was brought by the committee of a lunatic in their own name. The court in granting a new trial said: "This action is wholly misconceived. It should have been brought in the name of the *non compos*. The committee have no estate in his lands. They are regarded as mere bailiffs acting under the direction of the court of chancery, which has the care and custody of idiots and lunatics and of their real and personal estate." In *North Carolina* suit cannot be brought by the committee in his own name. *Brooks v. Brooks*, 3 Ired. (N. Car.) 389. See also *Reed v. Wilson*, 13 Mo. 28; *Jelly v. Elliott*, 1 Ind. 119; *Green v. Cornegay*, 4 Jones (N. Car.) 66; *Cathcart v. Sugenhimer*, 18 S. Car. 123; *Holden v. Scanlin*, 30 Vt. 177. In *Virginia* suit must be brought in the name of the committee. *Bird v. Bird*, 21 Gratt. (Va.) 712. So also in *Illinois*. See *Chicago etc. R. Co. v. Munger*, 78 Ill. 300. And the same rule applies in *Alabama*. *Dearman v. Dearman*, 5 Ala. 202. In *Pennsylvania* an action of ejectment may be brought in the name of the committee. *Warden v. Eichbaum*, 14 Pa. St. 121. But a personal action, it seems, must be brought in the name of both committee and lunatic. The reason of this is stated by the court in *Beale v. Coon*, 2 Watts (Pa.) 184, as follows: "All actions by or on behalf of a lunatic placed by law in the care of a committee must be in the name of the lunatic and the committee. The latter must join to manage the interests of one who is disabled to protect himself; and the lunatic must be joined, because he may recover his understanding, and then is to have the management and disposal of his estate." It was held in *Klohs v. Reifsnyder*, 61 Pa. St. 243, that since the act of Feb. 20th, 1867 (P. L. 30), there is no doubt but that the committee of a lunatic may maintain an action of partition.

In *Hayes v. Miller*, 81 Mo. 424, it was held that an insane husband who is under guardianship cannot be joined in a suit with his wife. It is the duty of the guardian of an insane person to prosecute and defend all actions instituted in behalf of or against his ward.

A person under guardianship, as of

unsound mind, cannot sue to impeach sales of his property made by his guardian. *Robeson v. Martin*, 93 Ind. 420. A committee cannot be appointed to bring suit for a sane man because at one time he was a lunatic. He must bring suit himself to recover his rights, and he may prove insanity to avoid a deed set up against him on the same terms as if he were defendant in the action, and the plaintiff were supporting his case with the same deed. *Crawford v. Scovell*, 94 Pa. St. 48. So also one who has executed a mortgage when insane may maintain a suit in equity to annul it. *Kerwin v. Hibernia Ins. Co.*, 25 Fed. Rep. 692.

2. *McCreight v. Aiken, Rice* (S. Car.) 56.

3. **Equity Suits Must be Brought in the Name of the Lunatic.**—In *Cathcart v. Sugenhimer*, 18 S. Car. 123, it was held that where equitable relief is sought in the court of chancery, the committee may sue alone and without using the name of the lunatic as a party plaintiff, and that the judgment will be as binding upon the lunatic's estate as if he were personally present. This subject was fully considered in *Gorham v. Gorham*, 3 Barb. Ch. (N. Y.) 31. CHANCELLOR WALWORTH there said: "In some of the earlier decisions in the court of chancery in England, it was settled that where a bill or information was filed to set aside an act done by a lunatic, upon the ground of his incompetency, it was not necessary that the lunatic himself should be a party. The case of *Attorney General v. Parkhurst* (1 Ch. Cas. 112), which is one of the cases alluded to, was settled upon great consideration . . . The decision was probably based upon the principle that the lunatic should not be compelled to stultify himself, and I am not aware that it has ever been overruled. It was, therefore, properly followed by CHANCELLOR KENT in the case of *Otley & Baker v. Messere*, 7 Johns. Ch. (N. Y.) 139, where a bill was filed by the committee of the lunatic to set aside acts done by the lunatic when he was incompetent. It was not intended, however, in the case of *Attorney General v. Parkhurst* (1 Ch. Cas. 112), to decide that the attorney general or the committee could file an information or

Where a person is insane, but has not been judicially adjudged so, suits both at law and in equity should be brought by some person as the next friend of the lunatic.¹

a bill for the benefit of a lunatic in all cases, without joining the lunatic himself as a party. For in the case of *Palmer, Attorney General, v. Woolrich* (1 Ch. Cas. 153), which was decided the next year by the same lord keeper. SIR ORLANDO BRIDGMAN, he allowed a demurrer to a bill filed by the attorney general for the benefit of a lunatic, upon the ground that the lunatic was not a party; the bill in that case not being brought for the purpose of avoiding any act done by the lunatic after the loss of his reason. And this decision was in conformity with the note at the end of the report of the case of *Fuller v. Lance* (1 Ch. Cas. 19), which was decided six years previous to that time. In accordance with this decision the bills in the cases of *Clark v. Clark*, 2 Vern. 412, and *Addison v. Dawson* (2 Vern. 678) . . . appear to have been filed in the name of the lunatic by his committee, in the same manner that an infant files a bill by his next friend. In 1729 the question came before LORD CHANCELLOR KING in the case of *Ridder v. Ridder*, 1 Eq. Ca. Abr. 279, whether the lunatic was at liberty to join with his committee in a bill filed to set aside a deed of settlement obtained from him after he became a lunatic; the defendant having objected by demurrer that it was against the maxim of law to permit a party to stultify himself; and his lordship decided that the lunatic might be a party to the bill, for that purpose, with the committee. The result of these several decisions was, that where the object of the bill was to set aside the act or deed of the lunatic upon the ground of his mental incapacity at the time the act was done, or the deed was executed, the bill might be filed by the committee, or the attorney general alone, or by joining the lunatic with the committee.

And the practice in England ever since that time appears to have been either to join the committee with the lunatic in bringing suits for his benefit, or to file a bill in the name of the lunatic by his committee." The chancellor further remarked: "When it is said by these writers that idiots and lunatics must sue by their committees, it is not meant that the suit is to be brought by the committee in his own name, merely describing himself as the

committee of the lunatic, as has erroneously been supposed by the court of one of our sister states; but they mean that the suit should be brought in the name of the lunatic, stating that he sues by the committee of his estate, naming them, as in the case of an infant suing by his next friend, or that the suit should be prosecuted in the names of the lunatic and of his committee." In this case a bill brought by the committee of a lunatic in their own names as committee, without joining the lunatic, and praying for a partition of lands of which the lunatic was a part owner, was held to be defective in form. See also *Norcom v. Rogers*, 1 C. E. Green (N. J.) 484; *Dorsheimer v. Roorback*, 2 C. E. Green (N. J.) 438; *Burnet v. Bookstaver*, 10 Hun (N. Y.) 481; *Fields v. Fowler*, 2 Hun (N. Y.) 400; *Owing's Case*, 1 Bland's Ch. (Md.) 290; *McKillip v. McKillips*, 8 Barb. (N. Y.) 552; *Person v. Warren*, 14 Barb. (N. Y.) 488.

1. **When Suits May be Brought by the Next Friend.**—In *Whetstone v. Whetstone*, 75 Ala. 495, it was held that a person *non compos mentis* may sue by next friend, before and without an inquisition of lunacy; but a mere volunteer who institutes a suit as next friend of a *non compos* before there has been an inquisition of lunacy, always proceeds at his peril that the alleged *non compos* may not in fact be so, or may recover and repudiate his interference; or that the chancery court may not consider him a suitable person, and may disallow his intermeddling.

In *Dorsheimer v. Roorback*, 3 C. E. Green (N. J.) 438, a bill was dismissed which had been filed by one styling himself the next friend of the lunatic, but who had not been appointed guardian nor authorized by the court to file the bill.

In *Illinois* it is provided by statute that the conservator of a lunatic shall "sue for and receive in his own name, as conservator, all personal property of and demands due his ward." But until the conservator is appointed, suit may be brought in the name of the lunatic. *Chicago etc. R. Co. v. Munger*, 78 Ill. 300.

See also *Light v. Light*, 25 Beav. 248; *Nelson v. Duncombe*, 9 Beav. 211; *Jetton v. Smead*, 29 Ark. 372. A wife

(d) *Suits Against Lunatics or Their Committees.*—At common law, an insane person could be sued and a valid judgment rendered against him, even after inquisition found. Service of summons was made upon him personally, and execution issued against his person or property.¹

In those of the United States in which courts of chancery have entire jurisdiction over insane persons, suits at law against such persons will be restrained by the chancellor, and debtors will be satisfied by proceedings in equity.²

In Pennsylvania, suits at law will not be restrained, but the court will restrain a levy upon the lunatic's property.³

may sue as next friend of her husband. *Rock v. Slade*, 7 Dowl. Pr. Cas. 22.

1. Shelf. Lun. 395; *Henry v. Brothers*, 48 Pa. St. 70; *Ingersoll v. Harrison*, 48 Mich. 234; *McAlister v. Lancaster Co. Bank*, 15 Neb. 295; *Stigers v. Brent*, 50 Md. 214; *Walker v. Clay*, 21 Ala. 797; *Weber v. Weitling*, 3 C. E. Green (N. J.) 441; *Johnson v. Pomeroy*, 31 Ohio 247. In *Henry v. Brothers*, 48 Pa. St. 70, on a *scire facias* to revive a judgment, the defendant pleaded his own lunacy, and offered in evidence the record of the lunacy proceedings by which he was found to be insane at the time the original judgment was entered. The offer was rejected, and on a writ of error the supreme court held that "the fact that the defendant was a lunatic when the debt was contracted would not make the judgment against him void," for "a judgment may be given against one who is *non compos mentis*." See *Nutt v. Verney*, 4 T. R. 121; *Kevnott v. Norman*, 2 T. R. 390; *Anon*, 13 Vesey 589; *Ex parte Hastings*, 14 Vesey 182; *Ex parte Lighton*, 14 Mass. 207.

2. In *New York* it is a contempt of court to begin a suit, without permission, against one who has been judicially declared a lunatic. *Ex parte Heller*, 3 Paige (N. Y.) 199; *Ex parte Hopper*, 5 Paige (N. Y.) 489; *Soverhill v. Dickson*, 5 How. Pr. (N. Y.) 109; *Williams v. Cameron*, 26 Barb. (N. Y.) 172. Where a creditor seeks to obtain payment out of a lunatic's estate, he should first cite the committee to file an inventory, and then petition the court for payment. *Brasher's Executors v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 242. In the leading case of *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, the New York practice as to the recovery of debts against lunatics is stated as follows: "If any person has a legal or

equitable claim against him, or his estate, the proper course is to apply to this court by petition for the payment thereof; and if the claim is disputed or doubtful, it may be referred to a master to ascertain the facts. It is not proper even to subject the estate to the expense of a proceeding by bill, except by the direction of the court. The statute having given to this court exclusive jurisdiction in such cases, and charged it with the duty of providing for the support of the lunatic and his family, and for the payment of his debts out of the estate, the chancellor will see that the legal and equitable rights of the creditors are protected and enforced. But this must be done according to the usual forms of proceeding in this court, or by suits instituted under its direction. None of the creditors will be permitted to take the law into their own hands and mete out justice to themselves according to their own ideas of their equitable rights." See also *Swartwout v. Burr*, 1 Barb. (N. Y.) 495; *Soverhill v. Dickson*, 5 How. Pr. (N. Y.) 109; *Crippen v. Culver*, 13 Barb. (N. Y.) 424. The courts will grant permission to sue a lunatic where the person applying shows such a cause as would justify a court of equity in granting relief if the facts alleged were established on the trial. *In re Wing*, 2 Hun (N. Y.) 671.

In *Miller v. Potter*, 54 Vt. 267, a writ was issued, and judgment rendered, by a justice of the peace, against the plaintiff while he was insane and under guardianship. Held, that *audita querela* will lie to set aside such judgment; that, by force of the statute, the justice had no power to issue a writ against the ward; that all the proceedings were *coram non iudice*; and that consent cannot confer jurisdiction in such a case.

3. *Executions Against Lunatic's Es-*

In Illinois, suits must be prosecuted against the conservator of the insane person.¹

In England, and in those of the United States where lunatics may be sued at law, service of the summons may be made upon the insane defendant, but if a committee has been appointed for him, the committee should also be served.² After service of summons, the insane defendant, if of full age, may appear and defend by attorney.³ In some States it is provided by statute

tate Restrained in Pennsylvania.—In *Eckstein's Case*, 1 Pars. (Pa.) 59, a creditor who had obtained judgment against a lunatic prior to the inquisition was not permitted to levy an execution upon the lunatic's property in the hands of the committee. In this case JUDGE KING said: "By recognizing the right of such creditor to issue execution on a judgment after inquisition found, and of levying such execution not only on the real estate of a lunatic, on which it may be a specific or general lien before such finding, but on the general personal estate of the lunatic, we produce results so disastrous, that no equitable tribunal should permit them to happen, unless the necessary consequents of positive law. To declare the whole estate, real and personal, of a lunatic, liable to the execution of the first creditor who can obtain judgment against him is to invoke a race for priority among the creditors of one whose sufferings, under the most afflicting of the visitations of God's providence, entitle him to the most kindly consideration of his fellow men. It leaves the more humane creditor no alternative between entering into the struggle or losing his debt, where the estate of the lunatic is not fully adequate to meet the execution of each successive creditor who brings suit. It would multiply litigation, by turning every demand against a lunatic's estate into an action at law; where the doubts or fears of creditors should induce them to make the effort for priority, the costs and expenses of which must of course be borne by the estate of the lunatic, and so far depreciate the fund left for his support and that of his afflicted family, if any he has. It would render the guardian care of this court over the estates of lunatics almost valueless, and would neutralize that grand element of equity, equality. If, on the contrary, should we adopt that construction of the 45th section of the act relative to lunatics, which gives any person claim-

ing to be the creditor of a lunatic the absolute right of having his claim ascertained by a trial by jury, and then leaves him as to the means of obtaining payment in the same position as all other creditors equally meritorious, perfect justice is done to all, and unjust preference is given to none." In *Ash v. Conyers*, 2 Miles (Pa.) 94, the court opened a judgment obtained pending a proceeding in lunacy; and in *Alexander v. Ticknor*, 1 Phila. (Pa.) 120, the court refused to enter judgment against a lunatic, a committee not having been appointed. In *Harmstead v. Kingsley*, 3 W. N. C. (Pa.) 64, it was held that an attachment execution could not issue against a lunatic defendant.

1. *Morgan v. Hoyt*, 69 Ill. 489.

In *Mississippi* the guardian must be joined as a party defendant to the suit. *Potts v. Hines*, 57 Miss. 735.

2. In *Michigan* an insane person continues liable to suit and to the personal service of summons.

In *California* if the insane person has no guardian, he may be served personally. *Sacramento Savings Bank v. Spencer*, 53 Cal. 737.

In *Pennsylvania* a writ against a lunatic must be served upon his committee, and there must be a suggestion of record of the inquisition and of the name of the committee. *Hulings v. Laird*, 21 Pa. St. 265. A summons in partition may be served upon the committee of a lunatic. *Snowden v. Dunlavy*, 11 Pa. St. 522.

Where a personal service has not been made, but service has been made upon a member of the defendant's household or upon his attorney, and afterwards an appearance is entered for the defendant, the service is sufficient: *Stigers v. Bent*, 50 Md. 214; *Doe dem. Gibbard v. Roe*, 3 Mac. & G. 87. See also *Sturges v. Longworth*, 1 Ohio St. 544.

3. *Beverley's Case*, 4 Coke 124 b; *Royston's Appeal*, 53 Wis. 612; *In re Northington*, 37 Ala. 496.

that a guardian *ad litem* may be appointed.¹ In equity, the general practice is to appoint a guardian *ad litem*. If the lunatic has a guardian, the guardian should be made a party to the suit.² Insanity is a good plea to an action against an insane person. The ancient rule that such a plea was in violation of the maxim that no one should be admitted to stultify himself is rejected by the modern authorities.³

1. **Guardian ad Litem.**—McNees *v.* Thompson, 5 Bush. (Ky.) 686; Yount *v.* Turnpaugh, 33 Ind. 46; Speak *v.* Ransom, 2 Tenn. Ch. 210. See also Stirges *v.* Longworth, 1 Ohio St 544; Walker *v.* Clay, 21 Ala. 797. In Mansfield *v.* Mansfield, 13 Mass. 412, on a libel for divorce, it was suggested to the court that since the commission of the crime of adultery by the husband, who was the respondent, he had become insane. The court ordered the libel to be continued, observing that the libellant, if so advised, might procure the appearance of a guardian, and upon the appearance of such guardian in the suit, further proceedings might be had. See also Van Horn *v.* Haven, 10 Vroom (N. J.) 207; Pub. Sts. Mass., ch. 146, § 14; Little *v.* Little, 13 Gray (Mass.) 264.

2. **Search *v.* Search**, 11 C. E. Green (N. J.) 110; Attorney General *v.* Waddington, 1 Mad. 321; Wilson *v.* Grace, 14 Ves. 172; New *v.* New, 6 Paige (N. Y.) 237; Stirges *v.* Longworth, 1 Ohio St. 544. Where a defendant has been found a lunatic by a regular commission, and is in custody, and it is so stated, it is a matter of course for him to answer a bill by his committee, without any special order for that purpose; but where it appears that the lunatic's committee is interested in the subject in controversy, it is necessary to appoint a disinterested person as his guardian to answer for him. Hewitt's Case, 3 Bland's Ch. (Md.) 184.

Notice of Appointment of Guardian ad Litem.—Notice of the appointment of a guardian *ad litem* should be served upon the alleged lunatic. Howlett *v.* Welbraham, 5 Madd. 423.

A court, by the service of its summons, acquires jurisdiction of the person of an insane defendant; and the failure to appoint a guardian *ad litem* when the general guardian fails to appear and defend, does not render the judgment either void or voidable. It is at most only erroneous, for which the appropriate remedy is by proceedings in error,

and not by an original action to vacate the judgment. McAlister *v.* Lancaster Co. Bank, 15 Neb. 295.

In Hollingsworth *v.* Chapman, 50 Ala. 23, it was held that where a defendant has been insane, the court may continue a case until an inquisition may be had.

3. **Insanity Is a Good Plea.**—In Mitchell *v.* Kingman, 5 Pick. (Mass.) 431, the defendant offered to prove he was *non compos mentis* at the time the note was signed on which suit was brought. The lower court refused to admit the evidence, but on writ of error the case was reversed. WILDE, J., said: "It is said to be a maxim of the common law that no man of full age shall be allowed by plea to stultify himself, and thereby to avoid his own deed or contract. This is affirmed by LORD COKE in Beverley's Case, 4 Coke 123, and also in his commentary on Littleton (Co. Lit. 147), and since his time seems to have been generally admitted as a settled principle, but without much consideration. On the other hand, Fitzherbert denies that this was ever a maxim of the common law; and Britton and Bracton maintain the same opinion. . . . But few decided cases on this point are to be found since the case of Beverley. But it was decided as late as the year 1737, in the case of Yates *v.* Boen, 2 Str. 1104, that lunacy might be given in evidence to avoid a contract. This was a case of debt on articles, and upon *non est factum* pleaded, the defendant offered to give lunacy in evidence. The chief justice (Lee) at first thought it ought not to be admitted, upon the rule in Beverley's case; but on the authority of Smith *v.* Carr, in which it was admitted by CHIEF BARON PERGELLEY, and the case of Thompson *v.* Leach, 2 Ventr. 108, he suffered it to be given in evidence. This case is cited with approbation by Buller (Buller's N. P. 172), and also in the case of Webster *v.* Woodford, 3 Day (Conn.) 90; in which it was decided, after a full examination of the

(e) *Accounts*.—In England, committees are required to render an account from time to time of their receipts and expenditures on account of the lunatic's estate. In the United States, where lunatics are under the control of a court of equity, their committees must account as trustees or receivers. Where they are under the jurisdiction of the probate courts, the committees account as guardians.¹ A committee is not permitted to make a profit for himself out of his trust; but, on the other hand, he will not be liable for any loss, unless he has been guilty of negligence or fraud.²

question, that a person *non compos mentis* might be permitted to plead his own disability in avoidance of his contract.

"It appears, therefore, on examination, that the supposed maxim of the common law relied on by the plaintiffs, is of doubtful origin and authority. Nor should we feel ourselves bound to adopt it, although it were supported by less questionable English authorities, because the property and interests of idiots and lunatics are not protected here, as they are in England, by the royal prerogative. There, if an idiot alien his lands, the King, after office found, may, upon *scire facias* against the alienee, recover the lands to the use of the idiot, and thereupon they will revert in him. And so if the idiot be sued in any action upon a bond or other contract, the king by his writ shall send a *supersedeas* to the justices where the suit is commenced. And the law is the same where the person becomes *non compos*. Beverley's Case, 4 Coke 126. But even in England there seems to be neither reason nor necessity for adopting the rule in question; a rule which Fonblanque says was adopted 'in defiance of natural justice and the universal practice of all civilized nations in the world.' 1 Fonbl. Eq. 46. That it is against natural justice is manifest, because a man in a fit of insanity may make a contract which, after the recovery of his reason, might be enforced against him under the rule, although made without consideration, provided it be under seal. For neither in England nor here can a committee or guardian be appointed to a lunatic or insane person after the recovery of his reason. If, therefore, in such a case the defendant could not avoid the deed by pleading his insanity at the time of the contract, he would be without defence; and thus by the visitation

of providence, followed up by a rule of law, a man, without fault, might be despoiled of his property and utterly ruined." The authority of *Mitchell v. Kingman*, 5 Pick. (Mass.) 431, has been followed in all the later cases. *Thornton v. Appleton*, 29 Me. 298; *Crawford v. Scovell*, 94 Pa. St. 48; *Lang v. Whidden*, 2 N. H. 435; *Seaver v. Phelps*, 11 Pick. Mass. 304; *Rice v. Peel*, 15 Johns. (N. Y.) 503; *Tolson v. Garner*, 15 Mo. 494; *McCormick v. Littler*, 85 Ill. 62.

1. General Orders in Lunacy, 1853, 15; *Bispham's Equity*, §§ 148, 239, 479. In *New York* it is held that if a committee neglect to file an inventory and to render periodical accounts, every presumption will be made against him. *Ex parte Carter*, 3 Paige (N. Y.) 146.

2. *Spack v. Long*, 1 Ired. Eq. (N. Car.) 426; *Buswell on Insanity*, 109.

Liability of Committee.—An order of a court of equity appointing a committee for a lunatic and authorizing the committee to retain the entire annual interest of the lunatic's estate for his support and maintenance, is no bar to an action to require the committee to account for profit subsequently made to himself by the labor of his ward. *Ashley v. Holman*, 15 S. Car. 97.

In *Missouri*, it was held that the guardian of a lunatic has no power, as such, to engage in business for, or by transactions pertaining to such business, bind the estate of the lunatic; nor can the probate court confer such power. *Western Cement Co. v. Jones*, 8 Mo. App. 373. See *Blakeley v. Bennecke*, 59 Mo. 193; *Wright v. Baldwin*, 51 Mo. 269; *Presbyterian Church v. McElhinney*, 61 Mo. 540. See also *Thatcher v. Dinsmore*, 5 Mass. 299.

A committee is liable for loss of rents sustained by a lease of lands without security, to one who was insolvent at the time the lease was executed. *De*

(f) *Compensation*.—In England, the committee of a lunatic, like other trustees, does not ordinarily receive a compensation for his services.¹ In the United States, committees receive such compensation as would be allowed to trustees or guardians of minors under similar circumstances.²

(g) *Discharge of Committee*.—The court which has appointed a committee may, at its discretion, remove him and appoint another in his place,³ and it seems that such removal is not the

Treville v. Ellis, 1 Bailey Eq. (S. Car.) 40.

In *Cole v. Cole*, 28 Gratt. (Va.) 365, a committee of a lunatic, on application to court, obtained leave to invest certain funds in bonds of the Confederate States. He thereupon deposited the funds with the proper officer and took a certificate for a bond. It did not appear that the bond was ever issued, and the deposit was lost. The committee was held accountable for the money.

The guardian of an insane person, who had been engaged in a manufacturing business, continued to carry on the business, either at the request or with the concurrence of all parties interested in the ward's estate, the result of which was advantageous to the estate. The business required storage room, and the guardian erected a building for such purposes on land of the ward's wife, and charged the cost of the building to the ward's estate; but this charge was disallowed by the probate court, and he was required to account to the estate, in money, for the amount so charged. *Held*, on appeal, that the guardian was entitled to charge the estate a reasonable rent for the building. *Murphy v. Walker*, 131 Mass. 341. See *Foster v. Merchant*, 1 Vern. 262.

Reasonable expenses incurred by a guardian in resisting the ward's application for a revocation of the guardianship, when the expenses were incurred in good faith, and there was a reasonable doubt of the ward's condition, will be allowed to the guardian in the settlement of his account. *Palmer v. Palmer*, 38 N. H. 418.

In *Massachusetts* it was held that the guardian of a lunatic cannot be allowed, in his probate account, the amount of damages occasioned to his own property by his ward's want of care. *Brown v. Howe*, 9 Gray (Mass.) 84.

Where suits have been instituted in good faith on behalf of the lunatic, the guardian or committee will not be

chargeable with costs. *Alexander v. Alexander*, 5 Ala. 517; *Sanford v. Phillips*, 68 Me. 431.

1. *In re Annesley*, Ambl. 78. Where no one can be found willing to act as a committee the court may appoint a receiver of the estate with a salary. *Ex parte Warren*, 10 Ves. 622.

2. In *May v. May*, 109 Mass. 252, a guardian was allowed a monthly charge of \$100 for personal services in visiting his ward three times a week and personally superintending the management of the lunatic's house and grounds, and also a commission of five per cent. on the amount collected. An additional charge of \$100 for attending court was disallowed, as was also a charge of \$200 for attending the ward on two journeys of a fortnight each, which were undertaken partly on account of the guardian's own business. It was also held in this case that a guardian who made up his accounts monthly might charge his ward's estate each month with his commissions on the amounts collected in that month, and with a month's interest on a balance from the preceding month in his own favor, and might carry the balance to the next month. It was also held that an additional compensation, if any, allowed to a guardian for changing investments of his ward's property or making repairs thereon, should not be by way of commissions on the amount invested or expended.

In *Ex parte Lyde*, Rich. C. C. (S. Car.) 3, a commission of five per cent. upon funds received and disbursed was allowed to the committee. This was the compensation allowed trustees under the *South Carolina* statute.

3. *Causes for Removal of Committee*.—Where a committee has permanently removed from the jurisdiction of the court he may be removed. *Ord's Case*, Jac. 94. Fixed habits of intemperance constitute a sufficient cause for the removal of a committee. *Kettletas v. Gardner*, 1 Paige (N. Y.) 488. So also is

subject of appeal.¹ The death or recovery of the lunatic also terminates the office of the committee.²

6. Contracts of Insane Persons.—As a general rule, insane persons are incapable of entering into valid contracts, and any agreements which they may make are either void or voidable.³

In order, however, to invalidate such an agreement, it must be shown that it was the direct result of the insanity alleged. The mere fact of delusion or insanity, if unconnected with the act under judicial consideration, is not sufficient to relieve the person who attempts to set it up as a ground of disability.⁴

a neglect to properly care for the lunatic. *Ex parte* Proctor, 1 Swanst. 531. In *Ex parte* Jones, 13 Vesey, 237, a committee was removed for contempt in publishing a pamphlet defaming the proceedings of the court. In *Lloyd v. —*, 2 Dickens 460, one of the defendants was a lunatic. The committee of his estate was also a defendant. On the committee refusing to put in an answer for the lunatic, it was moved by the plaintiff that the committee be ordered to answer within a certain time, or that a guardian should be appointed *ad litem*. The master of the rolls said the proper course was to proceed against the lunatic; and if the committee refused to answer, to apply to the Great Seal to appoint a new committee. In *Ex parte* Mildmay, 3 Ves. 2, bankruptcy was considered a cause for removal. See also *Ex parte* Proctor, 1 Swanst. 531. *Contra*, *In re* Chew, 4 Md. Ch. 6.

In *Lytle's Case*, 3 Paige (N. Y.) 251, it was held that the committee of a lunatic who has voluntarily accepted the appointment cannot be discharged without showing some valid excuse for resigning the trust; and the fact that his situation was rendered unpleasant, in consequence of controversies existing between different members of the lunatic's family, was not sufficient for that purpose. But see *Morgan's Case*, 3 Bland's Ch. (Md.) 332. In *Lytle's Case*, 3 Paige (N. Y.) 251, the wife of a lunatic petitioned for the removal of the committee upon the ground of fraud and mismanagement in the execution of his trust, and upon the hearing it appeared that the committee had faithfully discharged his duty, and no probable cause for the application was shown. The wife was accordingly denied costs out of the estate; but the costs of the committee were allowed.

1. In *Black's Case*, 18 Pa. St. 434, it was decided that the committee of a

lunatic was removable by the court of common pleas at their discretion, and their order of removal was not the subject of review in the supreme court.

In *Dean's Appeal*, 90 Pa. St. 106, the supreme court refused to decide that the refusal of the lower court to order the removal of the committee of a lunatic was the subject of review. They, however, held that nothing but a very clear case could justify such intervention.

In *Griffin's Case*, 5 Abb. N. S. (N. Y.) 96, it was held that an order of removal was not the subject of appeal.

2. In *Dean's Appeal*, 90 Pa. St. 106, it was said that "the functions and powers of the committee ceased with the life of the lunatic, leaving him liable to account to her administrator." See also *In re* Barry, 1 Molloy 414; *Ex parte* Gilbert, 1 Ball & Beatt. 297; *Ex parte* Latham, 6 Ired. Eq. (N. Car.) 406; *Cain v. Warford*, 3 Md. 454; s. c., 7 Md. 282; *Stumph v. Pfeiffer*, 58 Ind. 472; *Butler v. Jarvis* (N. Y.), 2 Cent. Rep. 377.

3. *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *George v. St. Louis etc. R. Co.*, 34 Ark. 613; *Curtis v. Brownell*, 42 Mich. 165; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422; *Beverley's Case*, 4 Co. 123b; *Ingraham v. Baldwin*, 9 N. Y. 45; *Ex parte* Beckwith, 3 Hun (N. Y.) 443; *Van Deusen v. Sweet*, 51 N. Y. 378; *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235; *Bensell v. Chancellor*, 5 Whart. (Pa.) 371.

4. Thus a partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will. *Banks v. Goodfellow*, L. R., 5 Q. B. 54; *Pidcock v. Potter*, 68 Pa. St. 348; *Benioist v. Murrin*, 58 Mo. 307; *Cole's Will*, 49 Wis. 179; *Wetter v. Habersham*, 60 Ga. 194; *Smee v. Smee*, L. R.,

With the exception of certain cases hereafter mentioned, on agreement of an insane person immediately connected with and growing out of his insanity, is voidable and not void.¹

5 Prob. Div. 84; *Emery v. Hoyt*, 46 Ill. 258; *Odell v. Buck*, 21 Wend. (N. Y.) 142.

In *Jenkins v. Morris*, L. R., 14 Ch. D. 674, a lessor, at the time when he made a lease of a farm, labored under the delusion that it was impregnated with sulphur. On an issue directed as to the capacity of the lessor to make the lease, rational letters by the lessor relating to the lease were put in evidence. The trial judge did not tell the jury that the letters did not displace the effect of the delusion, but directed them that it was a practical question whether the lessor was so insane as to be incompetent to dispose of his property though believed to be full of sulphur. The jury found that the lease was valid. *Held*, on a motion for a new trial, that there was no misdirection in the charge.

In *Ekin v. McCracken*, 32 Leg. Intel. (Pa.) 405, where a deed was sought to be avoided, it was *held* that a man may be a monomaniac on a particular subject; but if the deed has no connection with his morbid condition it will be sustained.

Where a person admitted to be insane on certain subjects committed suicide, understanding the nature of the act and intending to take his own life, his representatives were not allowed to recover from a life insurance company on a policy which provided that the policy should become void if the assured should die by his own hand. *Burgess v. Pollock*, 53 Iowa 273.

But a mortgage made by a man who had been insane some time before and had periodical recurrences of insanity, and was insane at the time he gave the mortgage, though he had all along managed his own affairs with average correctness and had been treated by his neighbors as competent to do business even while they considered him of unsound mind, was set aside as being made while *non compos mentis*, though not so manifestly insane as to make the conduct of the mortgagee fraudulent in making the bargain which it was meant to secure, even though he had been given sufficient warning to put him on his guard. *Curtis v. Brownell*, 42 Mich. 165. See also *Alexander's Will*, 12 C. E. Green (N. J.) 463; *Pela-*

mourges v. Clark, 9 Iowa 1; *Cook v. Parker*, 4 Phila. (Pa.) 265.

Where an act is sought to be avoided on the ground of mental disability, the proof lies with him who alleges it, but after a general derangement is shown, the burden of proof is cast upon the one who insists that the act was valid. *Jackson v. King*, 4 Cow. (N. Y.) 207; *Rogers v. Walker*, 6 Pa. St. 371; *Gangwere's Est.*, 14 Pa. St. 417.

1. Transactions that are neither void nor necessarily binding must stand until they are regularly assailed by some one whose position or interests warrant him in assailing them. *Campbell v. Kuhn*, 45 Mich. 513.

Cases in Which Restitution Has Been Held Not Necessary.—A grantor in a deed may avoid his conveyance by proof that he was *non compos mentis* at the time of its execution, where there is no evidence of ratification after restoration to reason; and to avoid such a deed it is not necessary that the insane person should put the grantee *in statu quo*, for one of the obvious grounds on which the deed of an insane man is held voidable is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds. Hence to avoid his conveyance no previous offer of restitution is necessary. *Crawford v. Scovell*, 94 Pa. St. 48.

Restitution of the consideration received by the insane person is not a condition precedent to the rescission of such contract or conveyance, if it has been wasted or has passed beyond his control. *Ricketts v. Jolliff*, 62 Miss. 440.

An exchange of property made by a person of mind so unsound that the want of mental capacity is apparent to any one of ordinary prudence and observation conversing with him, is of no validity. A guardian subsequently appointed may recover the property of the insane person without tendering back that received by him in the exchange. *Halley v. Troester*, 72 Mo. 73.

A person of full age who has been insane may, after he has sufficiently recovered his reason to understand the character of his act, file a bill in equity to annul a deed or contract to his

In States where it is provided by statute that after a finding of an inquisition of insanity the insane person shall be incapable of making a contract or performing any civil act, an agreement entered into by such a person is absolutely void.¹

An exception to the general rule that the contracts of insane persons are either void or voidable, is found in the case of contracts for necessities supplied in good faith to an insane person, and suitable to his rank in life.²

prejudice made by him when he was of unsound mind and incapable of contracting. *Turner v. Rusk*, 53 Md. 65.

To an action of ejectment against a widow, she answered that her husband held the land in his life under an executory contract for a conveyance upon payment of the purchase price; that he had paid a part, and afterwards, while *non compos*, the plaintiff, who was his son, had fraudulently procured him to assign the contract to him, and he (the plaintiff) paid the residue out of the rents and personality of her husband's estate, and obtained a deed from the vendor; and she prayed for a transfer of the cause to the equity docket, that the plaintiff be declared a trustee, holding the title for the use of the decedent's estate, to be administered upon as part of his estate, and for other relief. *Held*, upon demurrer, that the answer showed no right of dower or homestead in the widow, and no right to enforce the alleged trust; that the deed of a lunatic was not void, but voidable only by his heirs, or personal representatives, or a subsequent purchaser from him. *Langley v. Langley*, 45 Ark. 392.

1. In *Missouri* the deed of an insane person, after being placed in guardianship, is absolutely void; and guardianship is conclusive respecting the disability of the ward, whether he be insane or not. It is immaterial from what cause the insanity resulted, whether from old age, sickness, habitual drunkenness or other causes whatever; and the assent of the guardian to the insane person's deed confers upon that instrument no vitality. *Rennells v. Gerner*, 80 Mo. 474.

In an equitable proceeding it may be immaterial that a mortgagee was not sane at the date of the execution of a mortgage executed in strict pursuance of a specific written agreement entered into by the mortgagee when sane. *Bevin v. Powell*, 11 Mo. App. 216.

In *Indiana* every contract, sale or conveyance of a person judicially declared to be insane is void. Thus, in an action to foreclose a mortgage, where the mental unsoundness of the mortgagor and his incapacity to contract, resulting from habitual drunkenness, are relied upon as a defence to the action, if it is shown that, at the time of his execution of the mortgage, his insanity had been judicially ascertained, and that he was under guardianship as an insane person, the mortgage will be absolutely void; otherwise the mortgage will be voidable merely, and it may be shown to have been ratified or disaffirmed by the mortgagor, after the removal of his disability. Where, in such an action, the answer sets up the mental unsoundness of the mortgagor at the time he executed the mortgage, and does not show that he was then under guardianship as an insane person, a reply to such answer, stating merely the legal conclusion that after the removal of his disability he ratified the mortgage without setting forth the acts done by him amounting to such ratification, is bad on a demurrer thereto for the want of sufficient facts. *Copenrath v. Kienby*, 83 Ind. 18. See also *Fay v. Burditt*, 81 Ind. 433; *Northwestern Mut. Life Insurance Co. v. Blankenship*, 94 Ind. 535. The *Indiana* statute is applicable only to persons found *non compos mentis* in the manner prescribed by law. *Crouse v. Holman*, 19 Ind. 30; *Hardenbrook v. Sherwood*, 72 Ind. 403. In *Illinois* the contracts of persons judicially declared insane are void, but the statute does not apply to contracts for necessities, or to those made during lucid intervals. *Lilly v. Wagoner*, 27 Ill. 395; *McCormick v. Littler*, 85 Ill. 62; *Burnham v. Kidwell*, 113 Ill. 425.

2. **Contracts for Necessaries.**—An executed contract of a *non compos mentis* for necessities, *bona fide* supplied, stands on the footing of an infant's contracts for necessities. *LaRue v. Gilkyson*, 4 Pa. St. 375.

The word necessities is not to be restricted to articles of the first necessity, but it includes everything proper for the person's condition. *Baxter v. Earl of Portsmouth*, 2 Car. & P. 178. In *Ex parte Persse*, 3 Molloy 94, the LORD CHANCELLOR said: "The maintenance of a lunatic is not limited, as an infant's is, within the bounds of income. It is not limited except by the fullest comforts of the lunatic. Fancied enjoyments, and even harmless caprice, are to be indulged up to the limits of income, and for solid enjoyments and substantial comforts the court will, if necessary, go beyond the limits of income." In *Kendall v. May*, 10 Allen (Mass.) 59, a person who, at the request of a wealthy lunatic, accompanied him upon a journey, was *held* entitled to recover from the estate of the lunatic the expenses of the journey.

An insane person is, of course, liable for board, nursing and necessary attendance. *Sawyer v. Lufkin*, 56 Me. 308; *LaRue v. Gilkyson*, 4 Pa. St. 375; *Blaisdell v. Holmes*, 48 Vt. 492; *Reando v. Mosplay*, 90 Mo. 251.

A town which has been made chargeable, and has paid, for the commitment and support of an insane person at the insane hospital, may recover the amount paid of the insane person if able. In such an action, upon a hearing in damages, evidence of the ability of the defendant is inadmissible to reduce the amount to be recovered below the amount actually paid. If he is not able to pay the whole amount, he is not liable to pay any portion of it. *Cape Elizabeth v. Lombard*, 72 Me. 492; *Bangor v. Wescasset*, 71 Me. 535.

In *Massachusetts*, in an action by a city, under the Gen. Sts. ch. 73, § 25, against a woman, to recover \$479 paid for her support at a lunatic hospital, there was evidence that the defendant, when out of the hospital, lived with an intemperate husband and a lame daughter, neither of whom rendered her much assistance, and that the defendant's mental condition was such as to incapacitate her for any labor; that she owned a lot of land worth \$375, which, after part of the money sued for had been paid by the plaintiff, she had conveyed to her daughter without consideration; that, after this conveyance, she effected insurance on the house in her own name, and the attorney of her guardian had received \$775 from the insurance company for the destruction of the same by fire, which sum was claimed

by the daughter. *Held*, that this evidence would warrant a finding that the defendant was not "of sufficient ability" to pay the sums expended by the plaintiff. *Newton v. Ferley*, 130 Mass. 12.

But if an insane person is received into an asylum at the request of another, and on an express contract in writing by third persons to pay his board and other expenses there, no promise can be implied on the part of such insane person to pay anything; evidence that credit was given to him by the officers of the asylum is inadmissible, and an action against him by the asylum cannot be maintained. *Mass. General Hospital v. Fairbanks*, 129 Mass. 78.

Necessaries Furnished to the Wife of a Lunatic.—A person who in good faith furnishes necessities to the wife of a lunatic may recover against the lunatic's estate. *Read v. Legard*, 6 Exch. 636; *Stuckey v. Mathes*, 24 Hun (N. Y.) 461; *Bangor v. Wescasset*, 71 Me. 535; *Drew v. Munn*, L. R., 4 Q. B. D. 661. Where a wife had been appointed custodian of her insane husband for a compensation fixed upon by the commissioners of insanity, it was *held* by a divided court that the contract was void for want of consideration, the wife owing the duty independently of the contract. *Grant v. Green*, 41 Iowa 88.

Money Borrowed to Satisfy Liens.—Money borrowed by a lunatic to satisfy liens upon his estate may be recovered as a necessary. In *Kneedler's Appeal*, 92 Pa. St. 428, the defendant, acting under the advice of counsel, borrowed money from plaintiff, and gave therefor his bond and warrant of attorney, secured by a mortgage on his real estate. The money thus borrowed he prudently applied to the payment of liens on his estate. In subsequent proceedings it was found that he was a lunatic at the time of the execution of these papers. *Held*, that this was no defence in an action for the recovery of the loan.

Costs and Counsel Fees Are Necessaries.—Costs and counsel fees reasonably incurred in proceedings to establish the lunacy are necessary expenses and payable out of the lunatic's estate. *Clark's Case*, 22 Pa. St. 466; *Wier v. Myers*, 34 Pa. St. 377; *Breaux v. Francke*, 30 La. Ann. 336; *Williams v. Wentworth*, 5 Beav. 325.

The necessary expenses of a guardian incurred in resisting an application for removal were allowed in *Palmer v. Palmer*, 38 N. H. 418.

The commissions of the committee

Another exception to the general rule is found in those cases where a person in good faith enters into a contract with another apparently sane, and the contract is executed, and an adequate consideration paid, where consideration cannot be restored by the lunatic or those who represent him, so as to put the parties *in statu quo*. In such a case the contract cannot be set aside by the lunatic or his committee.¹

are regarded as necessary expenses. *In re Colah*, 3 Daly (N. Y.) 529.

1. **Contracts Made Without Notice of Lunacy.**—"Where a person fairly and in good faith sells property or loans money to a lunatic who appears to be sane, and is not known by the vendor or lender to be insane, and who has not been found to be a lunatic by judicial proceedings, and the lunatic receives and uses the same, whereby the contract becomes so far executed that the parties cannot be placed *in statu quo*, such a contract cannot afterwards be set aside or payment refused by the lunatic or his representatives. In *Elliot v. Ince*, 7 De G. M. & G. 475, 487, it is remarked that 'the result of the authorities seems to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding. CHIEF JUSTICE GIBSON based the lunatic's liability in such cases on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it; he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes.'" *Wirebach v. First National Bank*, 97 Pa. St. 549.

In *Gribben v. Maxwell*, 34 Kan. 8, it was held that where a purchase of real estate from an insane person is made, and a conveyance is obtained in perfect good faith, before an inquisition and finding of lunacy, for a fair and reasonable consideration, without knowledge of the insanity, and no advantage is taken by the purchaser, the conveyance cannot be avoided by the insane person, or one representing him, if the consideration has not been returned to the purchaser, and no offer has been made to return the same.

In *Burnham v. Kidwell*, 113 Ill. 425, it was held that where land is bought of a person before he is adjudged an idiot, in good faith, by the purchaser, or

money is loaned to him in good faith, and he secures its payment by mortgage, and the proceeds of the sale or loan are expended in and about his care and support, the deed or mortgage cannot be avoided until the money so received by the idiot is returned, or offered to be returned.

Where, in a suit to foreclose a mortgage, the answer set up the mortgagor's unsoundness of mind and incapacity to contract, at the time he executed the mortgage, in bar of the action, the mortgagee's reply to such answer, showing that the mortgage was given to secure the repayment of money borrowed by the mortgagor to enable him to pay his *bona fide* debt to a third person, that, when the mortgage was executed, the mortgagee had no knowledge whatever of any disability of the mortgagor to contract, but believed him to be sober, in his right mind, and capable of entering into a contract, that the transaction between them was *bona fide*, and that the mortgagor had not, nor had any one in his behalf, repaid or offered to repay the money so borrowed by him, states facts sufficient to constitute a good reply to such answer, on a demurrer thereto for the want of facts. *Copenrath v. Kienby*, 83 Ind. 18.

A chattel mortgage executed by an insane person, whose mental unsoundness has not been judicially determined, will vest the title, and, after default in the condition, the right of possession of the chattel in the mortgagee; and actual possession obtained under it cannot be made wrongful without a disaffirmance. In such case, there must be, therefore, a disaffirmance before an action can be maintained to recover the chattel from the mortgagee. *Fay v. Burditt*, 81 Ind. 433. See *Northwestern Mutual Fire Insurance Co. v. Blankenship*, 94 Ind. 535, where on a suit to foreclose a mortgage executed by husband and wife, on his lands, both being then dead, the wife having survived the husband, the heirs of the wife answered that she was insane when the mortgage

7. Insanity as Affecting the Contract of Insurance.—Where a policy of life insurance provides that the contract shall be void if the assured "die by his own hand," or "by suicide," such a policy is not necessarily rendered void by the assured committing suicide while insane. If the act of killing is the result of an insane impulse which deprived the assured of all ability to form a rational judgment as to the act he was committing, the contract of insurance will not be avoided. In many cases, however, it is held that if the person insured was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the insurers will not be liable.¹

was executed and so continued during life, and that the mortgage was given to secure a debt of the husband. Reply: 1. That when the mortgage was executed the wife was apparently sane, and was never judicially declared insane, and never disaffirmed the mortgage: that the plaintiff had no notice of her insanity, and took the mortgage in good faith to secure a loan to the husband, and it had not been disavowed by the wife or her heirs; 2. Alleging the same facts, and, also, that after the date of the mortgage she was treated by her family as a sane person in all respects; that the loan, \$6,000, was expended by the husband in the purchase of other lands; that the loan is wholly unpaid; that the husband died insolvent, and sale of the whole of the mortgaged lands will be required to repay the loan. *Held*, that the answer was good, and both paragraphs of the reply were bad.

See also *Young v. Stevens*, 48 N. H. 133; *Beals v. See*, 10 Pa. St. 56; *Wilder v. Weakley*, 34 Ind. 181; *Person v. Warren*, 14 Barb. (N. Y.) 488; *Beavan v. McDonnell*, 9 Exch. 309; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Physio-Medical College v. Wilkinson*, 108 Ind. 314; *Hull v. Louth*, 109 Ind. 315; *Lincoln v. Buckmaster*, 32 Vt. 652; *Mattherson v. McMahon*, 38 N. J. Law 536; *Lancaster Co. Bank v. Moore*, 78 Pa. St. 407.

A conveyance of land will be set aside where the defendants had knowledge of plaintiff's mental condition, and it is not shown that an adequate consideration was paid or agreed upon, and defendants have enjoyed the rents and profits long enough to compensate them for all they appear to have paid. *Alexander v. Haskins*, 68 Iowa 73.

An obligation entered into by an insane person to repay money loaned, of which he had the benefit, is valid where the lender acted in good faith, and without knowledge of the insanity, or notice or information calling for inquiry, and an action is maintainable thereon. *Mutual Life Insurance Co. v. Hunt*, 79 N. Y. 541.

1. In *Gay v. Union Mutual etc. Ins. Co.*, 9 Blatch. (U. S.) 142, *WOODRUFF, J.*, charged the jury that if the assured, "at the time he fired the pistol, was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the defendants are not liable; and that, if the act was thus committed, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong. And . . . if, on the other hand, he was not thus conscious or had no such capacity, but acted under an insane delusion, overpowering his understanding and will, or was impelled by an uncontrollable impulse, which neither understanding nor will could resist, then the defendants are liable."

"**Die by His Own Hand.**" In *DeGororza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232, *REYNOLDS, J.*, said: "It is now to be regarded as the settled law of this country and of England that a clause in a policy of life insurance exempting the insurer from liability if the assured 'die by his own hand,' has reference to an intelligent or voluntary act, and not to a suicide committed by a party in a state of mental derangement so great that the act of self-destruction is to be regarded as wholly involuntary." See *Van Zandt v. Mut. Ben. L. Ins. Co.*, 55 N. Y. 169; *Borra-dale v. Hunter*, 5 M. & G. 639; *Cleft*

v. Schwabe, 3 C. B. 437; *Esterbrooke v. Union Mut. Life Ins. Co.*, 54 Me. 224; *Dean v. Am. Mut. Life Ins. Co.*, 4 Allen (Mass.) 96; *Life Insurance Co. v. Terry*, 15 Wall. (U. S.) 580.

In *Van Zandt v. Mut. Benefit Life Ins. Co.*, 55 N. Y. 169, the assured shot himself. On a suit on the policy the defendant requested the court to charge that if the act of self-destruction was the voluntary and wilful act of the deceased, he having at the time sufficient power of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by the act, it avoided the policy. The request was refused and on a writ of error the judgment was reversed. See also *Newton v. Mut. etc. Ins. Co.*, 76 N. Y. 426; *Ins. Co. v. Rodel*, 5 Otto (U. S.) 232; *Ins. Co. v. Peters*, 42 Md. 414; *Phillips v. Ins. Co.*, 26 La. Ann. 404; *Keels v. Mut. Reserve Fund Ass'n*, 29 Fed. Rep. 198. In an action upon a policy containing a clause declaring the policy void in case the insured died by his own hand or committed suicide, it appeared that the deceased committed suicide; that he had a severe attack of congestion of the brain some seven years prior to his death, and for several years before, and up to the time of his death, periodical attacks of severe nervous headache, arising from indigestion or some functional derangement, and slight evidence was given that at times he was incoherent in answer to questions. Up to the time of his death he was engaged in and transacted large business operations. It did not appear that he was imprudent or indiscreet in business matters, or that he was at any time suspected of being incompetent. His physician, who visited him a few hours before his death, saw no symptoms of insanity, and never discovered or suspected any impairment of mental faculties. *Held*, that the evidence did not authorize the submission to the jury of the question as to the insanity of the insured, and that the plaintiff was properly nonsuited. *Weed v. Mutual etc. Ins. Co.*, 70 N. Y. 561.

Where a policy was declared to be void "if the assured should die by his own hand," and it appeared that he drowned himself in the Thames; and the jury found that he did it voluntarily, but that he was not capable of judgment between right and wrong, it was *held* the proviso was not limited to acts

of felonious suicide, and that the policy was void. *Borradaile v. Hunter*, 5 M. & G. 639.

In *Eastabrooke v. Union Ins. Co.*, 54 Me. 224, the words of the policy were, "shall die by his own hand." The jury found that the self destruction was the result of a blind and irresistible impulse over which the will had no control, and was not an act of volition. It was *held* that this did not avoid the policy.

In *Cooper v. Mass. Ins. Co.*, 102 Mass. 227, the court *held* that there was no substantial difference of signification between the phrases "shall die by his own hand," "shall commit suicide," and "shall die by suicide;" and that they include self destruction under the influence of insanity, within the limitations stated above. In that case there was no offer to prove madness of delirium, or that the self destruction was not the result of the will and intention of the insured, adapting the means to the end, and contemplating the physical nature and effects of the act; the insanity was therefore *held* not such as to take the case out of the proviso of the policy that it should be void if the assured "shall die by suicide."

In *Pennsylvania* a contrary rule is established, and it is there *held* that a policy of insurance which provides that it shall be void if the insured "shall die by suicide" is not forfeited by the insured destroying himself, he being insane at the time, but intending to take his life and knowing that death would result from his act. *Connecticut Mutual Life Ins. Co. v. Groom*, 86 Pa. St. 92; *American Life Ins. Co. v. Isett*, 74 Pa. St. 176; *Nimick v. Ins. Co.*, 3 Brewst. (Pa.) 502.

In the Supreme Court of the United States it has been repeatedly and uniformly *held* that such a provision, not containing the words "sane or insane," does not include a self killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect. *Life Ins. Co. v. Terry*, 15 Wall. (U. S.) 580; *Bigelow v. Berkshire Ins. Co.*, 93 U. S. 284; *Ins. Co. v. Rodel*, 95 U. S. 232; *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121; *Accident Ins. Co. v. Crandal*, 120 U. S. 527.

In *Ohio* it was *held* that a proviso

Where a policy provides that the contract shall be void if the assured "shall die by his own hand or act, sane or insane," an involuntary act of suicide by one incapable of exercising his will avoids the policy.¹

Where a policy of life insurance contains a clause declaring that the contract shall be void in case the insured dies by his own hand, or commits suicide, the burden of proof is upon the party seeking to enforce the policy to show that the self-destruction was not the conscious and voluntary act of one responsible for his actions, but the involuntary act of an insane person.²

It has become the custom in recent years for insurance companies to omit from their policies the restrictive clauses discussed in this article.

Where a policy of life insurance contains a clause forfeiting it

that an insurance policy should be void in case the insured "shall, under any circumstances, die by his own hand," did not include death by suicide when the party was insane, although he understood the act and intended the result. *Shultz v. Ins. Co.*, 40 Ohio St. 217.

1. In *Pierce v. Travellers' Ins. Co.* (3 Ins. L. J. 422, June, 1874), the condition of the policy was, that if the assured should "die by suicide, felonious or otherwise, sane or insane," it should be void. On the trial of the cause the jury were charged that if the assured "took his own life while in an insane condition of mind, still the defendants are liable, notwithstanding the attempt to avoid the policy under such circumstances." On an appeal the Supreme Court of Wisconsin held the charge erroneous, *Dixon, C. J.*, saying: "The intention here manifest is so plain as to seem incapable of further explanation, and unless there is something in the policy of the law which forbids such stipulation, we have nothing to do but to give effect to it; for however the word 'suicide,' which is held by the authorities to mean the same thing as 'death by his own hand' or 'take his own life' might, if standing alone, be construed to imply a felonious self destruction, or self destruction by a sane man, or one capable of understanding the nature and consequences of his own act, and of judging between right and wrong, it is obvious that it cannot be so received or applied here. Such construction is forbidden by the express words of the condition, which declares that it shall make no difference whether the suicide was felonious or otherwise, or

whether the party committing it was sane or insane at the time. The parties here, therefore, by the very language of the condition, defined the sense in which they use the word, and by that definition the courts must be bound, unless there be something in the condition contrary to public policy or sound morals, which is not pretended." See also *De Gorgorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232.

In an action on a life insurance certificate conditioned to be void if the insured "die by reason of any act of self destruction whatever, whether at the time of committing the same he be sane or insane, whether felonious or otherwise," the plea set up violation of this condition. *Held*, that a replication that at the time of the act he was of unsound mind and entirely unconscious of the physical and moral consequences of the act, and was the subject of an insane impulse which he had no power to resist, was demurrable for not denying the allegation of the plea that the act was intentional. *Suppiger v. Covenant etc. Ass'n*, 20 Ill. App. 595.

Where owing to uncontrollable physical and mental weakness, the assured takes an overdose of whisky, which kills him, this is not dying by his own hand, sane or insane. *Northwestern Mutual Life Ins. Co. v. Hazelett*, 105 Ind. 212; see also *Riley v. Hartford Life etc. Co.*, 25 Fed. Rep. 315.

2. *Weed v. Mutual etc. Ins. Co.*, 70 N. Y. 561.

Where a policy provides that it shall be void if the insured shall "die by his own hand," the court should not take from the jury, as insufficient to sustain a recovery, evidence tending to show

in case of nonpayment of any premium when due, the insanity of the insured is not an excuse for nonpayment.¹

8. Insanity as Affecting the Contract of Marriage.—A person who is so insane as to be incapable of entering into a valid contract concerning property, cannot enter into a valid contract of marriage.² Mere weakness of understanding will not invalidate a marriage;³ nor will insanity which does not affect the subject matter of the contract.⁴

The authorities are in conflict as to whether the marriage of an insane person is void *ab initio*, so that it may be impeached collaterally.⁵

that he was insane when he committed the act which caused his death. The weight of the evidence is for the jury to pass upon, although the court may, in its discretion, express its opinion thereon. *Charter Oak etc. Co. v. Rodel*, 95 U. S. 232.

In *Shank v. United Brethren Mutual Aid Society*, 84 Pa. St. 385, it was held that suicide was a question of intention, and where no direct evidence exists, the question of intention was to be inferred from the circumstances and should be submitted to the jury.

1. *Wheeler v. Conn. etc. Ins. Co.*, 82 N. Y. 543.

2. "It is but reasonable that these unhappy persons who are prohibited by law from making any binding contract for the merest pecuniary trifle, should be protected from the effects of a covenant of so high a nature, which never could be entered into by the other party without some base or sinister design. If it would be hard that the issue of such marriages should be deemed bastards, it would be as much so that human beings without reason, or their families, should be the victims of the artifice of desperate persons who might be willing to speculate on their misfortunes." *Middleborough v. Rochester*, 12 Mass. 363.

3. In *Massachusetts*, upon a libel for divorce for insanity of the wife at the time of the marriage, the testimony proved only dejection of mind and singularities of conduct on the part of the libellee. The court said that they felt bound to require such evidence of insanity as in a civil action would justify a jury in finding the party incapable of making a contract; that anything short of this would open a door to great abuses; and that the fact of a party's being able to go through the marriage ceremony with propriety was *prima*

facie evidence of sufficient understanding to make the contract. *Anonymous*, 4 Pick. (Mass.) 32. See also *Cole v. Cole*, 5 Sneed (Tenn.) 57; *Turner v. Meyers*, 1 Hagg. Cons. 414; *Browning v. Reane*, 2 Phill. 69; *Atkinson v. Medford*, 46 Me. 510; *Harrod v. Harrod*, 1 Kay & J. 4.

4. *Concord v. Rumney*, 45 N. H. 423; *Hancock v. Peaty*, L. R., 1 P. & D. 335; *Browning v. Reane*, 2 Phill. 69; *St. George v. Biddeford*, 76 Me. 593.

5. In *Wightman v. Wightman*, 4 Johns. Ch. (N. Y.) 343, CHANCELLOR KENT held that the marriage of an insane person was absolutely void, and no decree of nullity was necessary to set it aside. See also *Crumph v. Morgan*, 3 Ired. Eq. (N. Car.) 91.

In *Georgia* it was held that the question of whether a man was of unsound mind and so incapable of contracting a marriage, might be raised twelve years afterwards in a proceeding by a woman, after his death, to obtain the year's support given by statute. *Bell v. Bennett*, 73 Ga. 784. But in *Rawdon v. Rawdon*, 28 Ala. 565, a lapse of twenty-two years after the discovery of the alleged insanity was a bar to relief in a suit for nullity. In *North Carolina* it was held that the question whether a party to a marriage was an idiot, and so incapable of marrying, could not be raised in a collateral proceeding, as in an action to which the children of such marriage, claiming as heirs or next of kin, are parties. *State v. Setzer*, 97 N. Car. 252. To the same effect is *Wiser v. Lockwood*, 42 Vt. 720. Where a party while insane married, and died insane, the court held that the parties were husband and wife, and that the survivor was entitled to a share in the estate of the insane party. In *Kentucky* however, it was held in a case similar to *Wiser v. Lockwood*, 42 Vt. 720, that

A violation of the marriage contract by an insane husband or wife does not furnish a ground for the dissolution of the marriage. Thus, extreme cruelty, if caused by insanity, is not cause for divorce,¹ and the same rule applies to acts of sexual intercourse between an insane husband or wife and a stranger.²

the survivor could not claim dower or curtesy in the lunatic's estate. *Jenkins v. Jenkins*, 2 Dana (Ky.) 102. See also *Waymire v. Jetmore*, 22 Ohio St. 271; *Powell v. Powell*, 18 Kan. 371. In *Maine* a statute makes the marriage of an insane person solemnized in that State absolutely void. It, therefore, may be impeached collaterally. *Unity v. Belgrade*, 76 Me. 419. In *Massachusetts* there is a statute similar to the one in Maine. Pub. Sts. Mass., ch. 145, § 7. In New York the marriage of a lunatic is valid until duly annulled. It cannot be impeached collaterally, as in an action for the price of necessities furnished to an insane wife. *Stuckey v. Mathes*, 24 Hun (N. Y.) 461.

Where Insanity Is Fraudulently Concealed.—Where one of the parties to a marriage is insane, and this fact is fraudulently concealed from the other, the marriage will be declared invalid by reason of fraud vitiating the contract. *Keyes v. Keyes*, 22 N. H. 553. In *Hancock v. Peaty*, L. R., 1 P. & D. 535, where the husband was unaware of his wife's insanity when the marriage took place, a decree of nullity was entered on the petition of the wife's relatives. See *Smith v. Smith*, 47 Miss. 211; *Hamaker v. Hamaker*, 18 Ill. 137.

Insanity Subsequent to Marriage.—Insanity coming upon a person after marriage is no ground for divorce. *Smith v. Smith*, 47 Miss. 211.

A verdict in an action to set aside a marriage, that the person was sane, is not inconsistent with the finding of an inquisition that he was a lunatic two days later and for six months prior. *Viets v. Troy Nat. Bank*, 101 N. Y. 563.

1. *Powell v. Powell*, 18 Kan. 371.

2. **Insanity as a Defence to a Charge of Adultery.**—In *Nichols v. Nichols*, 31 Vt. 328, the libel was by the husband for a divorce *a vinculo*, for the adultery of the wife, who was insane. REDFIELD, C. J., in delivering the opinion, said: "The court held that general insanity is a full defence for all acts which, by the statute, are grounds of granting divorce. In regard to severity and desertion, there could be no question.

There is wanting the consenting will which is indispensable to give the acts the quality either of severity or desertion. The case is the same in regard to acts of sexual intercourse with one not the husband. If done by force or fraud no one could pretend that it formed any ground of dissolving the bonds of matrimony. And insanity is even more an excuse, if possible, than either force or fraud. It not only is not the act of a responsible agent, but in some sense it might fairly be regarded as superinduced by the consent or connivance of the husband, since he has the right and is bound in duty to restrain the wife, when bereft of reason and the power of self control, from the commission of all unlawful acts, both to herself and others. . . . And if the case were shown of those to whose care the husband had prudently entrusted his wife for care or for cure (as he might lawfully do), having betrayed or abused this confidence to purposes of crime on their part, as might possibly occur without his fault, he surely could not blame his insane wife for the treachery of his own agents, or their assistants. In insanity it is well known that the subject is liable to such illusions as to mistake utter strangers for the nearest relatives. If, too, they retain only the ordinary stimulus of propensity, at such a time, with no power of self control, they are, of course, at the mercy of every base man. But in many cases sexual propensity is more or less excited during insanity, and the liability to such contingencies proportionally increased. In such cases, for the husband to seek for a dissolution of the marriage relation must argue great weakness or great depravity.

"We have read the case of *Matchin v. Matchin*, 6 Pa. St. 332, and the opinion of the late CHIEF JUSTICE GIBSON, where he attempts to maintain that the adultery of the wife, although insane, is sufficient ground of divorce, for the reason that it tends to impose a spurious offspring upon the husband. The reason is one which will have no application to similar acts committed by the husband, and, as applied to the wife,

9. Insanity as Affecting Partnership.—In England, the insanity of a partner will not of itself work a dissolution of the partnership. It is a ground for dissolution only, and if the continuing partner does not avail himself of it, it will be presumed that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary.¹

seems truly revolting to all just sense of propriety and decency. We are surprised that such an opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American Republic." See also *Broadstreet v. Broadstreet*, 7 Mass. 474; *Wray v. Wray*, 19 Ala. 522.

In *Matchin v. Matchin*, 6 Pa. St. 332, CHIEF JUSTICE GIBSON said: "A wife's insanity, though so absolute as to have effaced from her mind the first lines of conjugal duty, would not be a defence to a libel for adultery, though it would be a defence to an indictment for it. The offence is a social as well as a moral one, and it is agreed by the civilians to be less grievous to the sufferer, though not less immoral, when it is committed by the husband, whose transgression cannot impose a supposititious offspring on the wife, than it is when committed by the wife, whose transgression may impose such an offspring on the husband; and hence it probably was—though the kindred fault of barrenness was also cause of divorce—that the right of repudiation was confined, in the primitive ages, to the husband; for there is no instance of an exercise of it by a wife till the time of Cicero; or shortly before it. Cooper's notes to Justinian, lib. 1, tit. 9, § 1, p. 435. A libel for divorce is said to partake of the nature of a criminal proceeding; but the primary intent of it is undoubtedly to keep the sources of generation pure, and when they have been corrupted the preventive remedy is to be applied without regard to the moral responsibility of the subject of it. It is true that neither the canon law nor our own statute makes any distinction as to sex; but that the legislation of England, to which the dissolution of marriage in that country exclusively belongs, is guided by an opposite principle, is proved by its readiness to divorce for the adultery of the wife, and its reluctance to divorce for the adultery of the husband. There have been but two instances of the latter, and in

each of them the offence was marked with such circumstances of brutality that a continuance of the nuptial relation would have reflected the disgrace of the husband on the wife. The distinction is said to be preserved in the laws of many other countries; and though it is not expressly preserved in the application of the remedy under our own, we are nevertheless at liberty to conclude that insanity might be a bar to divorce at the suit of the wife when it would not, in similar circumstances, be a bar to divorce at the suit of the husband.

"To say the least, adultery committed under the irresistible impulse of that morbid activity of the sexual propensity which is called nymphomania, or more recently erotic mania, would certainly be ground of divorce, though not of indictment. The great end of matrimony is not the comfort and convenience of the immediate parties, though these are necessarily embarked in it; but the procreation of a progeny having a legal title to maintenance by the father; and the reciprocal taking for better, for worse, for richer, for poorer, in sickness and in health, to love and cherish till death, are important, but only modal conditions of the contract, and no more than ancillary to the principal purpose of it. The civil rights created by them may be forfeited by the misconduct of either party; but though the forfeiture can be incurred, so far as the parties themselves are concerned, only by a responsible agent, it follows not that those rights must not give way without it to public policy, and the paramount purposes of the marriage—the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue and happiness to be found in the world."

1. In *Jones v. Noy*, 2 Mynle v. Keen 125, one of two partners having continued the partnership business for some time after the lunacy of the other, and having then sold the business, the representative of the deceased lunatic

In some of the United States it has been decided that the insanity of a partner works the dissolution of a partnership.¹

10. Insane Persons as Makers or Endorsers of Promissory Notes.—The insanity of the maker or endorser of a promissory note may be set up as a defence to an action on the note.² But where one in good faith takes a note signed by a person of whose incompetency to do business he has no notice, and in a transaction which is not likely to call his attention to it, he can recover on the note.³ Where, however, a promissory note, payable in bank, is given upon an unexecuted consideration to one who knew of the maker's dis

partner was *held* to be entitled to his share of the partnership profits up to the period of sale. In this case the Master of the Rolls said: "It is clear upon principle that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract; the insanity of a partner is a ground for the dissolution of the partnership, because it is an immediate incapacity; but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case . . . in order to make it a ground of dissolution, he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution." See also *Sadler v. Lee*, 6 Beav. 324; *Sayers v. Bennet*, 1 Cox 107; *Besch v. Frolich*, 1 Phillips 172.

The English rule has been followed in *Pennsylvania*, *Uberoth v. Union Bank*, 9 Phila. (Pa.) 83; and in *New Jersey*, *Doughty v. Doughty*, 3 Halst. Ch. (N. J.) 227. See also *Raymond v. Vaughan*, 17 Ill. App. 144; *Reynolds v. Austin*, 4 Del. Ch. 24; *Re Wilkie*, 3 Australian J. R. 12; *Re Anderson*, 4 Victorian L. R., Eq. 103.

1. In *New York* it has been *held* that death, insanity and bankruptcy work a dissolution of a partnership. *Griswold v. Waddington*, 15 Johns. (N. Y.) 57.

In *Tennessee*, a finding of an inqui-

sition of lunacy against a partner works an immediate dissolution. *Isler v. Baker*, 6 Humph. (Tenn.) 85.

In *New Hampshire* the English rule has been doubted. *Davis v. Lane*, 10 N. H. 156.

2. *McClain v. Davis*, 77 Ind. 419; *Hannahs v. Sheldon*, 20 Mich. 278; *Rice v. Peet*, 15 Johns. (N. Y.) 503; *Davis v. Tarver*, 65 Ala. 98; *Seaver v. Phelps*, 11 Pick. (Mass.) 304.

3. *Shoulders v. Allen*, 51 Mich. 529.

In *Lancaster Co. Bank v. Moore*, 78 Pa. St. 407, *Moore*, desiring to borrow money from one *Stauffer*, gave his note to him. It was discounted in good faith at a bank for *Stauffer*, and he gave *Moore* his check for the amount. An inquest afterwards begun found *Moore* a lunatic for a time anterior to the discount of the note. The finding was traversed. The bank had no notice of *Moore's* lunacy. On a suit by the bank on the note against *Moore*, *held* that the contract being executed and without fraud, the insanity of *Moore* was not a defence.

Moore v. Hershey, 90 Pa. St. 543, was an action by an endorsee against the maker of a promissory note, and evidence was offered to prove that the maker had received no consideration for the note, which fact the plaintiff had admitted in conversation, proof having been made that the maker was insane; the offer was rejected, the court below ruling that as the note in suit was commercial paper and the plaintiff a holder for value, the consideration could not be inquired into. This was *held* to be error. *PAXSON, J.*, said: "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by mad men. . . . The true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to enquire into

ability, though it has passed into the hands of an innocent purchaser, it may be disaffirmed. In such a case the purchaser of the note takes it with constructive notice of the maker's disability.¹

11. Torts of Insane Persons.—An insane person is liable in damages for any torts that he may commit.² The damages are limited to an amount sufficient to compensate the injured party for the actual injuries suffered, and punitive damages cannot be recovered in such cases.³

12. Insane Persons as Witnesses.—An insane person is competent to be a witness if he understands the nature of an oath, and has sufficient mental power to give a correct account of what he has seen or heard.⁴

its consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration."

But an accommodation endorser of a promissory note who receives no benefit therefrom either to himself or his estate, may defend against a *bona fide* holder on the ground that he was *non compos mentis* at the time of the endorsement; and this though the holder had at the time of the transfer to him no knowledge of the endorser's insanity. *Wirebach v. First Nat'l Bank*, 97 Pa. St. 543. See also *Sentance v. Poole*, 3 C. & P. 1; *Burke v. Allen*, 29 N. H. 106.

1. *McClain v. Davis*, 77 Ind. 419; *Wirebach v. First National Bank*, 97 Pa. St. 543.

2. By the common law, as generally stated in the books, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, although being incapable of criminal intent, he is not liable to indictment and punishment." CHIEF JUSTICE GRAY, in *Morain v. Devlin*, 132 Mass. 87; *citing* Bac. Max. reg. 7; *Weaver v. Ward*, Hob. 134; 2 Rol. Ab. 547; 1 Hale, P. C. 15, 16; 1 Hawk., ch. 1 § 5; Bac. Ab., Idiots and Lunatics, E.; *Haycraft v. Creasy*, 2 East. 92, 104; 1 Chat. Pl. (2d Am. ed.) 65; *Morse v. Crawford*, 17 Vt. 409; *Cross v. Kent*, 32 Md. 581; *Ward v. Conatser*, 4 Baxt. (Tenn.) 64; *Bullock v. Babcock*, 3 Wend. (N. Y.) 391; *Behrens v. McKenzie*, 23 Iowa 333; *Lancaster Co. Bank v. Moore*, 78 Pa. St. 407, 412; *Dickinson v. Barber*,

9 Mass. 225; *Brown v. Howe*, 9 Gray (Mass.) 84.

In *Morain v. Devlin*, 132 Mass. 87, it was held that a lunatic was civilly liable for an injury caused by the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which he was the owner, and of which his guardian had the care and management.

Slander.—If actual injury is sustained, damages may be recovered for slanderous words spoken by a lunatic. In *Dickinson v. Barber*, 9 Mass. 225, the court said that where derangement was great and notorious, so that the speaking the words could produce no effect on the hearers, it was manifest no damage would be incurred. But where the degree of insanity was slight, or not uniform, the slander might have its effect, and it would be for the jury to judge upon the evidence before them and measure the damages accordingly. In *Bryant v. Jackson*, 6 Humph. (Tenn.) 199, however, insanity was held a good plea in defence to an action for slander. See also *Homer v. Marshall*, 5 Munf. (Va.) 446; *Ycates v. Reed*, 4 Blackf. (Ind.) 463.

3. *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 647; *Cross v. Kent*, 32 Md. 581; *Ward v. Conatser*, 4 Baxt. (Tenn.) 64.

4. *District of Columbia v. Armes*, 107 U. S. 519; *People v. New York Hospital*, 3 Abb N. C. (N. Y.) 229; *Sarbach v. Jones*, 20 Kan. 497.

In the leading case of *Hartford v. Palmer*, 16 Johns. (N. Y.) 143, the rule is laid down "that all persons who are examined as witnesses must be fully possessed of their understanding; that is such understanding as enables them to retain in memory the events of which they have been witnesses, and gives

In accordance with the general rules of evidence, the competency of an insane witness is to be decided by the court upon examination of the witness himself, and of other witnesses competent to testify as to the nature of his insanity; the credibility of the insane witness is for the determination of the jury.¹

them a knowledge of right and wrong; that, therefore, idiots and lunatics, whilst under the influence of their malady, not possessing their share of understanding, are excluded."

It is no objection, either to the competency or credibility of a witness that he is subject to fits of mental derangement, if it appears that he is sane at the time he is offered. *Campbell v. State*, 23 Ala. 44. Thus, on a trial for forgery M was introduced as a witness for the commonwealth, and gave important testimony against the prisoner. He was examined and cross examined for two days, and neither the counsel nor the court suspected that he was deranged, though they thought he was drinking deeply. After the conclusion and sentence of the prisoner a new trial was moved for on the ground that M was deranged when he gave his evidence; and it was proved that he had been deranged a few days before the trial and within a few days after it, and so continued. But the judge who tried the prisoner overruled the motion and certified that at the time of M's examination he was a competent and proper witness, and not laboring under any mental disability whatever. On an appeal it was *held* that, as the proofs did not show derangement at the time of M's examination, he was a competent witness. *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865. See also *Queen v. Hill*, 20 L. J., N. S. 22; *Evans v. Hettich*, 7 Wheat. (U. S.) 453, 470. In *Kendall v. May*, 10 Allen (Mass.) 59, it was *held*, under a statute permitting the parties to a civil action to testify therein, except that when one party "is shown to the court to be insane, the other party shall not be admitted to testify in his own favor," that a party might be permitted to testify in his own favor, although the adverse party was insane, if it appeared that the insane party was in fact competent to testify.

1. **The Competency of an Insane Witness a Question for the Court.** The question whether a person who is offered as a witness is insane at the time goes to the competency of the witness, and is a preliminary question to be decided by the court.

The question whether a witness, sane at the time he testifies, was insane at the time of the transaction with regard to which he testifies, goes to the credibility of his testimony, and not to his competency, and is therefore a subject for evidence to the jury, to be adduced by the offering party with his other evidence. *Holcomb v. Holcomb*, 28 Conn. 177; *Grant v. Thompson*, 4 Conn. 203; *Coleman v. Commonwealth*, 25 Gratt. (Va.) 865.

In *Cannady v. Lynch*, 27 Minn. 435, the plaintiff alleged in her complaint that by reason of certain acts committed by the defendant she became insane, and was so adjudged, and was confined in an asylum, and that she would always be weak in mind and body. She was sworn as a witness, but the defendant objected to her testifying, because it appeared from her complaint that she came within the provision of a statute excluding persons of unsound mind from being witnesses. The objection was overruled. On appeal the lower court was sustained, the supreme court saying: "It [the statute] intends to affirm the common law rule on the subject, and admit persons as witnesses when, at the time they are offered to be sworn, they are possessed of 'such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong,' sufficient to appreciate the sanctity and binding force and obligation of an oath. If a person offered as a witness must be tested by this rule, it is evident the test must be applied by the trial court at the time of offering him. His condition at that time must determine his competency. This cannot be established by the allegations of the pleadings. It is not the purpose or office of pleadings to ascertain or make or present any issue on the competency of witnesses to be sworn on the trial. The trial court may take into account the allegations and admissions in the pleadings bearing on the mental condition of any person offered as a witness, as it may resort to any other evidence to ascertain the fact, but they are not to be taken as conclusively de-

13. Deeds of Insane Grantors—(a) When Void or Voidable.—The deed of an insane person is only voidable, and not void. This is the rule in England and in those of the United States in which the committee is held not to have an estate in the lands of the insane ward.¹ In those States, however, in which convey-

termining such condition. The court below did not err in overruling defendant's objection to plaintiff as a witness, based on the allegation in her complaint that she at one time became insane. It was not the duty of the trial court to examine plaintiff as to her mental soundness, merely because defendant alleged her to be unsound, unless it saw in her some indication of unfitness to testify. It must be presumed that the court declined to examine her because it saw no such indication."

In *Lewis v. Eagle Ins. Co.*, 10 Gray (Mass.) 508, the court *held* that the testimony of a witness who declares himself unable to answer questions put to him on cross-examination, on the ground that his memory, at times, failed him in consequence of mental injury resulting from a sunstroke, and that such was his present condition, is not to be stricken out, but should be submitted to the jury.

At the trial of an action, a witness, seventy-eight years old, with little knowledge of passing events, and but a feeble memory of past transactions, who did not know, while upon the stand, where he stayed the night before, or where he came from to the court room, and seemed to have absolutely no memory in reference to the recent events in his life, was permitted to testify as to the circumstances attending a conveyance executed to him some six years previously. *Held*, that his testimony was worthless. *Woodhull v. Whittle*, 30 N. W. Rep. (Mich.) 368.

1. Conveyance by Matter of Record.—At common law the conveyance of an insane person by matter of record was neither void nor voidable. In *Mansfield's Case*, 12 Rep. 123, a monstrous and deformed cripple, who had been an idiot from his birth, and who had been borne away from his guardian by stealth, was held concealed till he had acknowledged a fine of his land; and though his idiocy was visible at a glance, and LORD DYER said that the judge who took the acknowledgment was unworthy to take another, the fine was allowed to stand. Applying this prin-

ciple *C. J. GIBSON*, in *Snowden v. Dunlavy*, 11 Pa. St. 522, *held* that the estate of a lunatic might be transferred to another by means of proceedings in partition.

Feoffment.—At common law the feoffment of a madman was only voidable, but his deed was absolutely void. In *De Silver's Estate*, 5 Rawle (Pa.) 111, *C. J. GIBSON* said: "The authorities distinctly show that the feoffment and livery of a lunatic or madman are not void but voidable, and that as they work a divestiture of his seisin, they preclude the possibility of an escheat by his death, because seisin must be found by the inquest, as well as a failure of heirs, devisees, or known kindred. His feoffee holds discharged, because an avoidance of the act would not restore the seisin of the lunatic at the time of his death, which is essential to an escheat of his estate to the immediate lord of the fee." It was accordingly *held* that though escheats take effect in Pennsylvania, not on principles of tenure, but by force of the statutes, yet these statutes require the decedent to have been seized at the time of his death. See also *Thompson v. Leach*, 12 Mod. 173.

Where Deed Is Equivalent to Feoffment.—Where a deed is equivalent to a feoffment, with livery of seisin, it is voidable merely and not void. Thus in *Maryland* it was *held* that where an estate was devised to one in tail, and if he died without heirs of his body, then to another in tail, and the first tenant in tail conveyed the land in fee by deed of bargain and sale, which in *Maryland* was equivalent to livery of seisin, and then died, that the remainderman could not impeach the deed on the ground that at the time of its execution the bargainor was *non compos mentis*. *Key v. Davis*, 1 Md. 32. The modern authorities generally hold that a deed of an insane person, in whatever form it may be, is voidable only and not void. *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434; *Crawford v. Scovell*, 94 Pa. St. 48; *Gribben v. Maxwell*, 34 Kan. 8; *Burnham v. Kidwell*, 113 Ill. 425; *Copenrath v. Kienby*, 83 Ind.

ances by insane persons are declared void by statute, and in those in which the committee is vested with the legal estate of his ward, conveyances by an insane person after the finding of an inquisition, and the appointment of a committee, are absolutely void.¹

In order to invalidate a deed executed by an insane grantor, it must appear that the grantor was subject to insane delusion at

18; *Fay v. Burditt*, 81 Ind. 433; *Physio-Medical College v. Wilkinson*, 108 Ind. 314; *Lincoln v. Buckmaster*, 32 Vt. 52; *Beverly's Case*, 4 Coke 123 b; *Allis v. Billings*, 6 Met. (Mass.) 415; *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Somers v. Pumphrey*, 24 Ind. 231; *Musselman v. Craven*, 47 Ind. 1; *Freed v. Brown*, 55 Ind. 310; *Riggan v. Green*, 80 N. C. 236; *Eaton v. Eaton*, 8 Vroom (N. J.) 108; *Yauger v. Skinner*, 1 McCart. (N. J.) 389; *Breckinridge v. Ormsly*, 1 J. J. Marsh. (Ky.) 236; *Thomas v. Hatch*, 3 Sumn. (U. S.) 170; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Wait v. Maxwell*, 5 Pick. (Mass.) 217.

1. In *England* the finding of insanity by an inquisition is not conclusive evidence of such insanity in collateral proceedings. A deed overreached by a finding of insanity is therefore not necessarily void. *Niell v. Morley*, 9 Ves. 478; *Selby v. Jackson*, 6 Beav. 192; *Jacobs v. Richards*, 18 Beav. 300. In *Indiana* a statute providing that the deed of one duly found insane should be absolutely void, was *held* not to apply to deeds made before the grantor had been found insane by inquisition. *Musselman v. Craven*, 47 Ind. 1; *Freed v. Brown*, 55 Ind. 310. In *Massachusetts*, after the appointment of a guardian, a deed by an insane ward is absolutely void. *Wait v. Maxwell*, 5 Pick. (Mass.) 217. In *Maine* the same rule prevails. *Hovey v. Hobson*, 53 Me. 451. In *Missouri* the deed of an insane person under guardianship is void. *Rannells v. Garner*, 80 Mo. 474. In *New York* it has been *held* that an inquisition under a writ *de lunatico inquirendo*, stating that at the time of the execution of a deed the grantor was *non compos mentis*, is presumptive but not conclusive evidence of the grantor's incapacity in an action wherein a party claims under a deed. *Van Deusen v. Sweet*, 51 N. Y. 378; *L'Amoreux v. Crosby*, 2 Paige (N. Y.) Ch. 422; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513; *Griswold v. Miller*, 15 Barb. (N. Y.) 520; *Jackson v. Burchin*, 14 Johns.

(N. Y.) 124; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235; *In re Christie*, 5 Paige (N. Y.) 242.

Where a statute provided that the deed of a married woman, in which her husband does not join, shall not be valid, and it appeared that a husband while insane joined in a deed with his wife, such deed was *held* absolutely void. The court said: "We think that the learned judge who presided at the trial correctly ruled that if the defendant's husband was at the time he signed the deed insane, he could give no such assent as would satisfy the statute. The deed was void to the same extent as if there had been no assent by the husband, and no subsequent action or failure to act on his part could give it validity. The cases cited by the tenant to the point, that the deed or other contract of an insane person is voidable only, and may be ratified by him after he becomes sane, do not apply to this case. No subsequent assent or ratification by the husband could fulfil the requirements of the statute, or give validity to the deed as the deed of the wife."

Insane Settler.—*Leggate v. Clark*, 111 Mass. 308. Conveyances made by an insane settler without consideration, are absolutely void. *Elliott v. Ince*, 7 De G., Mac. & G. 475; *Clark v. Clark*, 2 Vern. 412; *Roddy v. Williams*, 3 Jones & La. T. 1.

In *Miskey's Appeal*, 107 Pa. St. 611, a man of intemperate habits, by which he had become enfeebled in mind and body, made a voluntary conveyance of all his estate to his father, in trust for his (the grantor's) father, mother and sister. The deed made no provision for the grantor's wife and but an inadequate provision was made for the only son. The parties benefiting by the deed were in affluent circumstances, and the consideration expressed in it was but nominal. The deed contained no power of revocation, and there was no proof that the grantor was conscious of that fact or that his attention was called

the time of the execution of the deed, and that the insane delusion influenced him to do the act, or that he had lost all power of intelligently reasoning on any subject.¹

(b) *Ratification*.—Where the deed of an insane person is sought to be established on the ground that the grantor, after his restoration to sanity, had ratified it by receiving and accepting the consideration, it must appear that the ratification was the intelligent act of the grantor, knowing that he was acting under the contract contained in the deed, and intelligently availing himself of the provisions of the contract in his favor.² Ratification may be inferred if the grantor, after his restoration to reason, takes advantage of the beneficial considerations contained in the contract of conveyance.³

to it. The transaction was under the professional advice of the father's attorney, and the son's private attorney was not cognizant of the proceedings. *Held*, in a suit in equity brought by the widow, and administratrix of the grantor, to set aside the deed, that the deed should be set aside in favor of the grantor's widow, and the property be transferred to her as the administratrix of her husband's estate. But where an insane father deeded lands to a son to the exclusion of three other children, it was *held*, in the absence of any persuasion or fraud on the part of the son, that the deed should not be annulled. *Nailor v. Nailor*, 5 Mackey (D. C.) 93.

1. *Deeds by Monomaniacs*.—In *Eken v. McCracken*, 32 Leg. Intel. (Pa.) 405, where a deed was sought to be avoided, it was *held* that a man may be a monomaniac on a particular subject, but if the deed has no connection with his morbid condition, it will be sustained. See also *Jenkins v. Morris*, L. R., 14 Ch. D. 674; *Dennett v. Dennett*, 44 N. H. 531; *Hovey v. Hobson*, 55 Me. 256.

Deed Made in Lucid Interval.—A deed is good if made in a lucid interval. *Towart v. Sellers*, 5 Dow 231.

Mere weakness of mind, not amounting to insanity, will not avoid a deed. *Odell v. Buck*, 21 Wend. (N. Y.) 142; *Corbit v. Smith*, 7 Iowa 60; *Darby v. Hayford*, 56 Me. 246. In *Curtis v. Brownell*, 42 Mich. 165, however, a mortgage made by a man who had been insane some time before and had periodical recurrences of insanity, and was insane at the time he gave the mortgage, though he had all along managed his own affairs with average correctness, and had been treated by his neighbors as competent to do business, even while they considered him of un-

sound mind, was set aside as being made while *non compos mentis*. See also *Kennedy v. Murrast*, 46 Ala. 161; *Titcomb v. Vantyle*, 84 Ill. 371.

2. *Bond v. Bond*, 7 Allen (Mass.) 1. In this case the ratification of a deed executed during insanity was *held* not to make it effectual as against the grantor's prior deed executed while he was sane, and recorded after the formal execution, but before the ratification of the second deed.

3. Thus, if one who, while of unsound mind, has executed a deed conveying land, after being restored to his right mind, and knowing that his grantee is in possession of the land under the deed, does not enter upon the land, nor give notice of his intention to disaffirm the conveyance, but receives payment of the notes for the price given to him while insane, his intention to ratify and confirm the deed may be inferred; although at the time of receiving such payment he does not know that he has the power of avoiding the deed, and that by receiving such payment he will relinquish that power. *Arnold v. Richman Iron Works*, 1 Gray (Mass. 434). In this case the court said: "It was argued that the plaintiff should not be bound in such case of the ratification of a contract made whilst of unsound mind, without affirmative proof that he knew that he had the power of avoiding his deed, and that, by demanding and receiving payment of his notes, he would relinquish that power. This is not tenable, unless a man of sane mind may set up his ignorance of the law to excuse himself from liability on his contracts. Could a man who should give a promise in writing to pay a debt of more than six years' standing, avoid his acknowledgment

(c) *Power of a Court of Equity to Set Aside Deed of an Insane Grantor.*—A court of equity, on good cause shown, may set aside a voidable conveyance of lands by an insane person, and this may be done at the instance of the grantor himself when restored to reason, or by his committee or guardian, or by his executor, administrator or heirs.¹

and promise by averring that he did not know that in point of law he had a good bar to the note, on the statute of limitations? It seems to us not. We think the law presumes that every man of competent capacity to make contracts, either by his knowledge or by the aid of legal counsel or such other aid and advice as he may avail himself of, knows enough of the law to make valid contracts; and, at all events, the law will not allow such an excuse to exempt him from the obligation of his contracts." See also *Tucker v. Moreland*, 10 Pet. (U. S.) 64; *Eaton v. Eaton*, 8 Vroom (N. J.) 108; *Seaver v. Phelps*, 11 Pick. (Mass.) 304.

In *Howe v. Howe*, 99 Mass. 98, it was held that "the evidence that the grantor in a deed remembered what he had done and afterwards spoke of it and gave his reasons for it, and did not express any regret or dissent, was properly admitted as tending to prove that he understood his act at the time and ratified it. 'The deed of an insane person is not void, but voidable. The maker of it, or his legal representatives, may avoid it; or, when in possession of his full powers of mind, if he recovers his reason, he may affirm and ratify it. The contract is not a nullity, but, until disaffirmed, is binding; and the sane party cannot repudiate it. Any distinct and decisive act of recognition as a valid and subsisting contract is competent evidence of ratification. A new delivery of the deed is not requisite, as it would be if the deed of an insane person were void. See also *Allis v. Billings*, 6 Met. (Mass.) 415; *Gibson v. Soper*, 6 Gray (Mass.) 279; *Campbell v. Kuhn*, 45 Mich. 513; *Jones v. Evans*, 7 Dana. (Ky.) 96.

In *Schuff v. Ransom*, 79 Ind. 458, it was held that the deed of an insane grantor before office found is voidable only and that the grantor has the right to avoid or ratify it on becoming sane, and that his heirs have the same right; but that an action by the heirs to set aside such deed could not be maintained unless some act disaffirming the deed had been done before commencing

the suit; and that if the complaint failed to show this, it was bad on demurrer.

But in *Valpey v. Rea*, 130 Mass. 384, on the trial of a writ of entry by a judgment creditor, claiming under the levy of an execution, of a person to whom the demanded premises were devised by his father, who, some time after the will was executed, conveyed the premises by deed to the tenant, it was held that the defendant might show that the grantor was insane at the time he made the deed, and that he died without being restored to reason, although no entry had been made, or any other act had been done to avoid the deed. See also *Rogers v. Blackwell*, 49 Mich. 192.

1. *Kerwin v. Hibernia Ins. Co.*, 25 Fed. Rep. 692; *Gribben v. Maxwell*, 34 Kan. 8; *Burnham v. Kidwell*, 113 Ill. 425; *Key v. Davis*, 1 Md. 32; *Judge of Probate v. Stone*, 44 N. H. 593; *Campbell v. Kuhn*, 45 Mich. 513; *Hunt v. Weir*, 4 Dana (Ky.) 347; *Carew v. Johnston*, 2 Sch. & Lef. 280; *Fecel v. Gumault*, 32 La. Ann. 91; *Miskey's Appeal*, 107 Pa. St. 611. The right to avoid the deed does not exist in behalf of strangers. Thus where a person in good faith purchased land at a sale under proceedings to foreclose a mortgage, and brought an action for possession against the tenant of the premises who was not the mortgagor, it was held that it was incompetent for the defendant to show that the mortgagor was of unsound mind when the mortgage was executed. *Ingraham v. Baldwin*, 9 N. Y. 45. In *Kilbee v. Myrick*, 12 Fla. 419, the court refused to set aside the conveyance of an insane husband, at the instance of the wife, the husband being still alive.

But in *Valpey v. Rea*, 130 Mass. 384, a different rule prevailed. On the trial of a writ of entry the defendant claimed title as the judgment creditor of Rea under the levy of an execution. The land demanded was devised to Rea by his father, who, some time after the will was executed, conveyed the premises by deed to the tenant. At the trial

In England and in most of the United States it is established that an executed contract for the sale of lands, in good faith, for a fair consideration, by an insane person to one who has no notice of the grantor's insanity, will not be set aside, except the purchase money be restored, and the grantee placed *in statu quo*.¹

the demandant offered to prove that Rea's father was insane when he executed the deed and that he died without being restored to sanity. It did not appear that any entry had been made or any other act done to avoid the deed. The trial judge ruled that the creditor could not avoid the deed by showing the insanity of the grantor. The supreme court *held*, on appeal, that when the will was proved Rea, under his title as devisee, acquired title to and the right to entry upon the land, and that this right being, under the statutes of Massachusetts, subject to be taken upon execution by a creditor, such creditor would acquire the right to recover the land and to avoid the deed to Rea, by showing the insanity of Rea's grantor.

1. Thus where an idiot mortgaged his land for a loan which was expended in his care and support, and the mortgagee acted in good faith and without notice, the idiot was not permitted to recover the land mortgaged without returning the amount of the loan. *Burnham v. Kidwell*, 113 Ill. 425.

Where Deed Is Accepted Without Notice of Grantor's Insanity.—In *Gribben v. Maxwell*, 34 Kan. 8, it was *held* that one who in good faith buys land of an insane person, for a fair price, without knowledge of his insanity, there having been no inquisition, can hold the land as against an attempt to avoid the sale without offering to restore the price. See also *Copenrath v. Kienby*, 83 Ind. 18; *Addison v. Dawson*, 2 Vern. 678; *Price v. Berrington*, 3 Mac. & G. 486; *Scanlan v. Cobb*, 85 Ill. 296; *Sewing Machine Co. v. Barnard*, 43 Mich. 379; *Riggan v. Green*, 80 N. Car. 236; *Eaton v. Eaton*, 8 Vroom (N. J.) 108; *Ashcraft v. De Armond*, 44 Iowa 229; *Behrens v. McKenzie*, 23 Iowa 333; *Rusk v. Fenton*, 14 Bush (Ky.) 490; *Yauger v. Skinner*, 1 McCart. (N. J.) 389; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434.

A conveyance of land, however, will be set aside where the defendants had knowledge of plaintiff's mental condition, and it is not shown that an adequate consideration was paid or agreed

upon, and defendants have enjoyed the rents and profits long enough to compensate them for all they appear to have paid. *Alexander v. Haskins*, 68 Iowa 73.

Prior Restitution of Purchase Money.—Some of the American cases hold that a suit may be maintained by a lunatic or his representatives for the avoidance of a deed without first restoring the consideration money to the grantee. In *Gibson v. Soper*, 6 Gray (Mass.) 279, *THOMAS, J.*, said: "To say that an insane man before he can avoid a voidable deed must put the grantee *in statu quo*, would be to say, in effect, that in a large majority of cases his deed shall not be avoided at all."

In *Hull v. Louth*, 109 Ind. 315, A procured a deed from an insane person, who received no consideration and did not comprehend the nature of the consideration. Then A mortgaged the land to B, who acted in good faith, relying on the record title. The insane person received no benefit from the money advanced by B. *Held*, that as against B the insane person was entitled to have the title quieted, and this, without a disaffirmance or an offer to make restitution.

In *Ricketts v. Jolliff*, 62 Miss. 440, it appeared that the consideration of a contract made by an insane person had been wasted, and it was *held* that restitution was not a condition precedent to the rescission of the contract.

In *Pennsylvania*, a lunatic, by his committee, may recover land conveyed by him when insane without restoring the purchase money or compensating the defendant for improvements. *Rogers v. Walker*, 6 Pa. St. 371. In *Crawford v. Scovell*, 94 Pa. St. 48, *TRUNKY, J.*, said: "To say that an insane man, before he can avoid a voidable deed, must put the grantee *in statu quo* would oftentimes be to say his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain so as to be able to make restitution. One of the obvious grounds on which the deed of an insane man is held voidable is not

(d) *Specific Performance*.—When a person, while sane, enters into an agreement to convey real estate, and afterwards becomes insane, equity will enforce the specific performance of the contract. But if the agreement is made while the person is insane, specific performance will not be decreed.¹

14. *Testamentary Capacity*—(a) *Definition*.—In order to make a valid will, a testator must have sufficient capacity to comprehend the nature of the act he is performing; he must understand the extent of the property of which he is disposing; he must comprehend the relation which he holds to those who have claims upon him, and be capable of making a rational selection among them.²

merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale. And the same incapacity which made the deed void may have wasted the price and made the restoration of the consideration impossible." The same rule seems to prevail in Maine. *Hovey v. Hobson*, 53 Me. 451. In *Indiana*, *Somers v. Pumphrey*, 24 Ind. 231; and in *New Hampshire*, *Flanders v. Davis*, 19 N. H. 139.

In the recent case of *Brigham v. Fayerweather*, 144 Mass. 48, the Supreme Judicial Court of Massachusetts decided that the deed of an insane person may be disaffirmed without returning the consideration money or placing the other party *in statu quo*. See also *Chandler v. Simmons*, 97 Mass. 508.

In *Physio-Medical College v. Wilkinson*, 108 Ind. 314, to a complaint to set aside a deed on the ground that the grantor therein at the time of its execution was of unsound mind, an answer was filed which alleged that the grantor had not, prior to the execution of the deed, been declared a person of unsound mind; that she did not exhibit any appearance of mental unsoundness; that the defendant without knowledge of her alleged infirmity accepted the deed in good faith, and in pursuance of a stipulation contained in the deed, the grantee, a medical college corporation, had afforded a medical education to the nephew and niece of the grantor, free of charge, the cost and value of which was \$500, which sum had never been repaid or tendered. The court held that the answer was bad, inasmuch as it did not aver that the grantor received anything which was either beneficial or necessary to herself. A reply to the answer was filed which alleged that soon after the death of the grantor the defendant took possession of the land

described, which had upon it a saw mill and a number of dwelling houses, and that from rents received and timber sold it had realized the sum of \$3,000, and that from waste committed on the land while in its possession, by carrying off valuable timber, the value of the land had been lessened in the sum of \$5,000. This reply was held to be good, even admitting the sufficiency of the answer.

1. *Hall v. Warren*, 9 Ves. 605; *Pegge v. Skynner*, 4 Cox Eq. 23; *Owen v. Davies*, 1 Ves. Sen. 82; *Yauger v. Skinner*, 1 McCart. (N. J.) 389.

2. LORD COCKBURN, in *Banks v. Goodfellow*, L. R., 5 Q. B. 549, states the rule as follows: That the "testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made."

An amusing, but accurate, definition of testamentary capacity is laid down in *Swinbourne on Wills*, p. 2, § 4, as follows: "If a man be of mean understanding, neither wise nor foolish, but indifferent as it were between a wise man and a fool; yea, though he rather incline to the foolish sort, so that for his dull capacity he may be termed *grossum caput*, a dunce, such a one is not prohibited to make a testament, unless he be yet more foolish, and so very simple and sottish that he may easily be made to believe things incredible or

impossible, as that an ass can fly, or that trees did walk, beasts and birds could speak, as it is in *Æsop's Fables*."

In *Whitney v. Twombly*, 136 Mass. 145, the following instructions to the jury were sustained by the Supreme Judicial Court of Massachusetts. "Soundness of mind, such as will enable a person under the statute to make a will, has relation to the business to be transacted; namely, the disposition of her property by will. Her mind must have been sound with reference to whatever is involved in this transaction; that is to say, she must have been able to understand and carry in her mind in a general way the nature and situation of her property, and her relations to those persons who are about her; to those who would naturally have some claim to her remembrance; to those persons in whom and those things in which she has been mostly interested. She must have been capable of understanding these things, and the nature of the act she was doing, and the relation in which she stood to the object of her bounty, and to those who ought to be in her mind on such an occasion, and free from any delusion which was the effect of disease, and which would or might lead her to dispose of her property otherwise than she would have done if she had known and understood correctly what she was doing. All the testimony covering the whole later portion of her life—as to her relations and degree of intimacy with her brothers and sisters and nephews and nieces; as to what she said and what she did; as to her peculiarities, if you find that she had any; as to her disposition and temperament, her griefs and bereavements, her attacks of sickness, whatever you may find them to have been, her habits and manners; as to what you may find that she was not able to do, and what she was able to do,—may be considered so far as they will aid you in determining her condition of mind on January 2nd, 1877. Age is not of itself a disqualification, but it incites vigilance to see if it is accompanied with incapacity. Disease is not itself a disqualification, but all infirmities awaken caution to see if mental capacity is impaired or gone."

Instructions that a testator had sufficient capacity if he understood his business, could recollect and keep it in mind, could understand the extent and value of his property, and how he wanted it disposed of, knew who were

the natural objects of his bounty, and could keep these matters in mind long enough to dictate his will without prompting, were held unobjectionable in *Cline v. Lindsey*, 110 Ind. 337. See also in *General Benoist v. Murrin*, 58 Mo. 307; *Young v. Ridenbaugh*, 67 Mo. 574; *Bates v. Bates*, 27 Iowa 110; *Brown v. Riggin*, 94 Ill. 560; *Lowder v. Lowder*, 58 Ind. 538.

Unnatural Disposition of Property.—

An unnatural disposition of property is a circumstance tending to prove a lack of testamentary capacity. *Lamb v. Lamb*, 105 Ind. 456; *Caldwell v. Anderson*, 104 Pa. St. 199; *Sherley v. Sherley*, 81 Ky. 240; *Fountain v. Brown*, 38 Ala. 72; *Young v. Barner*, 27 Gratt. (Va.) 96; *Evans v. Arnold*, 52 Ga. 169; *Kevil v. Kevil*, 2 Bush (Ky.) 614. But the giving of property to a stranger rather than to relatives is not without more evidence of a want of testamentary capacity. *Collins v. Brazill*, 63 Iowa 432; *Trumbull v. Gibbons*, 2 Zab. (N. J.) 117; *Van Pelt v. Van Pelt*, 30 Barb. (N. J.) 134; *Mosser v. Mosser*, 32 Ala. 551; *Austen v. Graham*, 8 Moo. P. C. C. 493.

Old Age.—Extreme old age, even when accompanied with disease, is not in itself sufficient evidence of testamentary incapacity. **CHANCELLOR KENT**, in *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 160, said: "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated." See *Collins v. Townley*, 6 C. E. Green (N. J.) 353; *Humphrey's Will*, 12 C. E. Green (N. J.) 567; *Taylor v. Kelly*, 31 Ala. 59; *Wintermute's Will*, 12 C. E. Green (N. J.) 447; *Reynolds v. Root*, 62 Barb. (N. Y.) 250; *Thompson v. Kyner*, 65 Pa. St. 368; *Tarr's Est.*, 3 Pa. County Court Rep. 319; *Rutherford v. Morris*, 77 Ill. 397; *Thomas v. Stump*, 62 Mo. 275; *Lowder v. Lowder*, 58 Ind. 538; *Wilson v. Mitchell*, 101 Pa. St. 495.

The law seems to require less mental

The highest degree of mental soundness is not required in order to constitute capacity to make a testamentary disposition of property. A person's mind may be impaired by grief, disease, melancholy or old age, yet if he has sufficient ability to weigh and consider intelligently the act of making the will, and its surrounding circumstances, the will will be valid.¹

The definition of testamentary capacity is a matter of law for the court. The sufficiency of the evidence must be passed upon before submission to the jury, and it is error to submit the question to the jury if there is no evidence that the incapacity existed.²

power for the execution of a will than for the making of a contract. In *Harison v. Rowen*, 3 Wash. (U. S.) 585, the court said that a testator's capacity may be perfect to dispose of his property by will, yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they could in comprehending business in some measure new. See also *Brinkman v. Rueggiesick*, 71 Mo. 553. But see *contra* *McElroy v. McElroy*, 5 Ala. 81; *Barnes v. Barnes*, 66 Me. 286; *Potts v. House*, 6 Ga. 324; *Kinne v. Kinne*, 9 Conn. 102; *Converse v. Converse*, 21 Vt. 168. The same degree of mental capacity is not required in making a will of a small and simple property as of a large and complicated estate. *Sheldon v. Dow*, 1 Dem. (N. Y.) 503.

An inquisition of lunacy overreaching the date when the will was made does not invalidate the will. Thus, in New Jersey a woman 82 years old made a will, and it appeared that at the time of its execution she had sufficient testamentary capacity. Two years afterwards an inquisition found that she had been of unsound mind for the past three years. It was held that the finding of the inquisition was immaterial as to her testamentary capacity. *Brady v. McBride*, 39 N. J. Eq. 495.

1. A person may not have been of sound mind, yet have been of disposing mind. It is accordingly error to instruct a jury that they must find against a will if they find the testator to have been so diseased mentally as not to have been of sound mind. *Freeman v. Easley*, 117 Ill. 317. It is also error to charge

that if testatrix, when she made the will, "had a diseased brain, and from this cause, or from disease, her mind was so unsound as not to remember the names of her relations, and to judge soundly of the acts she was about to do, or to know and understand the business she had in view, and to think soundly on that business, then she did not have capacity to make a will." *Kramer v. Weinert*, 81 Ala. 414. One may be competent to make a will, although an invalid, nervous, reserved, and disinclined to read and write. *Hoban v. Piquette*, 52 Mich. 346.

See also *Jackson v. Hardin*, 83 Mo. 175; *Delaney v. Salina*, 34 Kan. 532; *Burley v. McGough*, 115 Ill. 11; *Cockeram v. Cockeram*, 17 Ill. App. 604; *Re Potter*, 3 Demarest (N. Y.) 108; *Lyons v. Van Riper*, 11 C. E. Green (N. J.) 337; *Boyd v. Eby*, 8 Watts (Pa.) 66; *Thompson v. Kyner*, 65 Pa. St. 368; *Wilson v. Mitchell*, 101 Pa. St. 495; *Combs' App.*, 105 Pa. St. 155; *Stancell v. Kenan*, 33 Ga. 56; *Ragan v. Ragan*, 33 Ga. Supp. 106; *Runkle v. Gates*, 11 Ind. 95; *Yoe v. McCord*, 74 Ill. 33; *Kingsbury v. Whittaker*, 32 La. An. 1055; *Harvey v. Sallens*, 56 Mo. 372.

2. On the trial of an issue *devisavit vel non*, the trial judge is justified in directing a verdict in favor of the proponent, not when he may feel that if he were sitting as a juror he would regard the evidence as insufficient to induce him to find a verdict against the alleged will, but when, after a careful review of all the testimony, he would feel that if a verdict were rendered against the proponents after a fair and impartial trial, he would be constrained to set it aside as contrary to the manifest weight of evidence. *Herster v. Herster*, 116 Pa. St. 612; *Knauss's Appeal*, 114 Pa. St. 10; *Thompson v. Kyner*, 65 Pa. St. 368, 375; *Smith v. First National Bank*, 99 Mass. 611; *Cuffman v. Long*, 82 Pa. St. 72; *Kinne v. Kinne*, 9 Conn.

(b) *Delusions*.—Whenever a testator's mind is so deranged that he makes his will under the influence of an insane delusion, the will is void.¹

102; *Brown v. Torrey*, 24 Barb. (N. Y.) 583.

The Issue.—The issue must be framed so that the jury may find the facts from which the conclusion of law may be drawn, and not the conclusion of law itself. Thus a request was made that an issue might be framed as follows: "At the time said T signed said will did she have mind and memory sufficient to understand the ordinary affairs of life and to act with discretion therein? Did she know her children and grandchildren and have a general knowledge of the estate of which she was possessed?" The court below refused the request and framed this issue: "Was the said T of sound mind at the date of the execution of the paper writing in contest?" Upon appeal it was *held* that the issue as framed by the court was erroneous, inasmuch as it presented a question of law, whereas the issue as framed by the defendant called for the decision of facts alone, from which the conclusion of law could be drawn by the court. *Todd v. Fenton*, 66 Ind. 25.

1. *Chaney v. Bryan*, 16 Lea (Tenn.) 63; *Ballantine v. Proudfoot*, 62 Wis. 216; *Morse v. Scott*, 4 Dem. (N. Y.) 507; *Edge v. Edge*, 38 N. J. Eq. 211; *Brinton's Est.* 13 Phila. (Pa.) 234; *Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619; *Tawney v. Long*, 76 Pa. St. 106.

Strange Beliefs.—The existence of mental delusions, however, is not necessarily incompatible with mental intelligence sufficient to make a will. *Rice v. Rice*, 53 Mich. 432. Thus it has been *held* that a testator's mental delusion as to his physical condition, or the cause thereof, does not constitute testamentary incapacity. *Hollinger v. Syms*, 37 N. J. Eq. 221. See also *Otto v. Doty*, 61 Iowa 23, and *Smith's Will*, 52 Wis. 543, where it was *held* that the fact that the testator was a spiritualist was not sufficient ground for setting aside his will. See *Sheldon v. Dow*, 1 Dem. (N. Y.) 503; *Thompson v. Thompson*, 21 Barb. (N. Y.) 107. A belief that the souls of men after death passed into animals is not inconsistent with testamentary capacity. *Bonard's Will*, 16 Abb. Pr. (N. Y.) N. S. 128. Extreme religious anxiety is not a ground for setting aside a will. *Chafin*

Will Case, 32 Wis. 557; *Gass v. Gass* 3 Humph. (Tenn.) 278; *Weir's Will* 9 Dana (Ky.) 434.

Prejudice Against Relatives.—Unreasonable prejudice against relatives is not ordinarily a ground for invalidating a will. *Hall v. Hall*, 38 Ala. 131; *Barnes v. Barnes*, 66 Me. 286; *Cole's Will*, 49 Wis. 179. But where the testator's aversion is the result of a morbid delusion, and the testator's conduct cannot be explained on any other ground, the will will not be sustained. *Dew v. Clark*, 3 Add. Ecc. 79. In *Boughton v. Knight*, L. R., 3 P. & D. 64, it was *held* that a man, moved by capricious, frivolous, mean, or even bad motives, may disinherit wholly or partially his children and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children, but there is a limit beyond which it will cease to be a question of harsh, unreasonable judgment, and then the repulsion which a parent exhibits to his child must be *held* to proceed from some mental defect. If such repulsion, amounting to a delusion as to character, is shown to have existed previous to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made, and the jury in determining whether or not the delusion was operative, will have regard to the contents of the will and the circumstances surrounding the execution of it.

In *Bitner v. Bitner*, 65 Pa. St. 347, it was *held* that a testator "might have been perfectly conscious of the nature of his testamentary provision, and aware that its effect was to disinherit three sons, and yet be laboring under a delusion of fact as to their conduct, which led him to consider and do the thing contemplated, consciously and with intelligence." See *Tawney v. Long*, 76 Pa. St. 106.

Where an aged testator was led, by a declaration of his wife, made in the delirium of disease, to believe that one of his daughters was illegitimate, this suspicion on his part was *held* not to amount to an insane delusion, so as to invalidate the will. *Clapp v. Fullerton*, 34 N. Y. 190. In general an error in fact, or a prejudice or suspicion, will not amount

(c) *Presumption of Sanity*.—The law presumes that a testator is sane until the contrary is proved;¹ but where insanity is estab-

to an insane delusion. *Trumbull v. Gibbons*, 2 Zab. (N. J.) 117; *Hall v. Hall*, 38 Ala. 131; *Boardman v. Woodman*, 47 N. H. 120; *Taylor v. Kelly*, 31 Ala. 59; *Kelly v. Miller*, 39 Miss. 17; *Gleespin's Will*, 11 C. E. Green (N. J.) 523; *Barnes v. Barnes*, 66 Me. 286; *Lee v. Lee*, 4 McCord (S. Car.) 183; *Frower's Est.*, 2 W. N. C. (Pa.) 588; *Cole's Will*, 49 Wis. 179.

It is always a question of law for the court whether a particular delusion is in its nature sane or insane. *Robinson v. Adams*, 62 Me. 369.

1. *Presumption of Sanity*.—"That every man is presumed to be sane is abundantly proved by the authorities. We think that although the subscribing witnesses, if they can be produced, must be examined in relation to the soundness of the testator's mind, yet the party propounding a will for probate is under no general duty to offer any evidence of the testator's sanity, but may safely rely upon the presumption of the law, that all men are sane until some evidence to the contrary is offered." *Perkins v. Perkins*, 39 N. H. 163.

In *Taff v. Hosmer*, 14 Mich. 309, COOLEY, J., said: "The party assuming the burden of establishing a will has not supposed himself bound in his opening to go further than to give evidence by the subscribing witnesses of these facts which would make out, *prima facie*, a valid testamentary instrument, and has left all further evidence on the subject of mental capacity to be brought in by way of answer to that adduced by the contestant. The evidence at the opening has usually been of a formal character, and the proponent has confined himself to enquiries of a general nature respecting the signing and attestation, and whether, at the time, the party appeared to understand the business in which he was engaged. . . . To prove that the decedent was not insane is to prove that an exceptional state of facts did not exist; in other words, it is to prove a negative, and on general principles very slight evidence only should be demanded of the party called upon to take the burden of proving such a state of facts." See also *Banker v. Banker*, 63 N. Y. 409; *Dean v. Dean*, 27 Vt. 746; *Turner v. Cook*, 36 Ind. 129; *Mayo v. Jones*, 78 N. Car. 402; *Brooks v. Barrett*, 7 Pick. (Mass.) 94;

Hawkins v. Grimes, 13 B. Mon. (Ky.) 257; *Trish v. Newell*, 62 Ill. 196; *Carpenter v. Calvert*, 83 Ill. 62.

Even in States where affirmative proof of the testator's insanity is required by statute for the probate of a will, the presumption of sanity still continues, and if the evidence is doubtful the presumption will prevail. *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; *Trish v. Newell*, 62 Ill. 196; *Carpenter v. Calvert*, 83 Ill. 62; *Delafield v. Parish*, 25 N. Y. 9; *Kingsley v. Blanchard*, 66 Barb. (N. Y.) 317.

The custom of examining subscription witnesses as to the testator's sanity does not affect the presumption of sanity, for if the witnesses cannot be produced the proponent may safely rely upon the presumption. *Perkins v. Perkins*, 39 N. H. 163.

In most of the States it is *held* that on formal proof the burden is on the party alleging the testator's incapacity. *Thompson v. Kyner*, 65 Pa. St. 368; *Egbert v. Egbert*, 78 Pa. St. 326; *Trumbull v. Gibbons*, 2 Zab. (N. J.) 117; *Sloan v. Maxwell*, 2 Green Ch. (N. J.) 563; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; *Cox v. Cox*, 4 Sneed (Tenn.) 87; *Yoe v. McCord*, 74 Ill. 33; *Rich v. Bowker*, 25 Kan. 7; *Jenkins v. Tobin*, 31 Ark. 306; *Mayo v. Jones*, 78 N. Car. 402; *Cole's Will*, 49 Wis. 179; *Stubbs v. Houston*, 33 Ala. 555; *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Herbert v. Berrier*, 81 Ind. 1; *Kinloch v. Palmer*, 1 Mill (S. Car.) 216.

In some States it is *held* that on the question whether a will shall be established, there is no presumption of the testator's sanity. See *Barnes v. Barnes*, 66 Me. 286; *Beazley v. Denson*, 40 Tex. 416. In *Michigan* a statute requires affirmative proof of sanity on the part of the proponent. *McGinnis v. Kempsey*, 27 Mich. 363; see *Hubbard v. Hubbard*, 7 Oreg. 42.

In *Missouri* it is *held* that the burden of proof that an alleged testator was of sound and disposing mind rests upon those endeavoring to establish the will, and if there is a general presumption that men are sane, this may make out a *prima facie* case, but not change the burden of proof. *Elliott v. Welby*, 13 Mo. App. 19.

If *West Virginia* the burden of proof of the sanity of a testator is on the pro-

lished by proof, it is presumed to continue until the contrary be made to appear.¹

(*d*) *Declarations of Testator*.—The declarations of a testator are admissible to prove the condition of his mind at the time the will is made.²

ponent. *McMechen v. McMechen*, 17 W. Va. 683.

In *Perkins v. Perkins*, 39 N. H. 163, it is held that the burden of proof is upon the party who asserts the validity of the will, and this burden remains upon him until the close of the trial, though he need introduce no proof upon this point until something appears to the contrary.

In England it has been held that "in all cases the *onus* is imposed on the party propounding a will. It is in general discharged by proof of capacity and the fact of execution, from which the testator's knowledge of and assent to the contents of the instrument are assumed. *Barry v. Butlin*, 2 Moo. P. C. 480; *Dew v. Clark*, 3 Add. Ecc. 78; *Smee v. Smee*, L. R., 5 P. D. 84.

1. *Grabill v. Barr*, 5 Pa. St. 441; *Smee v. Smee*, L. R., 5 P. D. 84; *Taylor v. Cresswell*, 45 Md. 422; *Wade v. State*, 37 Ind. 180; *Mullins v. Cottrell*, 41 Miss. 291; *Emery v. Hoyt*, 46 Ill. 258; *Corbit v. Smith*, 7 Iowa 60; *Weston v. Higgins*, 40 Me. 102; *Cartwright v. Cartwright*, 1 Phill. 90. The rule does not apply to insanity which may have arisen from a violent disease. *Hix v. Whittemore*, 4 Met. (Mass.) 545. Or is due to some special or temporary cause. *Brown v. Riffin*, 94 Ill. 560; *McMasters v. Blair*, 29 Pa. 298; *Trish v. Newell*, 62 Ill. 106.

2. *Declarations of Testator*.—The declarations of testator are admissible when the condition of his mind is the point of contention. They are then received as external manifestations of his mental condition, and not as evidence of the truth of the facts he states. Rule *v. Maupin*, 84 Mo. 587; *Cawthorn v. Haynes*, 24 Mo. 237; *Tingley v. Cowgill*, 48 Mo. 291; *Spoonmore v. Cables*, 66 Mo. 579; *Gibson v. Gibson*, 24 Mo. 227; *Muller v. St. Louis etc.*, 73 Mo. 243; *Thompson v. Stump*, 62 Mo. 275; *Shaller v. Bunstead*, 99 Mass. 112; *In re Clark*, 40 Hun (N. Y.) 233; *Waterman v. Whitney*, 11 N. Y. 157; *Cudney v. Cudney*, 68 N. Y. 148; *Marx v. McGlynn*, 88 N. Y. 357; *Sanford v. Ellithorp*, 95 N. Y. 48; *Bush v. Bush*, 87 Mo. 480; *Reynolds v. Adams*, 90 Ill.

134; *Robinson v. Hutchinson*, 26 Vt. 38; *Potter v. Baldwin*, 133 Mass. 427; *Griffith v. Diffenderfer*, 50 Md. 466; *Cockram v. Cockram*, 17 Ill. App. 604; *Whitman v. Morey*, 63 N. H. 448; *Stevens v. Vancleve*, 4 Wash. (U. S.) 262; *Comstock v. Hadlyne*, 8 Conn. 254; *Provis v. Reed*, 5 Bing. 435; *Moritz v. Brough*, 16 S. & R. (Pa.) 403; *May v. Bradlee*, 127 Mass. 414; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; *Smith v. Fenner*, 1 Gall. (U. S.) 170; *Ross v. McQuiston*, 45 Iowa 145; *Thompson v. Kynn*, 65 Pa. St. 368; *Rambler v. Lyon*, 7 S. & R. (Pa.) 94; *Chess v. Chess*, 1 Pa. St. 16; *McTaggart v. Thompson*, 14 Pa. St. 149; *Bates v. Bates*, 27 Iowa 110; *Reel v. Reel*, 1 Hawks. (N. Car.) 248; *Dennis v. Weekes*, 51 Ga. 24; *Hayes v. West*, 37 Ind. 21; *Bundy v. McKnight*, 48 Ind. 502; *Boylan v. Meeker*, 4 Dutch. (N. J.) 274; *Johnson v. Brown*, 51 Tex. 65; *Lamb v. Lamb*, 105 Ind. 456; *American Bible Society v. Price*, 115 Ill. 623.

The declarations ought to have some direct connection with and tend to show the condition of the mind at the time the will was made. The period of time over which such declarations may extend depends much upon the character of the unsoundness of the mind alleged or attempted to be proved. Rule *v. Maupin*, 84 Mo. 587; *Irish v. Smith*, 8 S. & R. (Pa.) 573; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Moore v. Spier*, 80 Ala. 129; *Waterman v. Whitney*, 11 N. Y. 157. The fact that a testator, many years before making his will, expressed an intention to leave his property to his children equally, affords no evidence of undue influence or mental incapacity, where a different disposition of his property is made and such testimony should not be admitted in a proceeding to contest the validity of the will. *Rutherford v. Morris*, 77 Ill. 397; *Landis v. Landis*, 1 Grant (Pa.) 248.

The declarations of a testatrix, made subsequently to the execution of a will, and at a time when she was of sound mind, are not admissible for the purpose of showing her mental condition when the will was executed. There is no logical relation between such decla-

(e) *Declarations of Legatees and Devisees.*—The declarations of persons interested under a will, affirming the competency of the testator, are generally admitted when they make against the interest of the person uttering them. Where, however, the declaration is made by one of several devisees or legatees, it seems from the weight of authority that it should not be admitted to prejudice the rights of the others.¹

rations and the facts sought to be proved, although it is otherwise when mental unsoundness exists at the time the declarations are made. *Crocker v. Chase*, 57 Vt. 413; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31; *Flintham v. Bradford*, 10 Pa. St. 82; *Moritz v. Brough*, 16 S. & R. (Pa.) 403; *Comstock v. Hadlyme*, 8 Conn. 254; *Shailer v. Bumstead*, 99 Mass. 112; *Smith v. Fenner*, 1 Gall. (U. S.) 170; *Boylan v. Meeker*, 4 Dutch. (N. J.) 274; *Provis v. Reed*, 5 Bing. 435; *Stevens v. Vancleve*, 4 Wash. (U. S.) 266; *Gibson v. Gibson*, 24 Mo. 227; *Waterman v. Whitney*, 11 N. Y. 157; *Johnson v. Brown*, 51 Tex. 65.

Declarations of a testator at other times than at the time when he executed his will are admissible to the same extent as though then made. *Jones v. McLellan*, 76 Me. 49; *Bates v. Bates*, 27 Iowa 110.

Declarations by a testator, while insane, that he was insane and under undue influence at the time of executing the will, have no weight. *In Re Lang*, 65 Cal. 19. But declarations by testatrix, when sane, that she was crazy when she executed a will, are evidence that she had not testamentary capacity when that will was executed. *Colvin v. Warford*, 20 Med. 357.

A change of intention is of no importance if there be a sound mind, unconstrained, but if the question is whether there be such mind, testator's declarations of his intention may be given in evidence. *Titlow v. Titlow*, 54 Pa. St. 216; *Norris v. Sheppard*, 20 Pa. St. 475; *Kachline v. Clark*, 4 Whart. (Pa.) 316; *Potter v. Baldwin*, 133 Mass. 427; *May v. Bradlee*, 127 Mass. 414; *Canada's App.*, 47 Conn. 450; *Fuller v. Fuller*, 83 Ky. 345; *Shaw v. Shaw*, 1 Dem. (N. Y.) 21.

Contents of former will may tend to show that the testator was of unsound mind. *Lowder v. Lowder*, 58 Ind. 538; *Dietz's Case*, 41 N. J. Eq. 284; *Vance v. Upson*, 66 Tex. 476.

Where a will is disputed on the ground of fraud, duress or imposition

neither his prior or subsequent declarations are evidence. Only those can be admitted which are part of the *res gesta*. *Waterman v. Whitney*, 11 N. Y. 157; *Bibb v. Thomas*, 2 W. Black, 1044; *Doe v. Perkes*, 3 Barn. & Ald. 489; *Doe v. Brown*, 4 Cow. (N. Y.) 483; see also *Jackson v. Betts*, 6 Cow. (N. Y.) 377; *Shaw v. Shaw*, 1 Dem. (N. Y.) 21; see *contra*, *Durant v. Ashmore*, 2 Rich. (S. C.) 184; *Reel v. Reel*, 1 Hawks. (N. Car.) 248; *Howell v. Barden*, 3 Dev. (N. Car.) 442.

1. The interests of legatees and devisees under a will are not joint but several, and hence the declarations of one cannot be given in evidence to affect or prejudice the others. *Shaver v. McCarthy*, 110 Pa. St. 339; *Irwin v. West*, 81 Pa. St. 157; *Clark v. Morrison*, 25 Pa. St. 453; *Bovard v. Wallace*, 4 S. & R. (Pa.) 499; *Nussear v. Arnold*, 13 S. & R. (Pa.) 328; *Hauberger v. Root*, 6 W. & S. (Pa.) 434; *Boyd v. Eby*, 8 Watts (Pa.) 66. The decisions in *Massachusetts* have not been uniform on this subject. *Atkins v. Sanger*, 1 Pick. (Mass.) 192, holding the contrary doctrine, but this case has not been followed. *Shailer v. Bumstead*, 99 Mass. 112; *Phelps v. Hartwell*, 1 Mass. 71; *Matter of Baird*, 7 N. Y. 758; *Carpenter v. Hatch*, (N. H.) 15 Atl. Rep. 219; *Parsons v. Parsons*, 66 Iowa 754; *Dye v. Young*, 55 Iowa 433; *In re Ames' Will*, 51 Iowa 596; *Walker v. Jones*, 23 Ala. 448; *Bunyard v. McElroy*, 21 Ala. 311; *Taylor v. Kelly*, 31 Ala. 59; *Blakey v. Blakey*, 33 Ala. 611; *Burton v. Scott*, 3 Rand. (Va.) 399; *Thompson v. Thompson*, 13 Ohio St. 356; *Forney v. Ferrell*, 4 W. Va. 729. The contrary doctrine, however, is held in some states. *Dennis v. Weekes*, 51 Ga. 24; *Dennis v. Weekes*, 46 Ga. 514; *Brown v. Moore*, 6 Yerg. (Tenn.) 272; *Rogers v. Rogers*, 2 B. Mon. (Ky.) 324; *Beal v. Cunningham*, 1 B. Mon. (Ky.) 399; *Milton v. Hunter*, 13 Bush. (Ky.) 163; *Peebles v. Stevens*, 8 Rich. (S. Car.) 198; see also *Dillard v. Dillard*, 2 Strobb. (S. Car.) 89; *McCraine v. Clark*,

15. **Evidence**—(a.) *Province of Judge and Jury*.—Where a judge and jury are called upon to decide the question whether a party is insane or not, it is the province of the judge to determine whether sufficient evidence of the alleged insanity appears to warrant a submission of the issue to the jury. Where a judge submits a case to a jury upon clearly insufficient evidence, such action is ground for reversal.¹

2. *Murph.* (N. Car.) 317; *Armstrong v. Farrar*, 8 Mo. 627.

Declarations by an executor of and contingent devisee under a will against the sanity of a testator are admissible in an issue to contest the validity of the will. *Davis v. Calvert*, 5 Gill & J. (Md.) 269.

Declarations made before the execution of a will by parties who afterward take under the will are not admissible to affect its validity. *Ames's Will*, 51 Iowa 596; *Thompson v. Thompson*, 13 Ohio St. 356; *Burton v. Scott*, 3 Rand. (Va.) 399; *Hunt v. Hunt*, 3 B. Mon. (Ky.) 575.

Nor are declarations made after the execution of the will admissible when such declarations were made in ignorance of the execution of the will. *In re Ames's Will*, 51 Iowa 596. See *contra*, *Dennis v. Weekes*, 51 Ga. 24; *Dennis v. Weekes*, 46 Ga. 514; *Peoples v. Stevens*, 8 Rich. (S. Car.) 198; *Chapman v. Allen*, (Conn.) 14 Atl. Rep. 780.

The declarations of husband against wife, or wife against husband, are not admissible when they are both interested adversely to each other. *Walker v. Walker*, 34 Ala. 469; *Coryelle v. Stone*, 62 Ind. 307.

In *Brewer v. Ferguson*, 11 Humph. (Tenn.) 565, a wife, who had no interest in the issue, was held to be incompetent to establish his insanity. But see *Irish v. Smith*, 8 S. & R. (Pa.) 573.

Declarations by an attorney in fact that his constituent was *non compos* at the time of the making of the power, are inadmissible in an action of ejectment by the devisees of the constituent against the grantees under a deed executed by the attorney. *Bensell v. Chancellor*, 5 Whart. (Pa.) 371.

Declarations as to the incapacity of a testator by a party sustaining the will are properly rejected when the offer is made without limitation as to time, place and circumstance of making them. *Thompson v. Kyner*, 65 Pa. St. 368.

Declarations of legatees against their interest are not admissible in a proceeding to set aside the will to which proceeding they are not parties. *Carpenter v. Hatch*, 64 N. H. 573; *Dotts v. Fetzer*, 9 Pa. St. 88.

The declarations of one of three executors may be admitted as to facts which took place at the time of making the will. *Atkins v. Sanger*, 1 Pick. (Mass.) 192.

It seems that declarations made by a sole legatee or devisee would be admissible. *Blakey v. Blakey*, 33 Ala. 611; *Boyd v. Eby*, 8 Watts. (Pa.) 66; *Nussear v. Arnold*, 13 S. & R. (Pa.) 323; *Burton v. Scott*, 3 Rand. (Va.) 399.

Where, upon the probate of a will, the question is upon the sanity of a testator, the opinions of the opposing party upon that question, in favor of his sanity, expressed out of court, may be given in evidence by the executor, in support of the will. *Ware v. Ware*, 8 Me. 42.

1. In *Cauffman v. Long*, 82 Pa. St. 72, the question of the sufficiency of the evidence was considered. The court said: "There was serious error in submitting the question of testamentary capacity to the jury at all. The learned judge should have withdrawn it altogether. at most there was but a scintilla of proof. The evidence of the defendant upon this point amounts to nothing. One witness swears that he thought the testator was a weak minded man, because when he came to the store with his wife he allowed the latter to do the bargaining and never interfered. Sheriff Rhinehart thought he was a monomaniac, because he told his pastor, with whom he appeared to have had some difficulty, that 'we want one to preach Christ and Him crucified, and not for money, money, all the time, as you do.' Also that at a church meeting there was a dispute about the control of the church property. During the controversy Shimp, the minister, said: 'This was God's house.' Cauff-

(b.) *Presumptions*.—It is a presumption of law that all men are sane, and the burden of proof is upon the person alleging insanity.¹

man replied, 'It is not your house nor God Almighty's house. It is my house. I built it.' This was not perhaps exactly orthodox, but when it is remembered that the testator, as was alleged, gave the lot and materially aided in building the church, it hardly shows testamentary incapacity. Upon another occasion he expressed to the witness, Rinehart, his aversion to going to law, and thought he could not get justice. Abraham Long, another witness, says he thought his mind was wavering from the fact that when the witness made some remark about the time of day, he merely said 'Hunck?' and that when he asked him where the women were, he said 'Was sagt?' and looked queerly. Isaac Wright thought he was not sound in his mind because he would not decide upon selling the witness his crop of grain. These are all the witnesses upon this point whose testimony is worth noting. I have not, of course, given all they said. What I have quoted is a fair specimen. We look in vain through the evidence for anything like insanity or delusion. A court has a higher duty to perform than merely to answer points of law. It is its duty to see that the law is faithfully administered. Such administration requires that a man's will, the most solemn instrument he can execute, shall not be set aside without any sufficient evidence to impeach it. There is no redress here for an erroneous or improper verdict. But where a case is submitted to a jury upon clearly insufficient evidence, such as no court ought to sustain a verdict upon, it is our plain duty to reverse.

"It may be stated as a general rule that the question of the legal effect of insanity proved to exist in any case, as qualifying the nature of the act which is the subject of enquiry, is for the court, as being a question of law; and it follows that it is the duty of the court to embody the law, as applied to the evidence of insanity produced, in suitable instructions to the jury; and that it is the duty of the jury to receive the law as given by the court, and to decide, as matter of fact, upon the evidence submitted, not merely whether insanity exists, but whether if it exists, it is of

that character which, in law, invalidates the civil act or excuses the alleged crime of its subject. In other words, capacity to do an act is always a question of law, the condition from which such capacity may be deduced is a question of fact." Buswell on Insanity 174, citing *Kempsey v. McGinnis*, 21 Mich. 123; *Gass v. Gass*, 3 Humph. (Tenn.) 278; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Walker v. Walker*, 34 Ala. 469; *Gardner v. Lamback*, 47 Ga. 133; *Young v. Stevens*, 48 N. H. 133; *Boardman v. Woodman*, 47 N. H. 120.

In *Ins. Co. v. Rodel*, 95 U. S. 238, JUSTICE BRADLEY said: "The weight of the evidence is for them [the jury] and not for the judge to pass upon. The judge may express his opinion on the subject, and in cases where the jury are likely to be influenced by their prejudices, it is well for him to do so, but it is entirely in his discretion." See also *John Hancock Mutual Life Ins. Co. v. Moore*, 34 Mich. 41; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Hill v. Nash*, 41 Me. 585; *Thomas v. State*, 40 Tex. 60; *Erwin v. State*, 10 Tex. App. 706; *Van Zandt v. Mut. Ben. Life Ins. Co.*, 55 N. Y. 169; *Walker v. Walker*, 34 Ala. 469; *White v. Bailey*, 10 Mich. 155; *Guettig v. State*, 63 Ind. 278; *Baldwin's App.*, 44 Conn. 37; *Negroes Jerry v. Townsend*, 9 Md. 145; *Atwood v. Smith*, 11 Ala. 894; *Jenkins v. Tobin*, 31 Ark. 306.

1. *Perkins v. Perkins*, 39 N. H. 163; *Long v. Long*, 4 Ir. Ch. 106; *Sutton v. Sadler*, 3 C. B. 87; *State v. Pike*, 49 N. H. 399; *U. S. v. Lawrence*, 4 Cranch (C. C.) 518; *U. S. v. McGlue*, 1 Curt. (U. S.) 1; *O'Brien v. People*, 48 Barb. (N. Y.) 274; *Lilly v. Waggoner*, 27 Ill. 395; *State v. Brown*, 12 Minn. 538; *Symes v. Green*, 1 S. & T. 401; *Dyce Sombre v. Tunp*, 1 Deane Ecc. Rep. 38; *Hoge v. Fisher*, Pet. (C. C.) 163; *Stevens v. Vanclue*, 4 Wash. (U. S.) 262; *Yardley v. Cuthbertson*, 108 Pa. St. 395; *Commonwealth v. Kirkbride*, 11 Phila. (Pa.) 427; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500; *Boswell v. State*, 63 Ala. 307.

In New Hampshire it has been held that when the attesting witnesses to a deed are dead there is no presumption

Where, however, a person has been proven to be insane, the presumption is that the insanity continues, and the burden of proof shifts to the party alleging sanity.¹

that, if living, they would testify that the grantor was of sane mind at the time of the delivery of the deed. *Flanders v. Davis*, 19 N. H. 139.

In an action of ejectment the question being whether the defendant's grantor had the requisite *mental capacity* to make a deed, the court instructed the jury: "Whether she had *native* business capacity enough to understand it, or whether she learned from competent sources what would be for her interest, if she got the *capacity by education* at the time . . . that would be enough." "If she had competent advice from others, so that by their explanation she was made to understand," etc. *Held*, no error. *Doty v. Hubbard*, 55 Vt. 278.

The presumption that every man is sane until the contrary is proved is not a presumption of law, but a presumption of fact, or, at the most, a mixed presumption of law and fact. *Sutton v. Sadler*, 3 C. B. 87; *Smith v. Tebbitt*, L. R., 1 P. & D. 434; *Thornton v. Appleton*, 29 Me. 298; *Anderson v. Gill*, 3 Macqueen S. C. Cas. 197.

The presumption is that one whose life is destroyed by his own act was sane at the time, and therefore that his act was suicide. *Moore v. Connecticut Mut. Life Ins. Co.*, 3 Ins. L. J. 444; 1 Filippin, 363; *Jarvis v. Connecticut Mut. Life Ins. Co.*, 5 Ins. L. J. 507; *Wolff v. Conn. etc. Ins. Co.*, 5 Mo. App. 236. See also *Terry v. Ins. Co.*, 1 Dill. (U. S.) 408; *Sadler v. Sadler*, 3 C. B. (N. S.) 87.

1. *Anderson v. Cranmer*, 11 W. Va. 562; *Jarrett v. Jarrett*, 11 W. Va. 584; *Stevens v. Vancleve*, 4 Wash. (U. S.) 262; *Hoge v. Fisher, Pet.* (C. C.) 163; *Goodell v. Harrington*, 3 Thomp. & C. (N. Y.) 345; *Elkinton v. Brick* (N. Y.), 15 Atl. Rep. 391. Chronic insanity is presumed to continue. *State v. Brinyea*, 5 Ala. 244; *Saxon v. Whitaker*, 30 Ala. 237; *State v. Reddick*, 7 Kan. 143; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Ballew v. Clark*, 2 Ired. L. (N. Car.) 23; *Hoge v. Fisher, Pet.* (C. C.) 163; *Hix v. Whittemore*, 4 Met. (Mass.) 545; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Sprague v. Duel*, 1 Clarke (N. Y.) 90; *State v. Spencer*, 1 Zab. (N. J.) 197; *Ripley v. Babcock*, 13 Wis. 425; *Prin-*

cep v. Dyce Sombre, 10 Moo. P. C. 232; *White v. Wilson*, 13 Ves. 88; *Smith v. Tebbitt*, L. R., 1 P. & D. 398; *Nichols v. Binns*, 1 Sw. & Tr. 243; *Reg. v. Layton*, 4 Cox C. C. 149; *Reg. v. Stokes*, 3 C. & K. 188; *Gen. v. Parnther*, 3 Bev. C. C. 441; *Cartwright v. Cartwright*, 1 Phillimore, 100; *Titlow v. Titlow*, 54 Pa. St. 216; *State v. Wilner*, 40 Wis. 304; *Crouse v. Holman*, 19 Ind. 30; *Kennworthy v. Williams*, 5 Ind. 375; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Musselman v. Cravens*, 47 Ind. 1; *Wade v. State*, 37 Ind. 180.

The burden of proof, when the issue is on a contract, rests upon the party disputing sanity. *Saxon v. Whitaker*, 30 Ala. 237; *Cotton v. Ulmer*, 45 Ala. 378; *First Nat'l Bank v. Wirelach*, 106 Pa. St. 37; *Egbert v. Egbert*, 78 Pa. St. 326; *Thompson v. Kyner*, 65 Pa. St. 368; *Werstler v. Custer*, 46 Pa. St. 502; *Rees v. Stille*, 38 Pa. St. 138; *Farrell v. Brennan*, 32 Mo. 328; *State v. Smith*, 53 Mo. 267; *Trumbull v. Gibbons*, 2 Zab. (N. J.) 117; *Turner v. Cheesman*, 15 N. J. Ch. 243; *Jackson v. King*, 4 Cow. (N. Y.) 207; *Bogardus v. Clark*, 4 Paige (N. Y.) 623; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 158; *Stevens v. Vancleve*, 4 Wash. (U. S.) 262; *Dyce Sombre v. Thorpe*, 1 Deane Ec. R. 38; *Harris v. Ingledees*, 3 P. Wms. 91; *Phelps v. Hartwell*, 1 Mass. 71; *Howe v. Howe*, 99 Mass. 88; *Myatt v. Walker*, 44 Ill. 485; *Burton v. Scott*, 3 Rand. (Va.) 399; *Wright v. Jackson*, 59 Wis. 569.

The burden of proof is upon the one alleging a lucid interval, where by common report the vendor was supposed to be insane. *Rogers v. Walker*, 6 Pa. St. 371; *Gangwere's Est.*, 14 Pa. St. 417.

The finding of an inquisition, whether of lunacy or habitual drunkenness, is only *prima facie* evidence of mental infirmity during the period found, and the burden is on the party asserting capacity. *Miskey's App.*, 107 Pa. St. 611; *Willis v. Willis*, 12 Pa. St. 159; *Noel v. Kerper*, 53 Pa. St. 97; *Klohs v. Klohs*, 61 Pa. St. 245; *Hutchinson v. Sautt*, 4 Rawle (Pa.) 234; *McGinnis v. Commonwealth*, 74 Pa. St. 245; *Lancaster Co. Bank v. Moore*, 78 Pa. 407; *Hicks v. Marshall*, 8 Hun (N. Y.) 327;

(c.) *Opinions of Witnesses.*—The opinions of witnesses as to a party's sanity or insanity may be admitted in evidence, but only

Hamilton v. Hamilton, 10 R. I. 358; Hart v. Deaner, 6 Wend. (N. Y.) 497; Hoyt v. Adee, 3 Lans. (N. Y.) 173; Prinsep & E. India Co. v. Dyce Sombre, 16 Moo. P. C. R. 232; Faulder v. Silk, 3 Camp. 126; Dane v. Kirkwell, 8 C. & P. 683; Frank v. Frank, 2 M. & Rob. 315; Bannatyne v. Bannatyne, 2 Rob. 475; Hume v. Burton, 1 Ridg. P. C. 204; Sayeson v. Sealy, 2 Atk. 412; Hill v. Day, 34 N. J. Eq. 150. But see Redden v. Baker, 86 Ind. 191. Where insanity is relied on as a defence in a criminal trial it cannot be presumed that, if the defendant was insane a short time before he did the act, he was insane when he committed it. People v. Smith, 57 Cal. 130; Overall v. State, 15 Lea (Tenn.) 672.

A deed was executed on the second day of January, the application to the probate court was made on the same day for the appointment of a guardian, and he was appointed on the thirtieth of the same month. *Held*, that the plaintiff was not entitled to a charge that the presumption in favor of business capacity was changed. Doty v. Hubbard, 55 Vt. 278.

The presumption that insanity, once shown, continues, is a presumption of fact rather than of law. Leache v. State, 22 Tex. App. 279; Smith v. State, 22 Tex. App. 316; Physio-Medical College v. Wilkinson, 108 Ind. 314.

The maxim of the law, "once insane presumed to be always insane," is not an unqualified one. Neither observation nor experience shows us that persons who are insane from the effects of some violent disease do not usually recover the right use of their mental faculties. Such cases are not unusual, and the return of a sound mind may be anticipated from the subsiding or removal of the disease which has prostrated their minds. If, therefore, the proof in a proceeding to annul a deed made by a person to his prejudice, when he is alleged to have been insane, only shows a case of insanity directly connected with some violent disease, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the contract impeached, and not content himself with proof of insanity at an earlier period. Turner v. Rush, 53 Md. 65.

The presumption that insanity con-

tinues does not apply to cases of occasional or intermittent insanity. Physio-Medical College v. Wilkinson, 108 Ind. 314; State v. Wilner, 40 Wis. 304; Townshend v. Townshend, 7 Gill (Md.) 10; State v. Reddick, 7 Kan. 143; People v. Francis, 38 Cal. 183; Hall v. Warren, 9 Ves. 605; White v. Wilson, 13 Ves. 87; Lewis v. Baird, 3 McLean (U. S.) 56; Staples v. Wellington, 58 Me. 453.

It is impossible to fix the amount of mental weakness which will impose the duty of explanation upon a party drawing a will in his own favor. Yardley v. Cuthbertson, 108 Pa. St. 395; Wilson v. Mitchell, 101 Pa. St. 505.

The mere fact that a man commits suicide raises no presumption of his insanity. But it is, nevertheless, very pertinent evidence, especially where the suicide is immediately preceded by the murder of members of his family. Karow v. Continental Life Ins. Co., 57 Wis. 56; Terry v. Ins. Co., 3 Dill. (U. S.) 408.

The burden of proving capacity to make a will rests upon those who propound the will, and, *a fortiori*, when it appears that the testator was subject to delusions. Smee v. Smee, 5 L. R., P. Div. 84; Comstock v. Hadlyme, 8 Conn. 261; Delafield v. Parish, 25 N. Y. 10; Ean v. Snyder, 46 Bart. (N. Y.) 230; Taff v. Hosmer, 14 Mich. 309; Crowninshield v. Crowninshield, 2 Gray (Mass.) 524; McMechen v. McMecher, 17 W. Va. 683; Hall v. Unger, 2 Abb. (U. S.) 507; Yardley v. Cuthbertson, 108 Pa. St. 395; Davis v. Rogers, 1 Houst. (Del.) 44; Chrisman v. Chrisman (Oreg.), 18 Pac. Rep. 6.

On a feigned issue from chancery, based on a *prima facie* case of insanity, the burden is on the actor in the suit. Frank v. Frank, 2 M. & Rob. 314.

Where a prisoner sets up insanity as a ground of defence, the burden of proving his innocence on that ground, rests on the party accused. The question in such a case for the jury is not whether the prisoner was of sound mind, but whether he has made out to their satisfaction that he was not of sound mind. Reg. v. Layton, 4 Cox C. C. 149; Weed v. Mut. & C. Ins. Co., 70 N. Y. 561.

The presumption of law that a person found dead has not committed suicide

in connection with the facts upon which such opinions are based.¹

does not apply to an insane person. *Germain v. Brooklyn Life Ins. Co.*, 26 Hun (N. Y.) 604.

1. Opinions of Non-expert Witnesses.—

A non-expert can testify to the mental condition of the defendant only after detailing the facts on which he bases his opinion. *Shaver v. McCarthy*, 110 Pa. St. 339; *State v. Pennyman*, 68 Ia. 216; *American Bible Society v. Price*, 115 Ill. 623; *Carpenter v. Calvert*, 83 Ill. 69; *Clapp v. Fullerton*, 34 N. Y. 190; *Stackhouse v. Horton*, 15 N. J. Ch. 205; *Harrison v. Rowan*, 3 Wash. (U. S.) 585; *Dunham's App.*, 27 Conn. 192; *Beaubien v. Cicotte*, 12 Mich. 459; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Lucas v. Parsons*, 27 Ga. 593; *Harris v. Betson*, 28 N. J. Eq. 219; *Rice v. Rice*, 50 Mich. 454; *Roe v. Taylor*, 45 Ill. 485; *Upstone v. People*, 109 Ill. 175; *Clark v. State*, 12 Ohio 483; *Turner v. Kansas City etc. R. Co.*, 23 Mo. App. 12; *State v. Hockett*, 70 Ia. 442; *McRae v. Malloy*, 93 N. Car. 154; *Eloi v. Eloi*, 36 La. An. 563; *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612; *Parkhurst v. Hosford*, 21 Fed. Rep. 827; *Commonwealth v. Brayman*, 136 Mass. 438; *Sage v. State*, 91 Ind. 141; *Pittard v. Foster*, 12 Ill. App. 132; *People v. Wreden*, 59 Cal. 392; *Smith v. Hickenbottom*, 57 Ia. 733; *Kilgore v. Cross*, 1 McCrary (U. S.) 144; *Wood v. State*, 58 Miss. 741; *State v. Newlin*, 69 Ind. 108; *Yanke v. State*, 51 Wis. 464; *Webb v. State*, 5 Tex. App. 596; *McClackey v. State*, 5 Tex. App. 320; *Insurance Co. v. Rodel*, 95 U. S. 232; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Rambler v. Tryon*, 7 S. & R. (Pa.) 90; *Wogan v. Small*, 11 S. & R. (Pa.) 141; *Titlow v. Titlow*, 54 Pa. St. 216; *Pidcock v. Potter*, 68 Pa. St. 342; *Grant v. Thompson*, 4 Conn. 203; *Clay v. Clay*, 2 Ired. (N. Car.) 78, 83; *Hardy v. Merrill*, 56 N. H. 227 (overruling *Boardman v. Woodman*, 47 N. H. 120); *State v. Archer*, 54 N. H. 465; *State v. Pike*, 49 N. H. 399; *Lester v. Pittsford*, 7 Vt. 161; *DeWitt v. Bailey*, 13 Barb. (N. Y.) 550; *Culver v. Haslam*, 7 Barb. (N. Y.) 314; *Morse v. Crawford*, 17 Vt. 499; *Forbes v. Caruthers*, 3 Yeates (Pa.) 527.

Having stated the appearance, conduct, conversation or other particular facts, from which the state of the testa-

tor's mind may be inferred, non-expert witnesses are then at liberty to express their belief or opinion, as the result of those facts. *Potts v. House*, 6 Ga. 324; *Vanauken's Case*, 2 Stock. Ch. (N. J.) 186; *Hewlett v. Wood*, 55 N. Y. 634; *Duffield v. Morris*, 2 Harr. (Del.) 375; *Doe v. Reagan*, 5 Blackf. (Ind.) 217; *Doe v. State*, 3 Heisk. (Tenn.) 348; *People v. Sanford*, 43 Cal. 29; *State v. Klinger*, 46 Mo. 224; *Holcombe v. State*, 41 Tex. 125; *Norton v. Moore*, 3 Head (Tenn.) 480; *Baughman v. Baughman*, 32 Kan. 538.

The reason for admitting the testimony of non-experts as to the sanity of a testator seems to arise from the difficulty on the part of the witnesses to describe the appearance and conduct of a person to the jury. *Florey v. Florey*, 24 Ala. 247; *Dennis v. Weekes*, 51 Ga. 24; *Walker v. Walker*, 14 Ga. 242; *Fielder v. Collier*, 13 Ga. 496; *Choice v. State*, 31 Ga. 424; *Berry v. State*, 10 Ga. 511; *Dicken v. Johnson*, 7 Ga. 484; *Foster v. Brooks*, 6 Ga. 290; *People v. Sanford*, 43 Cal. 29; *Estate of Brooks*, 54 Cal. 471; *Kelly v. McGuire*, 15 Ark. 555; *Beller v. Jones*, 22 Ark. 92; *Roe v. Taylor*, 45 Ill. 486; *Sutherland v. Hawkins*, 56 Ind. 343; *State v. Newlin*, 69 Ind. 108; *Rush v. Megee*, 36 Ind. 69; *Waters v. Waters*, 35 Md. 531; *Williams v. Lee*, 47 Md. 321; *Stewart v. Redditt*, 3 Md. 67; *Dorsey v. Warfield*, 7 Md. 65; *People v. Finley*, 38 Mich. 482; *Hunt v. Hunt*, 3 B. Mon. (Ky.) 577; *Crowe v. Peters*, 63 Mo. 429; *Pinnney's Will*, 27 Minn. 280; *Thomas v. State*, 40 Tex. 65; *Holcombe v. State*, 41 Tex. 125; *Burnham v. Mitchell*, 34 Wis. 117; *State v. Hayden*, 51 Vt. 296; *Cram v. Cram*, 33 Vt. 15; *McDougald v. McLean*, 1 Winst. (N. Car.) 120; *State v. Pike*, 49 N. H. 408; *See Reg. v. Oxford*, 9 C. & P. 525; *Carew v. Johnston*, 2 Sch. & Lef. 280; *Reg. v. Neville, Craw. & Dix* Cas. 96.

The opinion of a witness not an expert as to the mental condition of another is not competent, save in the case of a subscribing witness to a will, although based on what the witness himself saw and heard. *Holcomb v. Holcomb*, 95 N. Y. 316; *DeWitt v. Bailey*, 9 N. Y. 371; *State v. Geddis*, 42 Ia. 268; *Van Horn v. Keenan*, 28 Ill. 445; *Wyman v. Gould*, 47 Me. 159; *Commonwealth v. Fairbanks*, 2 Allen

(d) *Expert Witnesses*.—Persons who are competent as experts on the subject of insanity may give opinions based on facts observed by themselves, or on hypothetical questions founded upon the evidence appearing in the case.¹

(Mass.) 511; *Townsend v. Pepperell*, 99 Mass. 40; *Commonwealth v. Wil-son*, 1 Gray (Mass.) 337; *Hastings v. Rider*, 99 Mass. 624; *State v. Archer*, 54 N. H. 465; *State v. Pike*, 49 N. H. 399; *Boardman v. Woodman*, 47 N. H. 120; *Hickman v. State*, 38 Tex. 191; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Pidcock v. Potter*, 68 Pa. St. 342; *Logan v. McGinnis*, 12 Pa. St. 27; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Poole v. Richardson*, 3 Mass. 330; *Chase v. Lincoln*, 3 Mass. 237; *Needham v. Ide*, 5 Pick. (Mass.) 510; *Hardy v. Merrill*, 56 N. H. 227; *Grant v. Thompson*, 4 Conn. 203; *Robinson v. Adams*, 62 Me. 369.

Subscribing witnesses to a will need not state the facts upon which they base their opinion of testator's sanity. *Van Huss v. Rainbolt*, 2 Coldw. (Tenn.) 139; *Williams v. Lee*, 47 Md. 321.

In a suit upon a life policy, where the issue is as to the insanity of the insured at the time he took his life, the opinion of a nonprofessional witness as to his mental condition in connection with a statement of the facts and circumstances within the personal knowledge of the witness upon which his opinion is based, is competent evidence. *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612; *Insurance Co. v. Rodel*, 95 U. S. 232; *Hathaway v. Nat. Life Ins. Co.*, 48 Vt. 335; *Butler v. St. Louis Life Ins. Co.*, 45 Iowa 93; *Higba v. Guardian etc. Ins. Co.*, 66 Barb. (N. Y.) 462; *Koenig v. Globe Mut. Life Ins. Co.*, 10 Hun (N. Y.) 558.

A witness should be asked his opinion at the time of the trial. It is no objection to his testimony that his opinion was not formed at the time he obtained the facts. *Runyan v. Price*, 15 Ohio St. 14; *Hathaway v. National Life Ins. Co.*, 48 Vt. 335.

A non-expert may not testify as to what he thought of a person's condition of mind, but is allowed to characterize as rational or irrational the acts and declarations to which he has testified. *Real v. People*, 42 N. Y. 282; *Sisson v. Conger*, 1 N. Y. Sup. Ct. 569; *O'Brien v. People*, 36 N. Y. 276; *Clapp v. Fullerton*, 34 N. Y. 190; *Hewlett v. Wood*,

55 N. Y. 635; *Howell v. Taylor*, 18 N. Y. Sup. Ct. 214; *People v. Lake*, 12 N. Y. 358.

1. *Opinions of Experts*.—Insanity is a defence on the sole ground that it disables the accused from knowing that his act is wrong. If, therefore, a witness is competent to give his opinion as to the mental capacity of the accused, he is competent to give his opinion as to the degree of capacity or incapacity, and whether the incapacity was such as to deprive him of the knowledge of right and wrong. *U. S. v. Guiteau*, 1 Mackey (U. S.) 498; *Chapin on Experts and Expert Testimony*, 5.

The law attaches peculiar importance to the opinion of medical men who have the opportunity of observation upon the question of mental capacity. *Reeves v. Davis*, 80 N. Car. 209; *Thomas v. State*, 40 Tex. 65; *Pannell v. Commonwealth*, 86 Pa. St. 260; *Jarrett v. Jarrett*, 11 W. Va. 584.

Upon the question whether a disease had reached such a stage at a given time before it had developed itself, that the subject of it was incapable of making a will or contract, or was irresponsible for his acts, the opinion of his neighbors, men of good common sense, is of more value than that of medical experts. *Rutherford v. Morris*, 77 Ill. 397; *Fairchild v. Bascomb*, 35 Vt. 398; *Reg. v. Oxford*, 9 C. & P. 525; *Choice v. State*, 31 Ga. 424; *Slais v. Slais*, 9 Mo. App. 96; *Evans v. Knight*, 1 Add. 239; *Clark v. State*, 12 Ohio 483; *Carpenter v. Calvert*, 83 Ill. 62; *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232.

In a case involving the question of the sanity of a testator, his medical adviser, who has never had charge of insane persons, except to advise that certain patients of his were insane and should be taken to an asylum, is competent to express an opinion as to the sanity of the testator. *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Hastings v. Rider*, 99 Mass. 625; *Van Deusen v. Newcomer*, 40 Mich. 90; *In re Carmichael*, 36 Ala. 514.

See *contra*, *Com. v. Rich*, 14 Gray (Mass.) 335; *Russell v. State*, 53 Miss. 367.

The opinion of a physician who had

nad frequent conversations with the decedent for a long time, is admissible on the question of sanity, although witness was not the attending physician. *Bitner v. Bitner*, 65 Pa. St. 347; *Pidcock v. Potter*, 68 Pa. St. 342; *Davis v. State*, 35 Ind. 496; *State v. Reddick*, 7 Kan. 143.

A Catholic priest, who in his preparation for the priesthood, had studied physiology and psychology that he might be competent to pass upon the mental condition of communicants in his church, is competent to testify as an expert as to the sanity of a testator. *Estate of Toomes*, 54 Cal. 510.

The disclosure of confidential information acquired in a professional capacity, is not involved in questioning a physician who attended testator and who stated that all his knowledge was derived from what he observed while attending him, as to the mental capacity of testator. *Grattan v. Metropolitan Life Ins. Co.*, 24 Hun (N. Y.) 43; *Staunton v. Parker*, 26 N. Y. 56; *People v. Stout*, 3 Parker Cr. Cas. (N. Y.) 670; *Fraser v. Jennison*, 42 Mich. 206; *Briggs v. Briggs*, 20 Mich. 34.

Hypothetical Questions.—An expert witness testifying as to a person's mental condition, about whose condition of mind he has no personal knowledge, can only testify with regard to the case as submitted in a hypothetical form, assuming matters embodied in the question to be facts, for the purpose of obtaining the witness' opinion thereon. *Yardley v. Cuthbertson*, 108 Pa. St. 395; *Aiman v. Stout*, 42 Pa. St. 114; *State v. Coleman*, 20 S. Car. 441; *Dilleber v. Home Life Ins. Co.*, 87 N. Y. 79; *McMechen v. McMechen*, 17 W. Va. 683; *Fraser v. Jennison*, 42 Mich. 206; *Keating's App.*, Pa. S. Ct. Dig. 1889; *Pigg v. State*, 43 Tex. 110; *Cooper v. State*, 23 Tex. 336; *Hoge v. Fisher*, Pet. (C. C.) 163; *Guetig v. State*, 66 Ind. 94; *McNaghten's Case*, 10 C. & T. 200.

It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts, and, therefore, counsel on each side may put to the physicians such states of fact as they deem warranted by the evidence, and have taken their opinions thereon. *U. S. v. McGlue*, 1 Cart. (U. S.) 1; *Negroes, Jerry et al. v. Townshend*, 9 Md. 145; *People v. Lake*, 2 Kern. (N. Y.) 358; *People v. Thurston*, 2 Park. Cr. Cas. (N. Y.) 49; *People v. McCann*, 3 Park. Cr. Cas. (N. Y.) 272; *Coyle v. Commonwealth*, 104 Pa. St.

117; *Dexter v. Hall*, 15 Wall. (U. S.) 9; *McClacky v. State*, 5 Tex. App. 320; *Barker v. Comins*, 110 Mass. 477; *May v. Bradlee*, 127 Mass. 414.

Hypothetical questions submitted to experts must be based upon an assumed state of facts included in the question. In the following cases the form of question has been approved. *Dilleber v. Home Life Ins. Co.*, 87 N. Y. 79; *Melendy v. Spaulding*, 54 Vt. 517; *Dejarretie v. Commonwealth*, 75 Va. 867; *McMechen v. McMechen*, 17 W. Va. 683; *State v. Windsor*, 5 Harr. (Del.) 512; *People v. Sutton*, 73 Cal. 243.

"The proper question to be put to the professional witnesses is this: If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances." *Commonwealth v. Rogers*, 7 Met. (Mass.) 500.

In the case of *Yardley v. Cuthbertson*, 108 Pa. St. 395, the following questions were approved by the supreme court: "Q. Assume that you were called upon the 2nd of December, 1876, to test Mr. John L. Neill's mental capacity prior to a proposed change in a former will, and that the whole of the plaintiff's testimony, as presented in evidence in this issue, was produced before you, I wish to know your opinion of the sufficiency of that evidence to your mind in determining the question of his mental capacity or not?"

"Q. Now, sir, assuming that the testimony of the defendants in this issue, that is of the contestants of the codicil, to be true, and taking that testimony as a whole, will you please state what that testimony indicates as to John L. Neill's mental capacity on the 2nd of December, 1876?"

A witness may be questioned as to a person's mental capacity both before and after the particular time in question. But such testimony is admitted only to show that the special acts testified to are connected either directly or inferentially with the particular time. *State v. Felter*, 25 Iowa 67; *Freeman v. People*, 4 Dem. (N. Y.) 9; *Lake v. People*, 1 Park. Cr. Cas. (N. Y.) 495; *Kinne v. Kinne*, 9 Conn. 102; *Grant v. Thompson*, 4 Conn. 203; *Norwood v. Morrow*, 4 Dev. & B. (N. Car.) 442; *McAllister*

v. State, 17 Ala. 434; *McLean v. State*, 16 Ala. 672; *Commonwealth v. Pomeroy*, 117 Mass. 148; *White v. Graves*, 107 Mass. 325.

The hypothetical questions submitted in the following cases were held to be bad. *Reed v. State*, 62 Miss. 405; *State v. Felter*, 25 Iowa 67; *State v. Coleman*, 20 S. Car. 441, *Hagadorn v. Conn. etc. Ins. Co.*, 22 Hun (N. Y.) 249; *Fraser v. Jennison*, 42 Mich. 206; *Yauke v. State*, 51 Wis. 464; *In re Ames's Will*, 51 Iowa 596; *May v. Bradlee*, 127 Mass. 414; *Storer's Will*, 28 Minn. 9. A question in the following form, "Suppose all the facts stated by the witnesses to be true, was the testator laboring under an insane delusion, or was he of an unsound mind?" cannot be admitted. The facts upon which his opinion is asked should be put to him hypothetically. *Woodbury v. Obear*, 7 Gray (Mass.) 467; *Van Zandt v. Mut. etc. Ins. Co.*, 55 N. Y. 169.

Where the facts on one side conflict with the facts on the other, they ought not to be incorporated in one question. *Woodbury v. Obear*, 7 Gray (Mass.) 467; *Fairchild v. Bascomb*, 35 Vt. 398; *Coye v. Commonwealth*, 104 Pa. St. 117; *Dexter v. Hall*, 15 Wall. (U. S.) 9.

Even where the medical witnesses have attended the whole trial and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses or of the truth of the facts testified to by others. *Commonwealth v. Rogers*, 7 Met. (Mass.) 500. See *Yardley v. Cuthbertson*, 108 Pa. St. 395.

While the evidence of medical experts is entitled to great weight, yet it is for the jury to determine the value of such evidence. *Watson v. Anderson*, 13 Ala. 202; *McAllister v. State*, 17 Ala. 434; *Stackhouse v. Horton*, 15 N. J. Ch. 205; *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232; *Pannell v. Commonwealth*, 86 Pa. St. 260; *Slais v. Slais*, 9 Mo. App. 96; *Francke v. His Wife*, 29 La. Ann. 302; *People v. Finley*, 38 Mich. 482; *Doughty v. Doughty*, 3 Halst. Ch. (N. J.) 227.

An expert's opinion based upon representations out of court, can be no more competent testimony than the representations. *Wetherbee v. Wetherbee*, 38 Vt. 454; *Heald v. Thing*, 45 Me. 392.

An expert's doubt as to a person's sanity is not competent evidence. *Sanchez v. People*, 22 N. Y. 147.

The opinion of experts of insanity of other members of the family may be received as tending to show insanity in person whose mental capacity is in issue. *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Fraser v. Jennison*, 42 Mich. 206; *Coughlin v. Poulson*, 2 McArthur (U. S.) 30; *Lord v. Beard*, 79 N. Car. 5; *People v. Montgomery*, 13 Abb. Pr. (N. Y.) 207; *State v. Windsor*, 5 Harr. (Del.) 512.

A physician, not an expert on the subject of insanity, may testify as to the mental condition of a patient when he has had adequate opportunity to form an opinion, but cannot qualify himself to testify by a single examination. *Fayette v. Chesterville*, 77 Me. 28. But see *State v. Felter*, 25 Iowa 67.

The opinion of a distinguished alienist on the probable mental condition of a patient, years before he had come under his observation, though entitled to respect, should be carefully scrutinized before acceptance, in a case where the opinion is avowedly contingent on the correctness of hypotheses which have not been established by the evidence. *Bristed v. Weeks*, 5 Redf. (N. Y.) 529. See *Townsend v. Pepperell*, 99 Mass. 40.

Opinions of expert medical witnesses as to mental capacity of a testator, expressed in response to a hypothetical question based upon the physical condition of testator, as testified to by a preceding medical witness, are entitled to but little weight as against proof of facts showing mental capacity. *Burley v. McGough*, 115 Ill. 11.

Positive evidence of the phenomena of insanity is unaffected by a dispute as to causes. *Landis v. Landis*, 1 Grant (Pa.) 248.

Contestants in a will case cannot read to the jury a passage from a work on mental diseases, enumerating certain causes of insanity. *Fraser v. Jennison*, 42 Mich. 206; *People v. Wheeler*, 65 Cal. 77.

In cases where the professional witness has made a personal examination, he must describe the symptoms, and state the circumstances from which he has drawn his conclusions. *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *Dickinson v. Barber*, 9 Mass. 225; *Hathorn v. King*, 8 Mass. 371; *Puryear v. Reese*, 6 Coldw. (Tenn.) 21; *White v. Bailey*, 10 Mich. 155; *Pierson v. People*, 79 N. Y. 424.

"The expert testimony is introduced at successive stages of a trial, and if

16. Power of Insane Persons to Choose Settlement in a Poor District.

Where a person is so deficient in mental capacity that he is not able to choose a domicile intelligently, and has no estate, he cannot, by mere residence, acquire a settlement in a poor district.¹ The settlement of such a person follows that of the father or guardian.²

the question is so framed as to include generally what has been produced in evidence to a certain period of the trial, it necessarily embraces but a portion of the whole case. The consequence is that at one stage of the trial a hypothesis will admit of one answer by an expert and at a subsequent stage another hypothesis, framed from additional evidence, warrants another, and exactly opposite answer. There is presented an apparent conflict of professional opinion between 'two trained bands of witnesses in battle array against each other,' with the possible and probable result of lowering, in the estimation of the court and jury, the value of the whole expert testimony. We know of no remedy for this except it may be found by changing the rule and permitting experts to express an opinion on a hypothetical question which embraces, in the judgment of the medical expert, all the points bearing on the question of insanity, where this is involved. A medical opinion formed after hearing one side of a case, is deserving of no more respect and has no more value than a verdict of a jury formed in a similar manner, or the opinion of a high court of appeal, the judges of which are, in a sense, experts in law, rendered after argument on one side only." Chapin on Experts and Expert Testimony, 18.

1. A pauper can obtain a settlement if he has a mind capable of having a choice and desire as to his place of abode, and in exercise of that choice goes to and resides in a town voluntarily for the requisite time. In *Westmore v. Sheffield*, 56 Vt. 239, the following instructions were held erroneous: if the pauper had a mental infirmity, not that he was an idiot, but that from mental infirmity his mind was so far weakened that he was in a state of helplessness and dependence upon the care of his parents, that it was rendered proper and necessary that he should live with his parents, he could not acquire a legal settlement. The correct rule was laid down in *Townsend v. Pepperell*, 99 Mass. 40, when the

court charged that the jury were to consider whether the pauper's mind was diseased "to such an extent as to deprive her of her volition, free will and power of choice, so as to take away from her her self-control over her mind and herself in these particulars, so that she had no power to make choice of a settlement." See also *Fayette v. Chesterville*, 77 Me. 28; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; *Upton v. Northbridge*, 15 Mass. 237; *Concord v. Rumney*, 45 N. H. 423.

2. Thus an insane person who lived in his father's family until the age of forty-eight years, and was then sent to an insane hospital, was held to follow the residence of his father acquired while he was an inmate of the hospital. *Strong v. Farmington*, 74 Me. 46; *Islesborough v. Lincolnville*, 76 Me. 572.

A father made application to the overseers of the poor of the town in which he lived for aid in taking care of his daughter, who was *non compos mentis*, and, though more than twenty-one years of age, not emancipated. Such aid was furnished during ten years, until he removed to another town, and, after an interval of a year, similar relief was furnished by that town for a longer period. Held, that the latter town was entitled to recover for the money so paid from the former town; that the daughter could not acquire an independent settlement by residence even for more than five successive years; and that the settlement of the father was not changed from the former town to the latter. *Winterport v. Newburgh*, 78 Me. 136. See also *Sharpe v. Crispin*, L. R., 1 P. & D. 611.

The general rule is stated by LORD TENTERDEN, in *Rex v. Much Cowarne*, 2 B. & Ad. 861, as follows: "A child unemancipated follows the settlement of his father; and the general rule is that until he reaches twenty-one the child is not emancipated unless he becomes the head of another family, or does some act to gain a settlement: but if after twenty-one he separates himself from his father's family, he is emancipated.

17. **Insanity as a Defence to Crime.**—This subject has been fully treated in the article on CRIMINAL LAW.¹

INSOLVENCY—(See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; COMPOSITION WITH CREDITORS; DEBTOR AND CREDITOR; FRAUDULENT CONVEYANCES, ETC.).

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Why is twenty-one the period thus fixed by law? Because at that age the party is presumed in law to be competent to take the management of his own affairs. Here the pauper never was, and never will be, competent to do so. The reason, therefore, for which that period is fixed upon in other cases wholly fails in this."

The domicile of one who has removed to a county with intent to reside there is not affected by his becoming insane. *Washington Co. v. Mahaska Co.*, 47 Iowa 57.

In *Iowa*, residence by a poor or insane person for more than a year in a county is *prima facie* evidence of a settlement there. *Scott Co. v. Polk Co.*, 61 Iowa 616.

In *Pennsylvania* it has been held that the settlement of a child upon his arrival at the age of twenty-one is the settlement of his father, but that this is not the rule where the child is of unsound mind upon his arrival at his majority. *Montoursville v. Fairfield*, 112 Pa. St. 99.

Where an insane pauper was charged upon the township in which his father lived, the removal of the father to another township does not affect her status as a pauper, or make her chargeable on the township to which he removed. *Overseers v. Overseers*, 3 Pennypacker (Pa.) 107.

Where notice has been served upon a poor district from the quarter sessions to appear and show cause why it should not be certified as the place of settlement of an insane pauper, the order of court, unappealed from, is final and conclusive of the place of settlement, and cannot be tried again in a collateral proceeding. *Overseers v. County*, 3 Pennypacker 259.

In *Maine* it has been held that the authorities of a municipality in deciding the question of a party's insanity act judicially, and the copy of their record is the legal evidence of their record. *Eastport v. Belfast*, 40 Me. 262; *Eastport v. East Machias*, 35 Me. 402.

1. See Criminal Law, 4 Am. & Eng. Encyc. of Law, 715.

- (3) *Rent*, 221.
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1. **Definition.**—Insolvency is the state of a person who from any cause is unable to pay his debts in the ordinary or usual course of trade.¹

1. *Levans' Appeal*, 112 Pa. St. 294. It is said in *Dodge v. Mastin*, 17 Fed. Rep. 660, that a bank is solvent when it possesses sufficient assets to pay within a reasonable time all its liabilities through its own agencies; and is insolvent when from the uncertainty of being able to realize on its assets in a reasonable time a sufficient amount to meet its liabilities it makes an assignment, by which the control of its affairs and property passes out of its hands.

A person who has contracted debts to a large amount, of which a large part is already mature, and is without money and confessedly unable to meet his obligations in the usual course of business, is insolvent within the meaning of the *Minnesota insolvent law* (Laws Minn. 1881, ch. 41); *Corliss v. Jewett*, 36 Minn. 364.

Insolvency is the inadequacy of a man's funds to the payment of his debts. *Herrick v. Borst*, 4 Hill (N. Y.) 652.

Insolvency means, that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions.

Insolvency means, when applied to traders, an inability to pay debts as they mature and become due and payable in the ordinary course of business, as persons carrying on trade usually do, in that which is made, by the law of the United States, lawful money and a legal tender, to be used in the payment of debts, without reference to the amount of the debtor's property and without reference to the possibility or probability, or even certainty, that at a future time, on the settlement and winding up of all his affairs, his debts will be paid in full out of his property. *Buchanan v. Smith*, 16 Wall. (U. S.) 277, 308.

Insolvency means a general inability to answer in the course of business the

liability existing and capable of being enforced. *In re Bininger*, 7 Blatchf. (U. S.) 264; *Brouwer v. Harbeck*, 9 N. Y. 594.

Remarks.—The subjects of insolvency, bankruptcy and assignment for the benefit of creditors at the present time bear so close a relation to each other that the distinction between them is not clear. The abolishment of imprisonment for debt has perhaps given aid to this confusion. Acts of insolvency and bankruptcy had their origin in the purpose of aiding an honest but unfortunate trader in escaping imprisonment. In more recent years their object has not been to save from imprisonment, but to encourage the honest and equal distribution of the debtor's assets among his creditors, and to permit the debtor to commence anew, free and unencumbered with debt.

It may, however, be said that at present the term bankruptcy in this country is commonly applied to the condition of a person's effects under a United States law. Insolvency means nothing more or less than bankruptcy under State laws. Bankruptcy and insolvency with us describe a similar condition of affairs, except that the former exists under and by virtue of an act of congress, and the latter by an act of the State legislature.

Assignment for the benefit of creditors differs from bankruptcy and insolvency in that it does not discharge the debtor from his debts, nor from imprisonment for debt, where that is still permitted. Almost every State in the Union has laws providing for assignment for benefit of creditors. Not more than fifteen have laws of insolvency. One thing, however, can be observed, and that is where imprisonment for debt still exists there will be found a law of insolvency. The States of Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New

Hampshire, New Jersey, North Carolina, Oregon, South Carolina, Vermont and Washington Territory have full and complete insolvent laws. The states of Arkansas, California, Connecticut, Georgia, Pennsylvania and Rhode Island and some others the laws providing for the assignment for the benefit of creditors bear some resemblance to laws for insolvency. The other States and territories merely provide for assignments for the benefit of creditors.

Distinction—History and Description.—The distinction between bankruptcy and insolvency which is taken by jurists and accurate law writers seems to be little regarded in common use, or even by the court, in many of the United States. In its primary sense, insolvency has a much more extensive signification than bankruptcy. The latter, which is one species or phase of the former, denotes the condition of a trader or merchant who is unable to pay his debts in the course of business. 2 Bell Com. 162; 1 Maul & S. 338; 5 Dowl. & R. 218; Park v. Moore, 4 Hill (N. Y.) 592; Cook v. Hinsdale, 4 Cush. (Mass.) 134. (Hence its derivation from *bancus*, signifying the broken bench or counter, per Story, 3 Stor. 453, art. Banke, Encyc. [1860], or *forme banqueroute*, a word of disputed etymology.) The bankrupt, says Blackstone, "is a trader who secretes himself, or does certain other acts tending to defraud his creditors." (Fraud is also implied in France by the use of *banqueroutier* as distinguished from the *simple failli*.) And the preamble to the statutes 34 & 35 Hen. 8, ch. 6, (A. D. 1542) is as follows: "Whereas divers and sundry persons, craftily obtaining into their own hands great substances of other men's goods, do suddenly flee to parts unknown, or keep their house, not minding to pay or restore to any of their creditors their debts and duties, but, at their own wills and pleasures, consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity and good conscience." From these passages it appears that originally the word bankrupt could only be applied to a dishonest merchant or trader. The meaning, however, is now so far changed that no dishonesty is implied from the statutes of bankruptcy; but it is still properly applied only to traders or merchants. Therefore the parliamentary commis-

sioners of 1840 report, "The immediate objection of the bankrupt law is the equal distribution of the debtor's property among his creditors, and the discharge of the honest trade. The object of the law for the relief of insolvent debtors in the personal discharge of honest debtors, prolonged imprisonment for the dishonest and fraudulent and a fair distribution of their present and future acquired property among their creditors." Insolvency, then, as distinguished from strict bankruptcy, is the condition or status of one who is unable to pay his debts. Insolvent laws are distinguished from strict bankruptcy laws by the following characteristics:

Distinguishing Features.—Bankruptcy laws apply only to traders or merchants; insolvent laws, to those who are not traders or merchants. Bankrupt laws discharge absolutely the debt of the honest debtor. Ogden v. Saunders, 12 Wheat. 230; Williams v. Norris, 12 Wheat. (U. S.) 122; Ward v. Crane, 2 Blackf. (Ind.) 394; Van Hook v. Whitlock, 26 Wend. (N. Y.) 43; 1 East 11. 4 B, and Ald. 654; Baldw. 296. Insolvency laws discharge the person of the debtors from arrest and imprisonment, but leave the future acquisition of the debtors still liable to the creditor. Sturges v. Crowninshield, 4 Wheat. (U. S.) 122; 3 H. & J. 61. Both laws contemplate an equal, fair and honest division of the debtor's present effects among his creditors *pro rata*. A bankrupt law may contain these regulations, which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law, per MARSHALL, C. J., Sturges v. Crowninshield, 4 Wheat. (U. S.) 122; 1 W. & M. 115. And insolvent laws quite coextensive with the English bankrupt system, have not been unfrequent in our colonial and State legislation, and no distinction was ever attempted to be made in the same between bankruptcies and insolvencies. 3 Story, Com. on Const. 11. By art. 1, 8, of the constitution of the United States, "congress shall have power to establish a uniform rule on the subject of . . . bankruptcies through the United States." From a desire of avoiding what seems to be an infringement upon an exclusive right of congress, the laws passed by the various states, with the exception of Texas, upon the subject, whether properly insolvent or bankrupt laws, have been

termed insolvent laws. And when congress exercised its constitutional right to pass a bankruptcy law, by the act "to establish a uniform system of bankruptcy throughout the United States, August 19th, 1841, all persons were included within its operation, and were allowed, upon petition, to be discharged from their debts. The law of congress rendered inoperative the State insolvent laws; and, under certain circumstances, traders could be proceeded against upon petition of their creditors. The provision in the bankrupt act rendering it properly an insolvent act, being exclusively in operation, gave rise to serious doubts whether the act was within the purview of the constitution. *Kunzler v. Kohaus*, 5 Hill (N. Y.) 317, *BRONSON, J.*, dissenting; *Thompson v. Alger*, 12 Met. (Mass.) 428; *Halsted v. Little*, 25 Me. 232; *Lalor v. Wattles*, 3 Gilm. (Ill.) 225, hold the act constitutional, and finally led to its repeal, March 3rd, 1843. *Encyc. Brit., Bankruptcy*; 2 Kent (12th ed.), 391 n. a. Therefore, in the United States, both the legislation of congress and of the separate States, has tended to obliterate the true distinction between bankruptcy and insolvency. The first bankrupt law, passed by congress in 1800, limited to five years, and expiring with its limitation, was modelled upon the English bankruptcy acts then in operation, and, like them, was only applicable to merchants. See act March 3rd, 1791, 1 Story, Laws 465; act March 2nd, 1799, 1 Story, Laws 630; act March 3rd, 1841, 4 Sharsw. Cont. Sto. L. 2263; act January 7th, 1834, 4 Sharsw. Cont. Sto. L. 2258; act March 2nd, 1837, 4 Sharsw. Cont. Sto. L. 2536.

Besides the power vested in congress on making uniform laws for the regulation of bankruptcies, Const. of U. S., art. 1, 8, it is provided, art. 1, 10, Const. of U. S., that "no State shall pass any . . . law impairing the obligation of contracts" (q. v.). By these clauses it was generally understood that congress possessed the exclusive regulation of both bankruptcy and insolvency. But the question how far the States may legislate upon these subjects came to be fully discussed in the celebrated case of *Ogden v. Saunders*, 12 Wheat. (U. S.) 218. The decision of that case recognized much larger powers in the State than had previously been supposed to exist. It was held that the power of making a bankrupt law, which shall be applicable

and binding upon creditors and all descriptions of debts, resides in congress. When congress exercises its power it is exclusive, and by its exercise the States' insolvent laws (so called) are rendered inoperative. *Griswold v. Pratt*, 9 Met. (Mass.) 16; *contra*, *Ziegenfuss's Case*, 2 Ired. (N. Car.) 463. But that a State insolvent law, whereby it is provided that a debtor, on giving up his property to his creditors, is absolutely discharged from further liability, will, as long as there is no act of congress on bankruptcy, be valid in respect to creditors residing in such State and to contracts made in the State subsequently to the passage of such insolvent law. *Cook v. Moffat*, 5 How. 295; *Brigham v. Henderson*, 1 Cush. (Mass.) 430-434. n; *Savoie v. Marsh*, 10 Met. (Mass.) 594; *Bills v. Comstock*, 12 Met. (Mass.) 470; *Stone v. Tibbetts*, 26 Me. 110; *Baynard v. Norris*, 5 Gill (Md.) 473; *Baldwin v. Hale*, 1 Wall. (U. S.) 229. See *Cooley, Const. Lim.* 360.

Insolvency may be simple or notorious. Simple insolvency is attended by no badge of notoriety. Notorious or legal insolvency, with which the law has to do, is designated by some public act or legal proceeding. This is the situation of a person who has done some notorious act to divest himself of all the property; as, making an assignment, applying for relief, or, having been proceeded against *in invitum* under bankrupt or insolvency laws. *Comegys v. Vasse*, 1 Pet. (U. S.) 195; 7 Toullie, n. 45; *Domat*, liv. 4, tit. 5, nn. 1, 2; 2 Bell Com. 165.

It is with regard to the latter that the insolvent laws (so called) are operative. They are generally statutory provision by which the property of the debtor is surrendered for his debts; and upon this condition, and the asset of a certain proportion of his creditors, he is discharged from all further liabilities. *Bartlett v. Prince*, 9 Mass. 431; 2 Kent (12th ed.) 321; *Ingr. Insolv.* 9. This legal insolvency may exist without actual inability to pay one's debts when the debtor's estate is finally settled and wound up. *Lee v. Kilburn*, 3 Gray (Mass.) 600. Insolvency, according to some of the State statutes, may be of two kinds, voluntary and involuntary. The latter is called the proceeding against the creditors *in invitum*. Voluntary insolvency, which is the more common, is the case in which the debtor institutes the proceedings, and is desirous of availing himself of the

2. What Constitutes Generally.—A trader is not necessarily insolvent, although his assets may not at a given time satisfy all the demands against him due or to become due.¹ A party whose

insolvent laws, and petitions for that purpose.

Description of Proceedings.—Involuntary insolvency is where the proceedings are instituted by the creditors *in invitum*, and so the debtor is forced into insolvency. The circumstances entitling either debtor or creditor to invoke the aid of insolvent laws are in a measure peculiar to each State. But their general characteristics are as follows: In case of voluntary insolvency, the debtor must owe a certain amount, which amount, with his inability to pay the same, must be set forth in his petition. The creditors are usually entitled to proceed *in invitum* to petition to have the debtor declared insolvent and his effects taken possession of and distributed upon the following grounds: That the creditor has fraudulently concealed his property, or has conveyed it away, or has allowed it to be attached and to remain so for a certain length of time without dissolving the attachment. The officers before whom insolvency proceedings may be had are, in the different States, judges (who are frequently judges of probate also), commissioner in insolvency, master in chancery, etc. They are appointed for the purpose and proceedings are commenced by petition, which sets forth the facts upon which the claim for relief is founded. Upon a petition of a debtor the facts are commonly taken to be true as set forth in the petition. A messenger or officer of the court is immediately sent to take possession of the property of the debtor, and a call is issued to the various creditors to attend a meeting. In a proceeding *in invitum* by the creditors the facts alleged must be proved before the warrant can be issued. And the debtor is usually entitled to notice of the proceedings instituted against him, and may appear and show cause, if any he has, why a commission should not issue against him. The first step taken by the magistrate in a case properly before him is to take possession, by means of his officers, of the debtor's effects, which, in some cases, the messenger may be directed to sell for the benefit of all concerned (as in the case of perishable articles, etc.). Then, a meeting of creditors being called, an assignee is chosen in a

way provided by statutes. In his choice the creditors are considered both with regard to their number and amount due them. To the assignee all the property is transferred, or ordered to be transferred by the magistrate by virtue of the power by law vested in him. This assignee becomes to all intents and purposes the owner of the property of the debtor, and, as agent for his creditors, has power to sell, dispose of, collect and reduce to money all the property of the debtor. He calls meetings of the creditors, when directed so to do by the magistrate, transacts all the other business and performs all the duties by law imposed upon him. The right of a debtor to a discharge is very different in the various States of America. In some the honest debtor may obtain a discharge, however small a percentage of his debts he may pay. In others he is entitled to discharge upon the payment of a certain percentage, or upon obtaining the assent of a majority of the creditors. It is also provided by the statutes of some of the States that the second or third discharge shall not be obtained at all, or as easily as in the first instance of insolvency.

The refusing to discharge a debtor upon the ground that he has been guilty of fraudulent conduct is also subject to State legislation. Certain acts are made presumptive evidence of fraud; as, the securing of debts within a certain time before the application for the discharge. Such times are regulated by the statutes, and, commonly, the times limited are six months or one year. In some States if a pre-existing debt has been paid or secured within a year prior to being declared insolvent the debtor having reasonable cause at the time to suppose himself insolvent, his discharge will not be granted. Bouv. Law Dict.

1. Bell v. Ellis, 33 Cal. 620.

Who Is Trader.—A livery stable keeper who buys hay and grain and sells, by keeping horses to bait and board, is a trader within the meaning of the insolvent law. Stat. 1878, ch. 74, § 42; Groves v. Kilgore, 72 Me. 489.

A person who, in the course of a few months, is engaged with another in purchasing one hundred cattle, and sells them to the proprietor of an establish-

assets are 40 per cent. above his liabilities is not to be considered insolvent.¹

The question of a debtor's solvency depends, not upon the nominal value of his property, but upon whether enough can be realized from a sale of it to discharge his liabilities.²

The rule that a trader who is unable to pay all his debts in the usual ordinary course of business, as persons carrying on a trade usually do, is to be regarded as insolvent, is approved as a general rule.³

To constitute an assignment within the insolvent laws, there must be a trust for some one besides the assignee.⁴

a. How Proven.—Reputation is not admissible to prove insolvency, but facts may be shown from which insolvency may be inferred,⁵ and the mere suing out of an attachment is no evidence of the defendant's insolvency.⁶

ment for "canning" beef, in pursuance of a previous contract with such proprietor, is a trader within the meaning of that term in the insolvency laws of this State. *Sylvester v. Edgecomb*, 76 Me. 499.

Taking the amendment in connection with the original bill, and construing it most strongly against the pleader, it does not appear that the person sought to be held as a trader was in fact such at the time of the bringing of the bill. So read, the allegations seem to show that he was merely engaged in winding up his business after having sold out, and the case is controlled by the former adjudication on this point. *Coates v. Allen*, 71 Ga. 787.

The fact that a debtor is under protest and does not pay his debts, does not establish his insolvency. It must be shown that he has not the means of paying his debts, by showing that all his property and credits are not equal in amount to the debts due by him. *Kork v. Bringier*, 19 La. Ann. 183; *Lea v. Bringier*, 19 La. Ann. 183; *Lea v. Bringier*, 19 La. Ann. 197.

Insolvency does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement and winding up of all his affairs, but a present inability to pay in the ordinary course of business. *Thompson v. Thompson*, 4 Cush. (Mass.) 127; *Lee v. Kilburn*, 3 Gray (Mass.) 594.

A nonpayment of a business check upon presentation is evidence of the insolvency of the drawer. *Brown v. Montgomery*, 20 N. Y. 287.

Where judgment had been recovered against insolvent debtors, and the

judgment creditor had caused money belonging to such debtors to be attached in the hands of a third person, the failure of the debtors to take any proceedings to set aside or "vacate the garnishment," or secure a release therefrom, or to make any assignment within ten days after the levy, under Laws Minn. 1881, ch. 148, § 2, authorized their creditors, on such default, to institute the insolvency proceedings therein provided for. *Maxfield v. Wilkins*, 38 Minn. 539.

1. *Hunt v. His Creditors*, 9 Cal. 45.

2. *Churchill v. Wells*, 7 Coldw. (Tenn.) 364.

3. *Driggs v. Moore*, 1 Abb. (U. S.) 440.

But failure to pay a single debt is not evidence of insolvency. *Driggs v. Moore*, 1 Abb. (U. S.) 440.

4. *Wellington v. Sedgwick*, 12 Cal. 469.

5. The insolvency of a person at a particular time cannot be proved by general reputation; as, that "he was generally reputed to be insolvent." *Stewart v. McMurray* (Ala. 1887), 3 So. Rep. 47; *Lawson v. Orear*, 7 Ala. 785; *Branch Bank v. Parker*, 5 Ala. 731.

6. Return by the sheriff of another county that he knows of no property in his county on which to levy, is no evidence of insolvency, where it is not shown that the defendant ever resided or had property in that county. *Knox v. Bates* (Ga.), 5 S. E. Rep. 61; *Gustine v. Phillips*, 38 Mich. 674.

Reasonable Cause to Believe.—In an action by an assignee to recover money claimed to have been paid in fraud of

b. How Insolvent Laws Construed.—The acts for the relief of insolvent debtors are to be liberally construed.¹

3. Power of Congress to Pass.—(See CONSTITUTIONAL LAW AND BANKRUPTCY).—The constitution of the United States provides that “congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States.”²

4. Constitutionality of State Insolvent Laws.—A State has authority to pass insolvency laws, provided they do not impair the obligation of contracts or conflict with any existing laws of congress.³

the insolvent law, the question being whether the defendant had reasonable cause to believe that the debtor was insolvent. *Held*, that it was immaterial whether the defendant *believed* him to be insolvent. But the defendant, having testified to the value of the insolvent's property, he could state what he understood was his indebtedness.

It was in the discretion of the court below to allow the defendant to prove the financial reputation of the insolvent, although he, defendant, did not reside in the same town that the debtor did, but was often there on business. *Larkin v. Batchelder*, 56 Vt. 416.

It is presumed that all the members of a community must know more or less of a matter which is one of common knowledge in such community. *Larkin v. Hapgood*, 56 Vt. 597.

On the issue whether a mortgagee had reasonable cause to believe the mortgagor to be insolvent or in contemplation of insolvency, within the Gen. Sts. Ch. 118, §§ 89, 91, evidence that the mortgagee, before he took the mortgage, was himself indebted to other persons, who were pressing him for payment of their debts, and that he exhibited the mortgage to them and offered it as collateral security for those debts, is inadmissible. *Purinton v. Chamberlin*, 131 Mass. 589.

In replevin against an assignee for benefit of creditors, for goods purchased on fraudulent representations by the assignor as to his solvency, judgments recovered after the assignment are not evidence of insolvency at the time of the purchase, but their admission is harmless when it appears from the schedule and other evidence that the debts upon which they were recovered existed at that time, and the judge charges, without objection, that defendant does not allege that the assignor was then solvent. *Underhill v. Ramsey*, 2 N. Y. Sup. Rep. 451.

1. *Mines v. Lockett*, 20 Ga. 474.

2. Const. U. S., art. 1, § 8. See BANKRUPTCY, 2 Am. & Eng. Ency. of Law 67.

3. *Bank of Tenn. v. Horn*, 17 How. (U. S.) 157; *Baldwin v. Hale*, 1 Wall. (U. S.) 223.

Distinctions and Power to Pass Discussed.—In considering this question it must be recollected that previous to the formation of the new constitution we were divided into independent States, united for some purposes, but in most respects sovereign. These States could exercise almost every legislative power, and among others, that of passing bankrupt laws. When the American people created the national legislature, with certain powers enumerated, it was neither necessary nor proper to define the powers retained by the States. These powers proceed not from the people of the United States, but from the people of the several States, and remain after the adoption of the constitution what they were before, except so far as they may be abridged by that instrument. In some instances, as in the making of treaties, we find an express prohibition; and this goes to show the sense of the convention to have been that the mere grant of a power of congress did not imply a prohibition on the State to exercise the same power. But it has been supposed that the concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion resulting from such a practice would be endless . . . Whenever the terms in which a power is granted to congress or the nature of the power required that it should be exercised exclusively by congress, the subject is as completely taken from the State legislatures as if they had been expressly forbidden to act on it.

The peculiar terms of the grant certainly deserves notice. Congress is not merely authorized to pass laws, the op-

The power of congress to establish uniform laws on the subject of bankruptcy throughout the United States does not exclude

eration of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is, perhaps, incompatible with State legislation on that part of the subject to which the acts of congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws, though the line of partition between them is not so distinctly marked as to enable any person to say with positive precision what belongs exclusively to the one and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws. But if an act of congress should discharge the person of the bankrupt, and leave his future acquisitions liable to creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt act; and, therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of the imprisoned debtor; bankrupt laws, at the instance of a creditor. But should an act of congress authorize a commission of bankruptcy to issue on the application of the debtor, a court would hardly be warranted in saying that the law was unconstitutional, and the commission a nullity. When laws of each description may be passed by the same legislature, it is unnecessary to draw a precise line between them. The difficulty can only arise in our complex system, where the legislation of the Union possesses the power of enacting bankrupt laws, and those of the States the power of enacting insolvent laws. If it be determined that they are not laws of the same character, but are as distinct as bankrupt laws and laws which regulate the course of descents, a distinct line of separation must be drawn and the power of each government marked with precision. But all perceive that this line must be in a great degree arbitrary. Although the two systems have existed apart from each other, there is such a connection between them as to render it difficult to say how far they may be blended together. The bankrupt law is said to grow out of the exigences of commerce, and is applicable

solely to traders; but it is not easy to say who must be excluded from or who may be included within this description. It is, like every other part of the subject, one in which the legislature may exercise an extensive discretion.

This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious that much inconvenience would result from that construction of the constitution which should deny to the State legislature the power of acting upon this subject, in consequence of the grant to congress. It may be thought more convenient that much of it should be regulated by State legislation, and congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the States as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies should and ought to be established, it does not follow that partial laws may not exist or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States. It has been said that congress has exercised the power, and by so doing has extinguished the power of the States, which cannot be revived by repealing the law of congress.

We do not think so. If the right of the States to pass bankrupt laws is not taken away by the mere grant of power to congress, it cannot be extinguished. It can only be suspended by the enactment of a general bankrupt law. The repeal of the law cannot, it

the right of the State to legislate upon the subject, except where the power is actually exercised by congress, and the State laws conflict with those of congress.¹

A State insolvent law is valid, even though it was enacted while the national bankrupt law is in force, but it cannot be enforced until the national act is repealed.²

Where a State has an insolvent law in force, and congress passes a bankrupt act, the State law is suspended during the continuance of the bankrupt law.³ On the question of the constitutionality of State insolvent laws, the decisions of the supreme court of the United States are final and conclusive.⁴ But no State insolvent law can be valid if it impairs the obligation of a contract.⁵

is true, confer the power on the States, but it removes the disability to its exercise which was created by act of congress. *C. J. MARSHALL*, in *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122.

1. *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Boyle v. Zacharie*, 6 Pet. (U. S.) 348; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122.

Act. Minn. March 7th, 1881, providing that when the property of a debtor is seized by attachment or execution, he may assign all his property for the equal benefit of all his creditors who shall file releases of their claims, and that thereupon his property shall be equitably distributed, does not violate the constitution of the United States by impairing the obligation of contracts, when applied to debts incurred after its passage. *HARLAN, J.*, dissenting. *Denny v. Bennett*, 9 Supreme Ct. Rep. (1889) 134.

The statute is not invalid as to an attaching creditor who is a citizen of another State, as each State may regulate remedies as to property within its jurisdiction, though it could not discharge the debt itself to such a creditor who does not appear and participate in the assignment. *HARLAN, J.*, dissenting. *Id.*

2. *Tua v. Carrierre*, 117 U. S. 201.

If those laws (insolvent laws) had been enacted then for the first time they would have been so far as inconsistent with the bankrupt act, inoperative while the act remained in force, but upon its repeal would have come into operation. The enactment of the insolvent law during the life of the bankrupt act would have been merely tantamount to a provision that the former should take effect on the repeal of the latter. *WOOD, J.*, in *Tua v. Carrierre*, 117 U. S. 201.

3. *Ward v. Procter*, 7 Met. (Mass.) 318; *Lothrop v. Foundry Co.*, 128 Mass. 120; *Orr v. Lisso*, 33 La. Ann. 476.

4. *Boyle v. Zacharie*, 6 Pet. (U. S.) 635.

5. **Validity of a State insolvent law** which discharges a debtor from all his liability from any debt contracted before such law was passed, on his surrendering all his property in the manner it prescribes, is void, as it impairs the obligation of the contract. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Boardman v. De Forest*, 5 Conn. 1; *Farmers' etc. Bank v. Smith*, 6 Wheat. (U. S.) 131; *Roosevelt v. Cebra*, 17 Johns. (N. Y.) 108; *Kimberly v. Ely*, 6 Pick. (Mass.) 451; *Betts v. Bagley*, 12 Pick. (Mass.) 572; *Smith v. Mead*, 3 Conn. 253; *Hammett v. Anderson*, 3 Conn. 304; *Hemstead v. Reed*, 6 Conn. 480.

Under the Illinois voluntary assignment act (1 Starr & C. St. 1303), which declares (section 13) that all preferences "in any assignment hereafter made" shall be void, when an insolvent debtor, realizing that he can no longer continue business, determines to yield the dominion of his entire estate, and, in execution of that purpose, executes in favor of certain of his creditors, who understand his purpose, confessions of judgment, conveyances, bills of sale, etc., at short intervals, and as parts of one transaction, such instruments constitute an assignment, within the meaning of the statute, and the preferences are void. *White v. Cotzhausen*, 9 Sup. Ct. Rep. 1889, 309.

But where the insolvent law is only to effect debts contracted after its enactment, it is valid. *Jaques v. Marquand*, 6 Cow. (N. Y.) 497; *Northern Bank v. Squires*, 8 La. Ann. 318; *Wilson v. Matthews*, 32 Ala. 332; *Smith v.*

5. Effect of the United States Bankrupt Laws Upon State Insolvent Laws—(See *BANKRUPTCY*; *CONSTITUTIONAL LAW*; *CONFLICT OF LAWS*).—The passage of a national bankrupt law suspends the action and effect of all State insolvent laws so far as they may conflict with such national bankrupt law,¹ and upon the repeal of the act of congress the State insolvent laws enacted before and during the existence of the act of congress, become of full effect and power.²

Proceedings in insolvency commenced under State insolvent laws before the United States bankrupt law was enacted, are unaffected by it.³

6. Extra Territorial Effect of State Insolvent Laws—(See *CONFLICT OF LAWS*).—Insolvent laws of a State have no extra territorial operation; they can act only upon the person and property within the State,⁴ but the United States courts in their adjudications

Parsons, 1 Ohio 236; *Baker v. Wheaton*, 5 Mass. 509; *Mather v. Bush*, 15 Johns. (N. Y.) 233; *Hicks v. Hotckiss*, 7 Johns. Ch. (N. Y.) 297; *Blanchard v. Russell*, 13 Mass. 16; *Shaw v. Robbins*, 12 Wheat. (U. S.) 369; *Ogden v. Saunders*, 2 Wheat. (U. S.) 213.

But State laws which abolish imprisonment for debt, or discharge debtors from debt, or discharge debtors from imprisonment, act merely upon the remedy and do not impair the obligation of contract. The right of imprisonment is no part of the contract. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122-199; *Mason v. Haile*, 12 Wheat. (U. S.) 370; *Beers v. Haughton*, 9 Pet. (U. S.) 329; *Woodhull v. Wagner*, *Baldw.* (U. S.) 296; *Lee v. Gamble*, 3 Cranch (C. C.) 374.

An insolvent law passed by a State legislature, discharging a person from his debts, is valid as to contracts made after its passage between citizens of the same State, but has no force as to contracts made out of the State, and to which a citizen of another State is a party. *Donnelly v. Corbett*, 7 N. Y. 500.

1. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Bank of Tenn. v. Horn*, 17 How. (U. S.) 157; *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Griswold v. Pratt*, 9 Met. (Mass.) 16.

A person arrested on a State process gave bond to apply for the benefit of the State insolvent law, and was released. He applied for the benefit of the bankrupt law, and was declared a bankrupt. Before discharge he applied for an injunction to stay proceedings in the State courts, which was refused.

Held, that this release was no satisfaction of the execution. *Ex parte Rank*, *Crabbe* 493.

2. *Tua v. Carriers*, 117 U. S. 201; *Atkins v. Spear*, 8 Met. (Mass.) 490; *Winch v. James*, 68 Pa. St.; *Re Damon*, 70 Me. 153.

In *Boedefeld v. Reed et al.*, 55 Cal. 299, it was *held* that the operation of the insolvent law was suspended by the bankrupt act, in the sense that no proceeding could be commenced for a discharge under it while a general bankrupt law existed; but, upon the repeal of the bankrupt act the insolvent law revived, and came again into operation, as if it had never been suspended; and its provisions apply as well to indebtedness contracted while it was suspended as to indebtedness contracted after it again came into operation.

3. *Longis v. His Creditors*, 20 La. Ann. 15; *Minot v. Thacher*, 7 Met. (Mass.) 348; *Judd v. Ives*, 4 Met. (Mass.) 401.

Whether the New Jersey bankrupt law was suspended was a query in *Steelman v. Mattux*, 36 N. J. L. 344.

The insolvent law of 1878 was a valid law when enacted, though its operation was suspended by the United States bankrupt law then existing. When the repeal of the bankrupt law took effect the insolvent law went into operation, and took cognizance of all acts within its provisions done while it was so suspended, and applied to contracts made during that time. *Palmer v. Hixon*, 74 Me. 447.

4. *Kennedy v. Bank of Georgia*, 8 How. (U. S.) 586; *Springer v. Foster*, 2 Story (U. S.) 383; *Poe v. Duck*, 5

will enforce them in actions arising in States where they exist.¹

State insolvent laws cannot discharge the contracts of citizens of other States.² The circumstance that the contract was to be performed in the State does not take it out of the operation of the rule.³ A non-resident, by voluntarily making himself a party to proceedings under insolvent laws, abandons his extra territorial immunity from the operation of such laws, and is bound by them the same as citizens of the State.⁴ But when he does not so make himself a party he is not affected.⁵

7. Assignment—*a. What Passes.*—Under an assignment, all the property passes to the assignee, to which the assignor had the legal or equitable title;⁶ but property held in trust does not pass by the assignment;⁷ and it will not pass any interest in a chose in action which was before voluntarily assigned by the in-

Md. 1; *Fisher v. Wheeler*, 5 La. Ann. 271.

Rights of Assignee.—An insolvent debtor, having an office in Vermont, where he resided, and one in New York, transferred, through his agent in New York, property situated there, to defendant, a Vermont creditor, in fraud of the Vermont insolvency laws. *Held*, that his assignee could maintain trover for the value of the property, though the transfer was valid in New York. *Crampton v. Valido Marble Co. (Vt.)*, 15 Atl. Rep. 153.

1. *Davidson v. Smith*, 1 Biss. (U. S.) 346.

2. *Clark v. Van Reimsdyk*, 9 Cranch (U. S.) 153; *Suydam v. Broadnax*, 14 Pet. (U. S.) 67; *Cook v. Moffat*, 5 How. (U. S.) 295; *Baldwin v. Hale*, 1 Wall. (U. S.) 223; *Baldwin v. Bank*, 1 Wall. (U. S.) 534.

State legislatures may pass insolvent laws provided there be no act of congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligations of contracts. Certificates of discharge, however, granted under such a law cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained, unless it appears that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one State cannot discharge the contracts of citizens of other States, because such laws have no extra territorial operation, and consequently the tribunal sitting under them, unless in case

where a citizen of such other State voluntarily becomes a party to the proceedings, has no jurisdiction of the case. *CLIFFORD, J.*, in *Gilman v. Lockwood*, 4 Wall. (U. S.) 411.

3. *Baldwin v. Bank of Neubery*, 1 Wall. (U. S.) 234.

4. *Clay v. Smith*, 3 Pet. (U. S.) 411.

Voluntary Appearance.—If a foreign creditor, either by himself or his attorney, voluntarily unites in the recommendation of a person as trustee for the insolvent, it is such an acquiescence in the insolvent laws of the State as will place him on the same footing with the domestic creditors and compel him to take the dividend of the assets as they do. *Jones v. Horsey*, 4 Md. 306; *Judd v. Porter*, 7 Greenl. (Me.) 337; *Felsh v. Bugbee*, 48 Me. 9; *Springer v. Foster*, 2 Story (U. S.) 387; *Pratt v. Chasse*, 44 N. Y. 597; s. c., 4 Am. Rep. 718; *Hanley v. Hunt*, 27 Iowa 303; s. c., 1 Am. Rep. 273.

5. *Beer v. Hooper*, 32 Miss. 246.

6. *Bank of Tennessee v. Horn*, 17 How. (U. S.) 157; *Kip v. Bank of New York*, 10 Johns. (N. Y.) 63.

An assignment by a debtor of "all his estate, real and personal," pursuant to an insolvent act, passes the title to all the lands which he owns without further description and whether mentioned in the inventory or not. *Roseboom v. Mosher*, 2 Den. (N. Y.) 61; *Marsh v. Wendover*, 3 Cow. (N. Y.) 69; *Cohen v. Gibbes*, 1 Hill (S. Car.) 206; *Hunt v. Danforth*, 2 Curt. (U. S.) 592.

7. *Kennedy v. Strong*, 10 Johns. (N. Y.) 289.

Land to which an insolvent holds the legal title upon an implied trust in favor of another, does not pass to the

solvent.¹ In some instances it has been held that the property passed, whether the assignee acted or not.²

The future earnings of a public officer do not pass by the assignment.³

The assignee takes the property assigned subject to all the equities which affected the debtor.⁴

A contingent claim is an assignable interest.⁵ Also a vessel at sea can be assigned by the law of the place where it is registered.⁶ A trade mark usually does not pass by assignment.⁷ Neither will a claim against a railroad corporation for injury to the person pass by an assignment under the insolvent laws.⁸ It

assignee as "property of the debtor which might have been taken on execution," within the meaning of the Pub. Sts., ch. 157, § 46, although no declaration of trust has been recorded. *Low v. Welch*, 139 Mass. 33.

1. *Hopkins v. Banks*, 7 Cow. (N. Y.) 650.

2. *Lore v. Hill*, 3 Harr. (Del.) 530; *Golden's Appeal*, 110 Pa. St. 581.

3. *Grow v. His Creditors*, 31 Cal. 328. See *Milnor v. Metz*, 16 Pet. (U. S.) 221.

4. *Palmer v. Thayer*, 28 Conn. 237.

The assignee takes no better title than the debtor to land held by the latter under a conveyance fraudulent against the creditors of the grantor. *Pratt v. Wheeler*, 6 Gray (Mass.) 520.

Goods bought by a retail dealer upon a condition that the property shall not vest in him until they are paid for, but with an understanding between him and the vendor that they are to go into his store and to be sold by him in the regular course of trade, will not pass to his assignee in insolvency or for the benefit of creditors. *Rodgers v. Whitehouse*, 71 Me. 222.

5. *Hunter v. U. S.*, 5 Pet. (U. S.) 173.

6. *Crapo v. Kelley*, 16 Wall. (U. S.) 610.

7. *Bradley v. Norton*, 33 Conn. 157.

The right to use trade marks, in connection with a manufacturing business, which are not personal in their character, but designate merely the place or establishment at which the goods are manufactured, passes to the assignee in insolvency of the owner, under the Gen. Sts., ch. 118, § 44. *Warren v. Warren Thread Co.*, 134 Mass. 247.

8. **Right of Action for a Tort Does Not Pass.**—The decision of this question depends upon the construction of the original insolvent law. St. 1838, ch.

163, § 5. One or two phrases in that section might seem to imply that anything which could be assigned by the debtor would pass by an assignment under that section. Such assignment does "vest in the assignees all the property of the debtor, both real and personal," incorporeal as well as corporeal, "all debts due to the debtor or to any person for his use and all liens and securities therefor, and all his rights of action for any goods or estates, real or personal." But an action for damages is not property, nor a right of property, nor a debt until it is reduced to judgment, and then it passes because it has assumed the form of a debt. The reason is, a claim for damages, when liquidated, must be liquidated in money, and a judgment for the money is, to all intents and purposes, a debt or specialty. The "right of action" which passes to the assignee by the statute are qualified by the addition "for any goods or estates." A similar qualification is embraced in the further provision of the same section, allowing the assignees to be admitted to prosecute actions in the name of the debtor at the time of the assignment. These provisions show the intention of the statute, in accordance with the reason of the thing and with some cases under the English bankrupt laws that everything should pass which forms part of the assets of the debtor, but not any right of action for personal damages.

Then what was the condition of the claim when the assignment was made?

The verdict being against the plaintiff was clearly no liquidation of his claim, and we are of the opinion that even if the verdict had been in his favor, if there had been no judgment on it, and especially if the exceptions had been allowed, which might occasion it to be set aside, it would not have

has been held that a patent right passes to the assignee.¹ Property sold conditionally and delivered without a legal record of the lien, passes to the assignee.² A claim against the United States belongs to the assignee. Property acquired by an insolvent debtor subsequently to his petition, by gift, descent or devise, or in the course of distribution, does not pass to the assignee.³

A claim of the debtor against another as surety passes to the assignee.⁴

b. Foreign—(See FOREIGN ASSIGNMENT).—Assignments preferring creditors do not pass property in any state except in the state where made;⁵ likewise the assignment of property under the insolvent laws of one State has no extra territorial force as against the *bona fide* purchaser of such property in another.⁶

passed to the assignee. In order to pass by the assignment it must be a definite judgment, a judgment upon which a suit might have been brought.

Stone v. Boston etc. R. Co., 7 Gray (Mass.) 539.

1. *Ex parte* Keach, 14 R. I. 571.

Under an assignment of the estate of an insolvent debtor under Pub. St. Massachusetts, ch. 157, § 44, letters patent owned by the debtor pass to the assignee, notwithstanding they are, under the laws of that State, exempt from attachment; and a bill in equity can be maintained to compel an assignment of the same to the assignee in insolvency. Barton v. White, 144 Mass. 281.

2. Collender Co. v. Marshall, 57 Vt. 232.

3. Hall v. Gill, 10 Gill & J. (Md.) 325.

4. Hunter v. United States, 5 Pet. (U. S.) 173.

Insolvent act *California*, 1880, § 17, provides that "the clerk of court shall . . . assign and convey to the assignee all the estate, real and personal, of the debtor." The clerk in an assignment, after styling himself "party of the first part," proceeded to convey "all the property, etc., of the said party of the first part." The instrument, which is entitled "*In the matter of A. B., an insolvent debtor*," recites the insolvency proceedings, and that it is made by the assignor as clerk of the court, and that it is in obedience to the insolvent act. Held, that it is a valid assignment of the insolvent's property, and that the words "party of the first part" mean the clerk acting under the statute as assignor. Mogk v. Peterson, (Cal.) 17 Pac. Rep. 446.

5. King v. Johnson, 5 Harr. (Del.) 31.

The assignee of an insolvent debtor, appointed under the laws of one State does not so far represent creditors as to be able to avoid a conveyance of personal property in another State good as against the insolvent but invalid as against creditors, by the laws of such other State. Betton v. Valentine, 1 Curt. (U. S.) 168.

6. Hoyt v. Thompson, 19 N. Y. 207.

Lex Loci Applies. The rule that a voluntary conveyance of personal property, valid under the laws of the State where made, will operate to transfer the property wherever it may be situated, does not extend to statutory transfers *in invitum*, in proceedings under State bankrupt or insolvent laws. Such a transfer affects only property situated within the territory of the State under whose laws it is made; and a title acquired under foreign bankruptcy or insolvent proceedings will not prevail against the rights of attaching creditors, under the laws of the State where the property is situated.

Kelly v. Crapo, 45 N. Y. 86.

Kelly v. Crapo, 16 Wall. (U. S.) 610.

Proceedings by a Canadian court under a Canadian insolvent act had against a person while he was in the State of Michigan, cannot, by mere force or operation of the orders and decrees therein made and in the absence of any transfer by the insolvent himself, vest the Canadian assignee with title to promissory notes in Michigan which have never been within the territorial jurisdiction of the Canadian court or subject by any process to its control, and the fact that the insolvent afterwards went to Canada and submitted himself to the jurisdiction of that court would not help the matter.

Wood v. Parsons, 27 Mich. 159.

c. When It Takes Effect.—The title in the property vests in the assignee—where a trial is required, from the time of the adjudication;¹ when it is made by deed, it vests from the time of the deed.² It has no retroactive effect.³ It sometimes takes effect at the time the assignee takes the oath required by statute.⁴

8. Existing Attachments—*a. Local.*—Where there is no statute to the contrary, an attachment is not affected by an assignment for the benefit of creditors, or by proceedings in insolvency. Attached property will be first applied to the payment of the creditor's claim for which it is procured, and the surplus will pass into the hands of the assignee.⁵

Some States have passed statutes making attachments made within a certain length of time prior to assignment or insolvency proceedings void.⁶

An insolvent debtor, resident of *Illinois*, made a general assignment for the benefit of his creditors. The assignment included real estate owned in *Kansas*. The assignee, with the approval of the county court of the county, in *Illinois*, in which the assignment was made, sold the land in *Kansas*. *Held*, the purchaser at such a sale got no title, the land not having been sold in accordance with the provisions or the act to regulate voluntary assignments for the benefit of creditors, in force in *Kansas*, nor by the order or judgment of any court of that state. *Thompkins v. Adams*, (Kan.) 20 Pac. Rep. (1889) 530.

1. *Goss v. Cardell*, 53 Vt. 447.

Sometimes it dates from the date of the petition. *Adams v. Lewis*, 31 Conn. 501.

2. *Ennis v. Hulse*, Wright (Ohio) 259.

3. *Ennis v. Hulse*, Wright (Ohio) 259.

4. *Hoag v. Hoag*, 35 N. Y. 469.

5. See ATTACHMENTS, vol. 1, p. 93.

Fees of Attaching Officer.—An officer attaching an animal has a right to charge for its keeping while in his custody in his bill of fees. The expense thus incurred is a part of the costs, which become a preferred claim against the estate of the debtor if the attachment is vacated by his going into insolvency.

The officer looks to the attaching creditor for his fees, and the creditor presents the claim for the costs in his own name against the assigned estate.

Neither the officer nor the attaching

creditor has any lien upon the property, as against the trustee in insolvency, which authorizes them to hold possession of it till the costs are paid. *Boughton v. Crosby*, 47 Conn. 577.

An attachment creditor, who presents his claim to his debtor's assignee for settlement, waives all objections to the regularity of the assignment, no actual fraud being charged. *Littlejohn v. Turner* (Wis.), 40 N. W. Rep. 621.

6. See statutes of *Massachusetts*, *Rhode Island*, *Minnesota*, etc.

Property of the defendant in an action was attached more than four months before the institution by him of insolvency proceedings. He was defaulted pending such proceedings. The plaintiff thereupon suggested these proceedings, and, before the St. of 1885, ch. 59, took effect, obtained a special judgment against the property attached. Execution issued, reciting the judgment for the plaintiff for the amount of the debt and costs, to be levied only on the property attached. The execution was returned satisfied in part only. *Held*, that the judgment was a final judgment; and that the plaintiff was not entitled to have a further judgment entered, or process issued, for the unsatisfied balance of his debt. *Gay v. Raymond*, 140 Mass. 69.

Subsequent Attachment.—Where proceedings by garnishment had been instituted by service of process upon a garnishee who was in fact a debtor to the defendant in the principal action, and such debtor, being insolvent, within 10 days thereafter, and before disclosure by the garnishee, in good faith

made an assignment under Laws 1881, ch. 148, § 1, and his property was thereupon duly turned over to the assignee, *held*, that the assigned property thereby passed under the control of the district court of the proper county, and the assignment was not to be deemed void, so as to subject the property to attachment, because it is made to appear in the suit between the attaching creditor and the assignee, involving the title of the latter to the assigned property, that the garnishee would have disclosed that the amount due from him to the insolvent was within the statutory limit. *North Star Boot & Shoe Co. v. Lovejoy*, 33 Minn. 229.

The act of March 31st, 1876, dissolves attachments levied within two months before the filing of a petition in insolvency, and in such case it is competent for the court, upon the motion of the assignee, to direct its officer to release the property from its process. *Baum et al. v. Raphael*, 57 Cal. 361.

Trustee in Insolvency and of Attaching Creditors.—Under art. 48, § 7, of the Code, property conveyed by deed from a debtor to a trustee, professedly for the benefit of his creditors (which deed, in proceedings instituted by an attaching creditor, was found to be fraudulent), does not vest in the grantee, but in the insolvent trustee, the debtor having some time after the execution of the deed applied for the benefit of the insolvent law; and if any of the property conveyed by the deed has been disposed of by the grantee, and put beyond the control of the insolvent trustee, the proceeds must take its place, and rightfully belong to the insolvent trustee for distribution, according to law and the principles of equity under order of court. The credits or proceeds of the property so conveyed, which have been condemned by judgments in attachments on original process, laid in the grantee's hands, entered after the execution of the deed, but before the appointment of the insolvent trustee, or to condemn which any proceedings in attachment are pending, of right belonging to the insolvent trustee, injunction was properly granted, restraining further proceedings upon the judgments of condemnation or pending attachments, in order that all questions of priority and lien might be determined according to the principles established by art. 48, § 10, of the Code; and whatever rights attaching creditors might have acquired,

the court would protect in the distribution of the estate. *Lynch v. Roberts*, Trustee, 57 Md. 150.

The State legislature, while the National Bankrupt act was in force, passed an act providing for the equal distribution of the estates of insolvent debtors. *Held*, that the State act, although in a degree dormant during the existence of the national act, took such vitality as was not inconsistent with that act, and was not void.

After the repeal of the national act, creditors of an insolvent debtor brought actions against him to recover debts incurred while that act was in force and before the State act was passed, and procured his property to be attached therein. Within sixty days after such attachments were made, the debtor was adjudged insolvent, and afterwards an assignee was appointed, and the debtor's property was conveyed to the assignee, who demanded it of the attaching officer. *Held*, that as the right to attach was not a part of the contract, but a right to a remedy for the breach of it, the legislature might provide that in case a debtor had not sufficient property to pay all his debts it should be equitably distributed among all his creditors, without violating that provision of the constitution that forbids the passing of a law "impairing the obligation of contracts"; and that therefore the assignee was entitled to possession of the property.

Held, also, that at the time the State act was passed the creditors had no absolute priority that they could assert by attachment; for that under the National Bankrupt act, which was in force when the debts were incurred, they would have been bound, in case of bankruptcy of the debtor, to release their attachments and surrender the property for distribution. *Baldwin v. Buswell*, 52 Vt. 57.

The St. of 1875, ch. 68, § 1, providing that, when any defendant in a civil action, who has dissolved an attachment made therein, is adjudged a bankrupt, the court may enter a special judgment, to enable the plaintiff to proceed against the sureties on the bond given to dissolve the attachment, does not apply to a defendant against whose estate a warrant in insolvency has been issued; and the St. of 1880, ch. 246, § 8, amending § 1 of the St. of 1875, by inserting after the word "bankrupt" the words "or against whose estate a warrant in insolvency has already been or

b. Foreign.—(CONFLICT OF LAWS, AM. & ENG. ENCY. OF LAW, vol. 3, p. 618).—The rule in the United States seems to be that a foreign bankrupt assignment is ineffective as against attaching creditors, whether it is movable or immovable property,¹ and some courts have held that this rule applies to subsequent as well as existing attachments;² but the general rule seems to be that it applies only to existing attachment.³

9. Petition for.—A petition in insolvency must allege the facts upon which the application is grounded. The facts must be specifically set forth, not broadly and vaguely stated.⁴ It should show the date of each debt set out as those contracted before the law was passed.⁵

afterwards is issued," does not apply to a bond given before the statute took effect, the condition of which is to pay the amount recovered "after any special judgment entered in accordance with" the St. of 1875, ch. 68, § 1. *Lincoln v. Leshure*, 132 Mass. 40.

Under the Gen. Sts., ch. 118, § 45, providing that the judge, before whom proceedings in insolvency are pending, may order the lien created by an attachment of the property of an insolvent debtor to continue, upon application made by any person interested "on or before the day of the third meeting of creditors," taken in connection with the provision of § 75, that the third meeting of the creditors is "to be held within six months from the time of the appointment of the assignee," the application must be made on or before the day provided by law for the holding of the third meeting, and cannot be made at an adjournment of that meeting. *Nelson v. Winchester*, 133 Mass. 435.

Proceedings under § 59 of the insolvent act of 1878 (in the cases of persons whose debts do not exceed \$300) do not dissolve attachments. Such assignments only as are provided for in § 30 will have that effect. *Collins v. Chase*, 71 Me. 434.

An assignment in insolvency, made since the St. of 1880, ch. 246, § 7, took effect, does not dissolve an attachment of the debtor's property made more than four months before the first publication of notice of the issuing of the warrant, although such notice was published before the enactment of the statute. *O'Neil v. Harrington*, 129 Mass. 591.

The bringing of a bill in equity and the issuing of an injunction, under the power a court of equity has to compel

or restrain conveyances of property, or to reach and apply in payment of a debt the property, legal or equitable, of a debtor, do not constitute an attachment of property, within the Pub. Sts., ch. 157, § 47, authorizing, in certain cases, the lien created by the attachment to continue where the attachment would otherwise be dissolved by proceedings in insolvency. *Squire v. Lincoln*, 137 Mass. 399.

1. See cases cited in note in 3 Am. & Eng. Encyc. of Law, 618-620 note.

2. *Dunlap v. Rogers*, 47 N. H. 281; *The Watchman, Ware* (U. S.) 232; *Felch v. Bugbee*, 48 Me. 9; *Beer v. Hooper*, 32 Miss. 246.

3. 3 Am. & Eng. Encyc. of Law, 620 note, and cases there cited.

An assignment made in another State, conveying lands in Texas, executed with words sufficient to convey, and the solemnities required by the laws of Texas, passes title, as between the parties thereto, and those claiming under them, and is evidence in trespass to try title. *Hervey v. Edens* (Tex.), 6 S. W. Rep. 306.

A voluntary assignee of a non-resident under the laws of another State cannot hold assets found in Illinois against attaching creditors in that State. *Sheldon v. Wheeler*, 32 Fed. Rep. 773.

4. *Schiff v. Solomon*, 57 Md. 572; *Bennett v. His Creditors*, 22 Cal. 38; *Gross v. Potter*, 15 Gray (Mass.) 556. It need not appear on the face of a petition by a debtor that the debtor had delivered an inventory of his property to the officer etc. *Stagg v. Austin*, 18 N. J. L. 82.

5. *Goodell v. His Creditors*, 1 Idaho 215. The requirement that the insolvent shall state the names of his creditors, if known, requires him to state the names of the present holder of a note,

The fact that the petitioner is not actually insolvent does not oust the jurisdiction of the court.¹

A petition will not be dismissed for want of a recognizance for costs, the statute not requiring such recognizance.² Where a party files his petition, his property is in the custody of the law, and cannot be distrained for rent due from the petitioner at the time of the filing.³

It must show a surrender of all the petitioner's property;⁴ and be addressed to the court.⁵

In the hearing of a petition, an attaching creditor has a right to be heard.⁶ The want of an authorized signature to the petition is ground for setting it aside.⁷

The petitioner must generally set forth the property passed by the assignment.⁸

or else describe the note with an averment that the holder is unknown. *McAllister v. Strode*, 7 Cal. 428; *Slidell v. McCrea*, 1 Wend. (N. Y.) 156; *McNair v. Gilbert*, 3 Wend. (N. Y.) 344. 1. *Weaver v. Leiman*, 52 Md. 708. But the making of a petition to the court or judge of a wrong county does not go to the jurisdiction of either over the subject matter or the debtor. When the petition is made to the wrong court or judge, the debtor, at the time appointed for the hearing of the petition, may apply to the court or judge before which or whom the proceeding is pending in a wrong county, to have it transferred to a proper county; and the application, if sustained by the facts appearing, must be granted as a matter of right. *Re Barnard*, 30 Minn. 512.

2. *Ripley v. Griggs*, 52 Vt. 460. A citation not conformable to law issued upon a petition in insolvency. This being ascertained by the judge, a new petition issued, its service being preceded by notice from the officer of the discontinuance of the first petition. *Held*, a sufficient discontinuance. *Ripley v. Griggs*, 52 Vt. 460.

If the judge of the court of insolvency declines to entertain an application of the petitioning creditor to vacate proceedings in insolvency, because not presented at a regular meeting, and the application is withdrawn, without asking for an order of notice thereon, or giving opportunity to other creditors to come in and prosecute the proceedings, the refusal of the judge affords no ground for this court to vacate the proceedings, under the Gen. Sts., ch. 118, § 16.

A judge of the court of insolvency should not be joined as a defendant in a bill in equity, under the Gen. Sts., ch. 118, § 16, to vacate proceedings in insolvency. *Winchester v. Thayer*, 129 Mass. 129.

3. *Buckey v. Snouffer*, 10 Md. 149.

4. *Meyer v. Kohlman*, 8 Cal. 44.

5. *Brewster v. Ludekins*, 19 Cal. 162.

6. *Brewster v. Shelton*, 24 Conn. 140.

7. *Merriam v. Sewall*, 8 Gray (Mass.) 316.

8. *Case of Woodward*, 1 Ashm. (Pa.) 107; *Case of Oliver*, 1 Ashm. (Pa.) 112.

Proceedings to Declare. Creditors who have filed their claims with a trustee under a general assignment are not estopped to petition to declare the debtor insolvent. *Castleberg v. Wheeler* (Md.), 12 Atl. Rep. 3.

Even if an issue made on a prayer to declare a defendant insolvent be improperly submitted to a jury, and the findings, therefore, erroneous, yet if on other prayers the jury arrive at the same result, and defendant be properly declared insolvent, the judgment will not be reversed.

A prayer to declare a person insolvent specifying the persons to whom defendant had "assigned, given, sold and transferred" his property with intent to hinder, delay and defraud petitioners and his other creditors while he was insolvent and in contemplation of insolvency states facts sufficient and proper to be submitted to a jury, under Code Md., art. 48, § 13, as re-enacted in acts 1886, ch. 298.

A prayer by defendant that the jury be instructed that to find for petitioners under the preceding charge they must

10. Assignees, Commissioners, Trustees, etc.—Who May be.—It is an essential qualification of an assignee not only that he should be capable, from age, health and education, of performing the duties of the office, but also that he should be of sufficient character and pecuniary ability to afford assurance to creditors that the fund will be safe in his hands, and that the trust will be properly administered.¹

find that defendant, within the time mentioned and while insolvent, made a deed, or created a lien, or otherwise gave an unlawful preference in favor of N., named in the petition, is properly refused when N. is not the only person allowed to have been so favored. *Castleberg v. Wheeler* (Md., 1888), 12 Atl. Rep. 3.

On appeal in insolvency proceedings, where the questions raised and decided in the court below have not been certified by such court as provided by Rev. Code Md., art. 71, § 6, will be dismissed. *Waters v. Momeny*, (Md.) 11 Atl. Rep. 763.

Dismissal of petition without notice to creditors. *Smith v. N. Y. Life Ins. Co.* (Minn.), 16 N. W. Rep. 452.

Variouly Designated.—In various States the person designated by the statute or by the debtor to settle up the affairs of an insolvent is known by different names, as assignee, trustee, commissioner, etc. In *Louisiana* he is designated by the name of syndic.

They are all, however, the holders of a *trust*, and the same general principles are applicable to them.

1. Burrill on assignments, (3d ed.) 118. *Wilt v. Franklin*, 1 Binn. (Pa.) 516; *Guerin v. Hunt*, 6 Minn. 375.

Thus where the debtor selected for assignees three relatives, one of whom was incapacitated by residence, one by blindness, and the third by want of education, it was *held* that it was evidence of an intent on the part of the assignor to keep the control of the property in his own hands . . . the assignment was void. *Cram v. Mitchell*, 1 Sandf. Ch. (N. Y.) 251.

Assignor May Generally Select Assignee.—The right of an embarrassed debtor to make an assignment, and to select his own assignee, without and against the consent of his creditors, has been finally admitted in most of the States of the Union, though the propriety of recognizing such a right has often been questioned, and if the question were a new one, might well be

doubted. But to prevent the abuse of the right, and to avoid its being made a convenient engine of fraud, the utmost good faith must be required of the debtor in the selection of the assignee. That selection must be made with reference to the interest of creditors rather than that of the debtor. Hence, if the assignee be so deficient in age, health, business capacity or character for integrity, that a prudent man honestly looking to the interest of his creditors alone, would not be likely to select him as a proper person for the performance of the trust, then his selection will furnish an inference more or less strong, according to the circumstances, that the assignor, in making the selection, was actuated by some other motive than the desire to promote the interest of creditors; in other words, an inference of the intent to hinder, delay or defraud his creditors. And this inference will be strengthened if the assignee be a clerk or near relative, or a person likely to be easily influenced by the assignor, as this would tend to raise a presumption that the assignment was intended to be made use of for the assignor's, or that there was some secret trust in his behalf. Anything, therefore, which tends to show the assignee, in any respect, is not such a person as an honest and prudent man would be likely to select for the position, with reference to the interest of creditors, must, upon principle, be admissible to impeach the good faith of the assignment. (The weight of the evidence would, of course, depend upon the degree of unfitness shown.) In this view it is well settled that the selection by the assignor of a person known to him to be insolvent is very strong evidence of a fraudulent intent. This is upon the principle that, as the assignee is not by law compelled to give security for the assets, or the faithful performance of the trust, the assignor, in placing the property beyond his own control and that of his creditors, ought to place it in the hands

But the relationship of parties, though calculated to awaken suspicion, is of itself no evidence of fraud in a conveyance of property;¹ and where the creditors are consulted and consent to the assignment to a particular individual, no fraud will be presumed.² Indeed, they may agree that the assignor himself shall

of such persons as will be able to respond to creditors for the waste, or wrongful disposition of the assets, or the maladministration of the trust. The principle, therefore, is not confined to actual insolvency, but extends to any case where the property or pecuniary means of the assignee are clearly inadequate to this end, or any state of pecuniary embarrassment likely to deprive the creditors of this security. Not that this consideration, of itself, is always a controlling one, or decisive of the question of fraud, as the high character of the assignee for integrity and business capacity may sometimes compensate, in a great measure, if not entirely, for his want of pecuniary means, and afford nearly, if not quite, as strong assurance to creditors that the funds will be safe in his hands, and that the trust will be faithfully executed.

The enquiry, therefore, is not so much whether the assignee is strictly, in a legal sense, insolvent, but what is the state of his property and his pecuniary standing. And upon principle, as well as upon authority, we think this may be proved by reputation. See *Hard v. Brown*, 18 Vt. 87; also *Heywood v. Reed*, 4 Gray (Mass.) 574.

But second, I think reputation of insolvency is admissible in cases like the present, independent of its tendency to prove insolvency or a less degree of pecuniary embarrassment in fact. It is well settled that an assignment made by a debtor for the purpose of inducing a compromise on more favorable terms than he could otherwise obtain, is fraudulent. Now, whatever may be the condition of an assignee as to solvency, as known to himself, creditors have not his means of knowledge, and they judge of the fact as it appears to the public—in other words, mainly by reputation. It is upon this they must generally form their judgment and decide upon their course, whether it is best to run the risk of a suit or to assent to such compromise as the debtor may choose to offer. And if the assignee has a confirmed reputation for insolvency, we cannot fail to see that all prudent creditors would be much more likely, in

ordinary cases, to consent to a compromise on the debtor's own terms than if the assignee were reputed to be solvent, and able to respond for malversation or breach of trust. In this view we cannot resist the conclusion that, if the assignor has knowingly assigned to a person having the reputation of insolvency, this fact would have a tendency to show that the assignment was made for the purpose of inducing a compromise, even though the assignor believed him solvent in fact (and there was certainly enough in the case to authorize the jury to infer a knowledge on the part of Wilbur of this reputation of Rosenbury); and this tendency would be greater or less according to the character or fitness of the assignee in other respects, and the other circumstances of the case. But its tendency to prove that such was the purpose of the assignment would be very strong when, as in this case, the assignees are shown to have acted together in their endeavors to procure a compromise after the assignment was made. We think, therefore, the court erred in excluding the deposition referred to. *Angell v. Rosenbury*, 12 Mich. 241.

It is doubtless if the above remarks would be applicable in their full sense when by statute, as in most of the states is the case, the assignee is required to give bond before assuming his duties.

So, where the debtor selected his brother, who was at the time unfit to attend to business by reason of a lingering disease which the assignor himself believed was incurable, and of which he died, it was *held* void. *Currie v. Hart*, 2 Sandf. Ch. (N. Y.) 353.

1. *Bumpas v. Dotson*, 7 Humph. (Tenn.) 310; *Nesbitt v. Digby*, 13 Ill. 387; *Baldwin v. Buckland*, 11 Mich. 389; *Montgomery v. Kirksey*, 26 Ala. 172; *Dunlap v. Bournonville*, 26 Pa. St. 72.

Especially is this so, however, when they are placed as preferred creditors. *Cram v. Mitchell*, 1 Sankf. Ch. (N. Y.) 255; *Currie v. Hart*, 2 Sandf. Ch. (N. Y.) 353.

2. *Reed v. Emery*, 8 Paige (N. Y.) 417.

act as trustee or agent in certain cases.¹

The fact that the assignee is an attorney at law,² or is not a freeholder,³ will not disqualify him, unless so required by statute.⁴ Creditors are sometimes excluded.⁵

b. Duties and Powers of.—The assignee is clothed with all the necessary powers to obtain possession of the property assigned, and to collect the debts by process of law.⁶ He may attack the validity of a judgment entered upon the confession of the assignor;⁷ he may contest for the benefit of creditors the claims of a mortgagee under a defective mortgage, to a preference in the distribution of the proceeds;⁸ he may bring an action to set aside a fraudulent conveyance;⁹ he may restrain by injunction attaching creditors from interfering with property fraudulently conveyed by the assignor;¹⁰ he may contest the validity of any claim against the estate;¹¹ he has power to appoint and employ all necessary clerks and agents to assist him in the performance of his duties, and to allow and pay them suitable compensation for their services.¹² He should proceed with promptness in the

1. *Tomkins v. Wheeler*, 16 Pet. (U. S.) 106.

2. *Tucker v. Parks*, 7 Colo. 62.

3. *Simon v. Mann*, 33 Minn. 412.

4. *Rev. Stat. Wis.* 1878. *Rev. Stat. Minn.* 1878.

5. *Barker v. Wales*, 1 Root (Conn.) 265; *Lyon v. Lyon*, 2 Root (Conn.) 203; *Fairbanks' Case*, 2 Root (Conn.) 386.

6. *Van Heusen v. Radcliffe*, 17 N. Y. 580; *Burrill on Assign.* 394 (3rd ed.).

The assignee in insolvency represents the creditors as well as the insolvent. A bill in equity may be maintained by an assignee in insolvency against one holding money or property of the insolvent under a contract fraudulent and void as to creditors, when the bill seeks to have the contract annulled and the consideration restored. This court has by force of the statute full equity jurisdiction in cases of fraud, limited only by the usage and practice of chancery courts, concurrent with courts of law or exclusive of them. *Taylor v. Taylor*, 74 Me. 582.

Smith v. Sullivan, 71 Me. 155, distinguished and confirmed.

7. *Nichols v. Kribs*, 10 Wis. 79.

8. *Sixth Ward Building Association v. Willson*, 41 Md. 506.

9. *Tams v. Bullitt*, 35 Pa. St. 308; *Englebert v. Blanlot*, 2 Whart. (Pa.) 240; *Huntsecker v. Heing*, 11 S. & R. (Pa.) 250.

May Sell Property Fraudulently Conveyed.—An assignee, upon clearly manifesting his election to treat as void a conveyance of land made by the

debtor in fraud of creditors, may sell and convey his whole interest in an land without himself first bringing an action to set aside the deed. *Freeland v. Freeland*, 102 Mass. 475.

Where a debtor has made a fraudulent conveyance of his property, and afterwards makes an assignment in insolvency, the right to institute a suit against the fraudulent grantee to recover the property vests in the trustee in insolvency. But where in such a case a trustee, after consulting the creditors, concluded that it was not expedient to expend the money of the estate in the attempt to recover the property, and intentionally abandoned the claim as an asset of the estate, it was held that the property was open to the attachment or levy of a creditor of the fraudulent grantor in the same way as if there had been no assignment in insolvency. The assignee may set the conveyance aside even where the assignor could not. And it did not affect the case that the levying creditor had proved his claim against the assigned estate and taken a dividend with the other creditors. *Filley v. King*, 49 Conn. 211; *Moore v. Williamson* (N. J. 1889), 15 Atl. Rep. 587.

10. *Lynch v. Roberts*, 57 Md. 150. The title in such case vests in the assignee.

11. *Byrne v. Creditors*, 33 La. Ann. 198.

12. *Vernon v. Morton*, 8 Dana (Ky.) 247; *Hennessey v. Western Bank*, 6 W. & S. (Pa.) 300; *Mann v. Whitbeck*, 17

collection of all debts, or he may be liable for all loss occasioned by delay;¹ he may bring an action even against the assignor, where he wrongfully withholds property;² he may compromise or compound such debts as cannot be wholly collected, provided it is done in good faith for the best interest of the creditors.³

Barb. (N. Y.) 388; Van Dine v. Willett, 38 Barb. (N. Y.) 319; Casey v. Janes, 37 N. Y. 608; Nye v. Van Husan, 6 Mich. 329; Maennel v. Murdock, 13 Md. 164.

And where the deed of assignment designated certain persons to be employed as attorneys in the settlement of the estate it was looked upon as a badge of fraud. Carlton v. Baldwin, 22 Tex. 724.

1. Winn v. Crosby, Daily Reg. Dec. 14, 1876.

It is the duty of the trustee to use all necessary means, by action or otherwise, to realize the debts; if a debt is lost by his neglect of duty, where the debtor had property sufficient to pay, he is presumably responsible for the loss, although he may have acted without any improper motive. Royall v. McKenzie, 25 Ala. 363.

2. Pike v. Bacon, 21 Me. 280.

In *Ohio* an examination of the debtor may be had on application of the assignee or any creditor, and the court may, upon or after such examination, make and enforce any order upon proper parties which it may deem necessary to prevent any fraudulent transfer or change in the property or effects of the assigner, or the allowance or payment of any unjust or fraudulent claims out of his estate. Rev. Sts., §6341.

3. Anon v. Gelpeke, 5 Hun (N. Y.) 245.

This power is sometimes conferred in the deed of assignment.

Powers Conferred in the Deed.—A clause in an assignment of real property, authorizing the assignees to lease the property for the benefit of the creditors, has been held to be inoperative. Rogers v. DeForest, 7 Paige (N. Y.) 272; Darling v. Rogers, 22 Wend. (N. Y.) 483; Plank v. Schermerhorn, 3 Barb. Ch. (N. Y.) 644.

A power given to assignees to declare future preferences, or change the order of preferences already given will render the assignment void. Barnum v. Hempstead, 7 Paige (N. Y.) 568; Green v. Trieber, 3 Md. 11; Strong v. Skinner, 4 Barb. (N. Y.) 546; Sheldon v. Dodge, 4 Den. (N. Y.) 217; Stimp-

son v. Fries, 2 Jones Eq. (N. Car.) 156.

Even a power to compound debts has been very severely criticized. Grover v. Wakeman, 11 Wend. (N. Y.) 187; Wakeman v. Grover, 4 Paige (N. Y.) 24.

Likewise a provision empowering an assignee "generally to adopt such measures in relation to the settlement of the estate as will, in his judgment, promote the true interests thereof" has been held to render an assignment void. Hennessy v. Western Bank, 6 W. & S. (Pa.) 300.

In *Illinois* a clause in a general assignment, authorizing the trustee to compound with the creditors, renders it void. Hudson v. Maze, 3 Scam. (Ill.) 578.

In *Maryland*, however, an assignment reserving to the trustee the power to mortgage the assigned property, has been sustained. Beatty v. Davis, 9 Gill (Md.) 211.

Whether an express power to sell on credit will avoid the assignment or not is a mooted question.

The following States have held the affirmative:

New York, Griffin v. Barney, 2 N. Y. 371; Nicholson v. Leavitt, 6 N. Y. 510; Burdick v. Post, 6 N. Y. 522; Porter v. Williams, 9 N. Y. 142; Kellogg v. Slauson, 11 N. Y. 302.

Vermont, Mussey v. Noyes, 26 Vt. 470; Page v. Olcott, 28 Vt. 469.

Wisconsin, Hutchinson v. Lord, 1 Wis. 286; Keep v. Sanderson, 2 Wis. 42; Keep v. Sanderson, 12 Wis. 352; Haines v. Campbell, 8 Wis. 187.

Minnesota, Truitt v. Caldwell, 3 Minn. 364; Greenleaf v. Edes, 2 Minn. 264; Mower v. Hanford, 6 Minn. 535.

Michigan, Sutton v. Hanford, 11 Mich. 513.

Illinois, Bowen v. Parkhurst, 24 Ill. 257; Pierce v. Brewster, 32 Ill. 268.

While in the following States the contrary is held:

Alabama, Abercrombie v. Bradford, 16 Ala. 560; Evans v. Lamar, 21 Ala. 333; England v. Reynolds, 38 Ala. 370.

Virginia, Dance v. Seaman, 11 Gratt. 778, 781.

Tennessee, Gimell v. Adams, 11 Humph. (Tenn.) 285.

An assignee cannot maintain a bill in equity to restrain certain creditors from proving their claim against the estate.¹

He is the agent of the creditors of the insolvent as well as of the law. He is the instrument by which, instead of by attachment, the property of the insolvent is secured for the benefit of the creditors.²

c. Sale Made by.—The power to sell is very often given by the deed of assignment, and sometimes by statute; but it is always necessarily implied by every conveyance for the payment of debts.³ The assignee must use not only good faith, but

Maryland, Farquharson v. Eichelberger, 15 Md. 63; Berry v. Matthews, 13 Md. 537.

Missouri, Johnson v. McAlister, 30 Mo. 327; Gates v. Labeaume, 19 Mo. 17.

Texas, Carlton v. Baldwin, 22 Tex. 724.

Ohio, Conkling v. Coonrad, 6 Ohio, St. 611.

California, Billings v. Billings, 2 Cal. 107.

1. Fellows v. Spaulding, 141 Mass. 89.

2. Shipman v. Aetna Ins. Co., 29 Conn. 245.

3. Williams v. Otey, 8 Humph. (Tenn.) 563; Wood v. White, 4 M. & C. 481; Perry on Trusts 147, 398.

Where, however, the statute of a State requires that the assignee must procure an order of sale before he can sell, as sale without such order would be invalid. Gable v. Scott, 56 Md. 176.

Can Sell Without Order of Court. In the present case, it is very manifest that the trustee took an estate in fee; it was to him, his heirs and assigns, and whether the limitation to successors to be appointed by this court, to take effect only after such appointment, was of any avail nor not, the estate to the first grantee, Levi Goodridge, was an estate in fee. Having an estate in himself, a right of property, by the general law applicable to real property, he had a right, *prima facie*, to pass that title to another, and his grantee would take a legal title. The difference between such trustee and an executor, administrator or guardian, as to the necessity of obtaining a licence to sell according to law, is, that the latter execute a mere naked power, and to give validity to his act it must appear not only that he had such power, but that his deed or act was in strict conformity with it, otherwise the property does not pass. It was argued on the part of the

demandant, that unless a licence or decree was obtained by the trustee the estate could not pass by his deed. We think that was a mistake arising from not observing the distinction between one who has a fee and transfers his own estate, and one who can only act as empowered, in transferring the property of another. Undoubtedly it is a frequent practice for a trustee to apply to a court having jurisdiction over a trust estate, for permission to sell on particular occasion and for particular purpose, of which such court has power to judge; and in the new and somewhat imperfect understanding and practice of the law upon this subject, it is wise and expedient, and often necessary, to do so; and the statutes have provided for granting such licence upon summary application. Sts. 1845, c. 1846, ch. 242. But often this is done *ex majori cautela*, in order that a trustee, in the exercise of his powers and duties, may be assured of protection both in courts of equity and courts of law. But it leaves the question open whether an estate will not pass by deed of the trustee without a licence. In the present case, the estate was conveyed to the trustee in fee, charged with the payment of one half of the grantor's debts, not specified, nor could they be specified, because they were the debts which might be due at the time of decease. And though this charge is expressed in the form of a condition, it is, in legal effect, rather a charge than a technical condition; it binds the land to such payment, and the trustee takes it subject to this charge. In order to execute his trust and save the estate from forfeiture, for the benefit of his *cestui que trust*, he must raise the money for the payment of such debt, and this can only be done by sale; therefore he must sell. It is part of his duty as trustee, and of course within the scope of his fiduciary authority. Take the familiar case of

every degree of diligence and prudence in conducting the sale.¹ He should be present to conduct and superintend it.² He will be held liable to account for the highest value which might have been obtained.³ The sale should be made at as early a date as it profitably can be,⁴ and the assignee can use his discretion as to the time.⁵

Generally he has discretion to sell either at public or private sale.⁶ If, however, he cannot get a fair price at an early date at private sale, he should sell at public auction.⁷ It is a general rule, perhaps without exception, that he cannot be a purchaser, either directly or indirectly, of any of the effects of the assignor's,⁸ either at public or private sale. It is said that he can convey by an attorney in fact.⁹

But no covenant can be required of an assignee in a conveyance

a conveyance of real and personal property to trustees for the payment of the settler's debts; of necessity, the estate must be sold to raise money for such payment; the estate is vested in the trustees by the deed of an owner; it is within the scope of the fiduciary authority to sell; therefore they have no occasion to obtain licence to sell their own deed transfers a good title to purchaser. *Purdie v. Whitney*, 20 Pick. (Mass.) 25; *Gould v. Lamb*, 11 Met. (Mass.) 84; *Goodrich v. Proctor*, 1 Gray (Mass.) 567.

1. *Chesley v. Chesley*, 49 Mo. 540; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 27; *Ringgold v. Ringgold*, 1 H. & G. (Md.) 11; *Quackenbush v. Leonard*, 9 Paige (N. Y.) 334; *Johnston v. Eason*, 2 Ired. Eq. (N. Car.) 330.

2. *Burrill on Assign.* 561 (3rd ed.); *Harvey's Admr. v. Steptoe*, 17 Gratt. (Va.) 289.

3. *Melick v. Voorhies*, 24 N. J. Eq. 395.

4. *Inloes v. Am. Ex. Bank*, 11 Md. 173.

5. *Hawkins v. Alston*, 4 Ired. Eq. (N. Car.) 137; *Haynes v. Crutchfield*, 7 Ala. 180.

6. *Perry on Trusts* 412, 415, 422; *Ex parte Dunman*, 2 Rose 66; *Ex parte Hurley*, 1 D. & C. 631; *Huger v. Huger*, 9 Rich. Eq. (S. Car.) 217.

7. *Hart v. Crane*, 7 Paige (N. Y.) 37; *Burrill on Assign.* 562.

8. *Van Horne v. Fonda*, 6 Johns. Ch. (N. Y.) 388; *Hawley v. Cramer*, 4 Cow. (N. Y.) 718; *Giddings v. Eastman*, 5 Paige (N. Y.) 561; *Campbell v. Johnston*, 1 Sandf. Ch. (N. Y.) 148; *Slade v. Van Vechten*, 11 Paige (N. Y.) 21; *Abbott v. American etc. Co.*, 33

Barb. (N. Y.) 578; *Burrill on Assign.* 568, etc.

Assignee Cannot be Purchaser.—It may be here observed, as a general rule applicable to sales, that when a trustee of any description, or any person acting as agent for others, sells a trust estate, and becomes himself interested, either directly or indirectly, in the purchase, the *cestui que trust* is entitled as of course in his election, to acquiesce in the sale, or to have the property re-exposed to sale, under the direction of the court, and to be put up at the price bid by the trustee; and it makes no difference in the application of the rule that the sale was public auction *bona fide*, and for a fair price. A person cannot act as agent for another and become himself the buyer. He cannot be both buyer and seller at the same time, or connect his own interest in his dealings as an agent or trustee for another. It is incompatible with the fiduciary relation *Emptor emit, quam minimo potest; venditor vendit, quam maximo potest*. The rule is founded on the danger of imposition and the presumption of the existence of a fraud, inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the case in which such a relationship exists, is deemed to be of itself sufficient to create the disqualification. This principle, like most others, may be subject to some qualification in its applications to particular cases, but as a general rule it appears to be well settled in the English and in our American jurisprudence. 2 Kent's Com. 438 (12th ed.)

9. *Blight v. Schenck*, 10 Pa. St. 285;

by him, except against his own encumbrances.¹ Doubtful claims may be disposed of for less than their face value.²

d. Compensation of.—A stipulation that salaries shall be paid the assignees out of the trust property has been held to be proper,³ and even large salaries so stipulated to be paid do not make the deed fraudulent on its face.⁴

Where there is no express stipulation or agreement for compensation beyond the assignee's expenses, the rule in some States is that he is entitled to none,⁵ and such seems to be the general rule in England.⁶

It is now generally provided by statute that assignees shall either receive a percentage or a reasonable compensation in all the States,⁷ and where no provision is thus made, it is held that by the common law they are entitled to a fair compensation.⁸

The compensation is to be ascertained and awarded by the proper court upon the rendering of the assignee's account.⁹

If he is guilty of gross carelessness¹⁰ or misconduct,¹¹ or violates the trust,¹² no compensation will be allowed. If he maladministers and refuse to account, both compensation and expenses may be refused.¹³

It has generally been held that he cannot charge the estate with a counsel fee paid to himself.¹⁴

Burrill on Assign., 571. See *Cranston v. Crane*, 97 Mass. 459; *Gillispie v. Smith*, 29 Ill. 473.

1. Burrill on Assign. 572 (3rd ed.); *Ennis v. Leach*, 1 Ired. Eq. (N. Car.) 416; *Perry on Trusts*, 421; *Barnard v. Duncan*, 38 Mo. 170.

An assignment giving the assignee power to sell the real estate "at such time and in such manner and upon such terms as he may deem prudent" does not give him power to bind the estate by express covenant of warranty, nor does such power exist by implication of law. *Welsh v. Davis*, 3 S. Car. 110.

2. *Shaeffer v. Child*, 7 Watts (Pa.) 84; *McHenry v. McVeigh et al.*, 56 Md. 578.

3. *Ingraham v. Grigg*, 13 Sm. & M. (Miss.) 22; Burrill on Assign. 175 (3rd ed.); *Vernon v. Morton*, 8 Dana (Ky.) 247.

Where an assignee, after the assignment, agreed with one who had a lien on the goods, for advances made, to sell the goods and pay over the money when received without expense to the lienor, he cannot recover for his services. *Moors v. Wyman* (Mass.), 15 N. E. Rep. 104.

An assignee who had no agency in collecting or disbursing the funds to pay the debts, is not entitled to commissions on lands not converted into

money, though he refrained from selling them at the request of the assignor, who promised that he should not be prejudiced thereby. Appeal of *Hower* (Pa. 1889), 15 Atl. Rep. 687; *Ingraham v. Grigg*, 13 Sm. & M. (Miss.) 22.

4. But where the trustees were each to receive eight thousand dollars per annum, the assignment was for this and other reasons held invalid as against creditors not parties. *Bodley v. Goodrich*, 7 How. (U. S.) 276.

5. Burrill on Assign. (3rd ed.) 577.

6. Lewin on Trusts (8th Eng. ed.) 438; See *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527; *Hill on Trusts* (ed.)? 857; *Perry on Trusts* 535.

7. Burrill on Assign. (3rd ed.) 582; *Perry on Trusts*, 918, where the rules governing the various States are collected.

8. *Barney v. Saunders*, 16 How. (U. S.) 535.

9. *Geisse v. Beal*, 3 Wis. 367; *Heckert's Appeal*, 24 Pa. St. 482; *Gilbert v. Sutliff*, 3 Ohio St. 129.

10. *Stehman's Appeal*, 5 Pa. St. 413.

11. *Jenkins v. Eldredge*, 3 Story (U. S.) 332.

12. *Flagg v. Mann*, 3 Sumn. (U. S.) 486.

13. *Gilbert v. Sutliff*, 3 Ohio St. 129; *Barney v. Saunders*, 16 How. (U. S.) 535.

14. *Mayer v. Galluchat*, 6 Rich. (S

c. Liability of.—The liability of an assignee is for the most part commensurate with the duty which the assignment imposes on him.¹ This duty may, in its most general terms, be stated to be to observe good faith in all his transactions, and to exercise all reasonable diligence and care in the management of the trust.²

For gross misconduct or violation or abuse of the trust he is not only personally responsible,³ but may be dismissed from office.⁴ He is answerable for property or money lost by his gross negligence,⁵ and it need not always be gross negligence to make him liable.⁶ He is liable for every loss occasioned by his negligence, want of caution or mistake,⁷ as for neglecting to collect

Car.) Eq. 1; *Nichols v. McEwen*, 21 Barb. (N. Y.) 65; *Nichols v. McEwen*, 17 N. Y. 22; *Heacock v. Durand*, 42 Ill. 230; *Burrill on Assign.* (3rd ed.) 315, 585.

In *Mississippi* it has been held counsel fee can be allowed the assignee. *Shirley v. Shattuck*, 28 Miss. 13.

1. *Burrill on Assign.* (3rd ed.) 627. See *Hext v. Porcher*, 1 Strobb. Eq. (S. Car.) 170.

2. *Freeman v. Cook*, 6 Ired. Eq. (N. Car.) 373.

The schedule of debts showed a debt to the assignor's brother for \$29,586.76, on notes secured by insurance policies. These policies had been transferred to the brother before the assignment, and the adjusted amount due on them was collected by him soon after the assignment. There was no entry on the books of the firm to show this debt except an entry in the back part of a bill book of four notes, amounting to about \$6,000, given on a settlement between the brothers three years before the assignment, and the rest of the debt was fraudulent. *Held*, that as the schedule was properly verified, and the entry in the bill book, even if brought to the knowledge of the assignee, would not have disclosed the fraud, he had the right to assume that the schedule was correct, and was not negligent in permitting the brother to collect the amount of the policies. *In re Cornell*, 110 N. Y. 351.

Where an assignment was made in April, and the assignee commenced proceedings to sell in June, which were completed in August, he was not negligent in not renting the land assigned. *Creager v. Creager* (Ky.) 9. S. W. Rep. 380.

An assignee is not liable for the appropriation by the assignor of crops

grown on the land assigned, but excepted from the assignment.

An assignee is liable for interest on moneys remaining uninvested in his hands. *Appeal of Hower* (Pa.), 15 Atl. Rep. 687.

3. *Williams v. Otey*, 8 Humph. (Tenn.) 563.

4. 2 Story Eq. Jur. 1287; *Geisse v. Beall*, 3 Wis. 367; *Pinneo v. Hart*, 30 Mo. 561; *Mandel v. Peay*, 20 Ark. 325; *Perry on Trusts* 817.

5. *Hurt v. Fisher*, 1 Han. & G. (Md.) 88; *Meacham v. Sternes*, 9 Paige (N. Y.) 405.

6. *Litchfield v. White*, 7 N. Y. 438.

7. *Wills on Trustees*, (ed.) 173; 2 Kent's Com. (12th ed.) 230.

How Property Should be Managed.—

The assignment in question contained a clause by which it was mutually agreed between the parties thereto that the assignee should not be liable or accountable for any loss that might be sustained by the trust property, or the proceeds thereof, unless the same should happen by reason of the gross negligence or wilful misfeasance of the assignee.

The creditors of Mr. White were the beneficiaries in the trust by the assignment; they became owners in equity of the assigned property. They were entitled to the whole of it, until their debt should be satisfied; and to all the rights and remedies which the law would have given them if they had created the trust. A failing debtor, by an assignment, puts his property where it cannot be reached by ordinary legal process; he puts it into the hands of a trustee of his own selection; often, his particular friend sometimes, a man to whom the creditors would not have been willing to confide such a trust. The debtor has an interest in the appli-

debts assigned,¹ omitting to recover property from the debtor,² for permitting the debtor to retain possession of assigned property,³ and for failure to take proper security for property sold.⁴ Loss through an honest mistake will not generally be charged to him,⁵ although it is not easy to say when he will not be held

cation of the trust funds to the payment of his debts; but the creditors have usually a far greater interest therein; and that interest depends, in many cases, on the competency and diligence of the assignee. The debtor cannot be permitted, by creating a trust of his creditors, to place his property where it cannot be reached by ordinary legal remedy, and at the same time, exempt the trustee from his proper responsibility to his creditors.

What degree of diligence, then, would the assignee have been bound in the business of his trust, if the clause in question had been omitted? This question is answered by one elementary writer in these words: "A trustee is bound to manage the trust property for the benefit of his *cestui que trust*, with the care and diligence of a provident owner." (Willis on Trustees 125); and by another, as follows: "A trustee is called upon to exert precisely the same care and solicitude in behalf of his *cestui que trust* as he would do for himself, but greater measure than this a court of equity will not exact." (Lewin on Trusts 152.) And in Story's Equity it is said, that where a trustee has acted in good faith, in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for any losses accruing in the management of the trust property. The first of these writers measures the liability of the trustee by the diligence of a provident owner; the two last mentioned, by the diligence of the trustee in his own concerns; but there is no substantial difference between them. The degree of diligence which a trustee uses in his own affairs cannot properly be the subject of judicial enquiry; every trustee must be presumed by the court before whom his account is taken to use in his own concerns such diligence as is commonly used by all prudent men. (Jones on Bailments 30.) The diligence of a provident man, therefore, is the measure of a trustee's duty. If it were otherwise, there would be one rule for a careless and a different rule for a vigilant trustee; and the careless

trustee would be exonerated in the same case in which the vigilant would be held liable. This was never intended, either by the elementary writers or by the authorities from which they deduce these conclusions.

In § 1268 of Story's Equity, it is suggested, that inasmuch as a trustee is not entitled to a compensation for his services, he would seem, upon analogous principles applicable to bailments, to be liable only, like a gratuitous bailee, for gross negligence. But he adds, however, that it would be difficult to affirm that courts of equity do, in fact, always limit the responsibility of trustees, or measure their acts, by such a rule. In some of the English decisions, the liability of a trustee seems to have been determined upon the analogy between a trust and a gratuitous bailment, but such a rule cannot be applicable to trustees within this State, because they are in fact entitled to compensation by way of commission on moneys received and paid (*Meacham v. Sternes*, 9 Paige (N. Y.) 403); and although the smallness of their compensation may be a good reason for judging them with indulgence and liberality, they cannot be placed on the footing of gratuitous bailees. *Litchfield v. White*, 7 N. Y. 438.

1. *Royall's Admr. v. McKenzie*, 25 Ala. 363.

2. *Pingree v. Comstock*, 18. Pick. (Mass.) 46.

And where the assignee had paid a dividend to all the creditors excepting one, to whom he paid nothing, and had through motives of charity permitted one claim to remain uncollected until it was barred by the statute of limitations, it was held, that the assignee was personally liable to the unpaid creditor to the amount of the uncollected claim. *Simpson v. Gowdy*, 19 Ind. 292; *Blackburne's Appeal*, 39 Pa. St. 160.

3. *Harrison v. Mock*, 16 Ala. 616.

4. *Miller v. Holcombe*, 9 Gratt. (Va.) 665.

5. *In re Durfee*, 4 R. I. 401; *Perry on Trusts*, § 562; *Hext v. Porcher*, 1 Strobb. Eq. (S. Car.) 170.

liable for even an honest mistake.¹ The only safe way where he is in doubt is to apply to the court for instruction.²

The legal presumption always is that the assignee has faithfully executed his trusts, unless the contrary is fully shown.³ And where the assignees act in good faith, and with due diligence, they receive the favor and protection of the court, and their acts are regarded with the most indulgent consideration,⁴ but where they betray their trust they will be rigorously dealt with.⁵

f. Removal of.—If an assignee misconducts himself in his office by wasting, neglecting or mismanaging the estate, or refusing or neglecting to comply with some requirement of the law, he may be removed;⁶ or if he is or becomes insolvent,⁷ or fails to give new bonds when required,⁸ or if he becomes incapacitated from lunacy,⁹ or habitual drunkenness,¹⁰ he will be removed. If he moves out of the State, the court may remove him.¹¹ A refusal to allow the creditors access to his books of account will be good ground for his removal.¹²

But an assignee will not be removed without proof of fraud or of injury to the estate.¹³

g. Continuing Assignor's Business.—It has been held by leading courts that the assignor may direct in general terms a sale of property and collection of dues assigned, and may also direct upon what debts and in what order the proceeds shall be applied,

1. Ward v. Lewis, 4 Pick. (Mass.) 518; Pinkston v. Brewster, 14 Ala. 315; Chittenden v. Brewster, 2 Wall. (U. S.) 191.

Must Exercise Good Judgment.—A trustee may not be accountable for an honest mistake, but where his duty is so plain that no man of ordinary intelligence could mistake it, he is responsible if he has that intelligence. He cannot shield himself from responsibility by doubts that he takes no measures to either verify or dispel. Gilbert v. Sutliff, 3 Ohio St. 130.

2. Freeman v. Cook, 6 Ired. Eq. (N. Car.) 373.

Chancery, it is said, will assist and protect trustees in the performance of trusts committed to them whenever they seek the aid and direction of the court, as to the establishment, management or execution of them. Trotter v. Blocker, 6 Port. (Ala.) 269; Burrill on Assign. (3rd ed.) 631.

3. Maccubbin v. Cromwell, 7 Gill & J. (Md.) 157; Goodwin v. Mix, 38 Ill. 115.

4. Burrill on Assign. (3rd ed.) 633.

5. Diffenderfer v. Winder, 3 Gill & J. (Md.) 311; Paige v. Olcott, 28 Vt. 469; Miller v. Holcombe, 9 Gratt. (Va.) 665.

6. 2 Story Eq. Jur. 1287; Burrill on Assign. (3rd ed.) 645.

In the case of People v. Norton, 9 N. Y. 176, it was held that the chancery court had power by its general authority independent of any statute, to displace a trustee on good cause shown.

7. Most of the States have laws now requiring the assignee to give bond. Where this is the case the solvency of the assignee would have nothing to do with removing or retaining him. Keyes v. Brush, 2 Paige (N. Y.) 311; Reed v. Emery, 8 Paige (N. Y.) 417.

8. Burrill on Assign. (3rd ed.) 648.

9. Purdon Dig. (Penn.) 10th ed. 1418.

10. Bayles v. Steatts, 1 Hals. Ch. (N. J.) 513; Suarez v. Pumpelly, 2 Sandf. Ch. (N. Y.) 336.

11. Burrill on Assign. (3rd ed.) 641.

12. **Creditors Should Have Access to Books.**—It is of the very first importance that the trustee of an insolvent should be open and candid with the creditors whose claims are provided for in the instrument, and afford them every reasonable means and opportunity of examining into the affairs of the assignor. Manning v. Stern, 1 Abb. N. Cas. (N. Y.) 409.

13. Rogers v. Jackman, 12 Gray (Mass.) 144.

but beyond this can prescribe no conditions whatever as to the management or disposition of the assigned property.¹

The general rule seems to be that where such stipulations are intended chiefly to benefit the assignor, they will be held invalid;² if to benefit the creditors, valid.³

Independently, however, of any provision in the deed of assignment, the assignee may continue the assignor's business during such a length of time as is manifestly for the interest of the estate.⁴

He should, however, continue the business no longer than is required to work up the material on hand.⁵

When a stock of goods in a retail business is assigned, the assignee cannot continue the business and retail the goods as before with the view of obtaining higher prices,⁶ without an order of the court authorizing him to do so.

1. *Dunham v. Waterman*, 17 N. Y. 9; *Schlüssel v. Willett*, 34 Barb. (N. Y.) 615; *Renton v. Kelley*, 49 Barb. (N. Y.) 536.

2. *King v. Kenan*, 38 Ala. 63; *Inloes v. Am. Ex. Bank*, 11 Md. 173; *Marks v. Hill*, 5 Gratt. (Va.) 400; *Berry v. Riley*, 2 Barb. S. C. (N. Y.) 307; *Burrill on Assign.* (3rd ed.) 284.

3. *Hitchcock v. Cadmus*, 2 Barb. (N. Y.) 381; *Foster v. Saco etc. Co.*, 12 Pick. (Mass.) 451; *Woodward v. Marshall*, 22 Pick. (Mass.) 468; *Ravisles v. Alston*, 5 Ala. 297.

In *Connecticut* an assignment of the contents of a country store, and raw materials of a factory, empowering the assignees to dispose of the property and apply the avails as directed, also to carry on the business of the factory, and to purchase such additional articles as should be necessary until all the raw materials on hand should be worked up, was held valid. *De Forest v. Bacon*, 2 Conn. 633; *Kendell v. N. Eng. Carpet Co.*, 13 Conn. 393.

4. *Patten's Appeal*, 45 Pa. St. 151; *Patten's Estate*, 2 Pars. (Penn.) Select Cases 108; *Burrill on Assign.* (3rd ed.) 546.

Where the estates of insolvent men are liable to be transferred, and that too generally, without much discretion in the selection of a propitious opportunity, it will necessarily happen that property of all kinds and in every stage of preparation will come into the hands of the assignees; and unless they exercise the power of preparing it for the market it will often perish or be sacrificed. Of the propriety and expediency of the measures to be adopted they

must judge in the first instance. Whether they (assignees) abuse their trust or not may be inquired into in a proper form of action. *Woodward v. Marshall*, 22 Pick. (Mass.) 468.

5. *Patton's Appeal*, 45 Pa. St. 151; *Patten's Estate*, 2 Pars. (Penn.) Select Eq. C. 108; *Doyle v. Smith*, 1 Coldw. (Tenn.) 15.

The assignee of the insolvent estate of a corporation has power to work up the stock on hand, if authorized to do so by the court. *Harding v. Mill River etc. Co.*, 34 Conn. 458.

6. *Hart v. Crane*, 7 Paige (N. Y.) 38; *Whallon v. Scott*, 10 Watts (Pa.) 237; *Am. Ex. Bank v. Inloes*, 7 Md. 380.

And even where he is allowed to retail the goods for a limited time as a more beneficial course to creditors than an immediate sale at auction, the sales must uniformly be for cash. *Meacham v. Sternes*, 9 Paige (N. Y.) 398.

And there must be no new purchases with the proceeds, nor any act done or permitted which can prevent the business from being at any time, brought to a close. *Connah v. Sedgwick*, 1 Barb. (N. Y.) 210.

Must Close the Business Soon.—The idea that a general assignee can, in the exercise of any proper discretion imposed upon him by virtue of the assignment, proceed to conduct the previous business of the assignor so long as he pleases to do so, or to do any act in respect thereto, except such as tends to the most speedy conversion of the assigned estate into cash, is wholly untenable, and the acts of the assignee tending to any other result are (equally as if committed by the debtor) in fraud

h. Rights in Mortgaged Property.—As a general rule an assignee is not to be considered as a *bona fide* purchaser of the assignor's property.¹ While this rule seems now well settled, it was formerly much doubted,² and seems, occasionally, yet to be somewhat entrenched upon.³

of the creditor, in hindering and delaying him in the realization of what is justly due him either from his debtor or from the assigned estate. *Levy's Accounting*, 1 Abb. (N. Y.) N. Cas. 186.

1. *Haggarty v. Palmer*, 6 Johns. Ch. (N. Y.) 437; *Knowles v. Lord*, 4 Whart. (Pa.) 500; *Walker v. Miller*, 11 Ala. 1067; *Maas v. Goodman*, 2 Hilt. (N. Y.) 275; *Griffin v. Marquardt*, 17 N. Y. 28; *Reed v. Sands*, 37 Barb. (N. Y.) 185; *Willis v. Henderson*, 5 Ill. 13; *Burrill on Assign.* (3rd ed.) 539.

2. *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 188; *Gates v. Labeaume*, 19 Mo. 17; *Hardcastle v. Fisher*, 24 Mo. 70; *Wickham v. Martin*, 13 Gratt. (Va.) 427; *Exchange Bank v. Knox*, 19 Gratt. (Va.) 739.

3. In *Ohio Lindemann v. Ingham*, 36 Ohio St. 1, it is held that the assignee can sell the mortgaged property and turn over the proceeds to the mortgagee, and that the mortgagee has no right to foreclose his lien.

An inferior court (*Snyder v. Betz*, 2 Circuit Ct. (Ohio) 485) has decided that a mortgage of the assignor unrecorded is void as to the assignee, and that the assignee takes the property. See *Gilbert v. Vail*, 14 Atl. Rep. (Vt.) 542; *Stewart v. Platt*, 101 U. S. 731.

A mortgage of personal property executed and delivered before the issuing of the warrant, and not recorded until after the property is taken possession of by the assignee, is valid. *Briggs v. Parkman*, 2 Met. (Mass.) 258.

As a general rule, where a mortgagor goes into insolvency, and a trustee is appointed for him, such trustee will supersede a conventional trustee named in a mortgage of the insolvent debtor to make sale of the property mortgaged, in case of default, and is the proper person, as representing all creditors, to sell to the exclusion of the conventional trustee. It is the equity of redemption that passes to the trustee in insolvency; but where he does not apparently take the equity of redemption, and may or may not succeed in a suit asserting title to it, he ought not to supersede the conventional trustee who can proceed

without delay, and who must proceed to sell in the end, if the trustee in insolvency fail in his suit. *Ensor v. Keech et al.*, 64 Md. 378.

R., the agent of T., the owner of a lot of land, made an arrangement with N. to buy the land, but at no definitely fixed price. N. entered into a contract with a builder to erect a block of houses, for which he was to be paid in instalments, partly in cash and partly in promissory notes guaranteed by R. After the houses were partially completed, to enable T. to get the benefit of the improvements placed upon the land, T., with knowledge that N. was insolvent, executed a deed of the land to N. at a price more than twice its real value without the improvements, and N. made a mortgage of the same back to T., to secure his promissory note for a sum of money much greater than the value of the land without the improvements. The note was payable at a fixed time. It was also under seal, and referred to the mortgage. The mortgage gave N. the right to pay the debt in instalments from time to time. T. subsequently, and before the maturity of the note, assigned the mortgage and note to trustees, in trust to pay certain unsecured creditors, and to pay over the surplus to him. Subsequently these creditors, by an instrument to which T. was not a party, agreed with the trustees to extend the time of payment of their claims. *Held*, on a bill in equity by the assignees in insolvency of N. against T. and his trustees, that the assignees were entitled to redeem the land from the mortgage on payment of its value without the improvements; and that the trustees did not stand in the position of *bona fide* purchasers for a valuable consideration. *Held*, also, that the creditors were not necessary parties to the bill. *Held*, also, that the court would not act on a suggestion, made for the first time in this court, that R. should be made a party, it not appearing that the rights of the plaintiffs as against the defendants could not otherwise be determined. *Jewett et al. v. Tucker et al.*, 139 Mass. 566.

11. Rights of Creditors—*a. Generally.*—A creditor is entitled to prove his whole claim against the estate notwithstanding any security he may have from third persons.¹ A creditor who becomes a party to an assignment under an insolvent act passed subsequent to the time when his claim accrued, waives all objection to the constitutionality of the act.² A payment by an insolvent debtor to a pre-existing creditor is valid, except as against proceedings in insolvency.³ In matters of insolvency, the law does not contemplate that a majority of the creditors shall deprive the minority of the right to have their claims paid within a reasonable time.⁴ The creditor possesses no greater right than the debtor himself had in the property passed to the assignee.⁵ A creditor may require the production of the as-

1. *Wilder v. Keeler*, 3 Paige (N. Y.) 167. The holder of a promissory note, by an arrangement with a solvent surety thereon, proved the note against the insolvent estate of another surety and then assigned the note with his claim against the estate to the solvent surety, who paid the holder in full. *Held*, on a bill in equity, that this amounted to payment of the note, and that the court of insolvency rightly ordered the proof to be expunged, and the surety to prove only one half of the claim, although he would not receive more than half of what he had paid for the note, if allowed to prove to the full amount. *New Bedford Inst. v. Hathaway*, 134 Mass. 69; s. c., 45 Am. Rep. 289.

2. *Van Hook v. Whitlock*, 7 Paige (N. Y.) 373. Where a creditor commences a suit for the purpose of setting aside an assignment by his debtor as fraudulent, he does not debar himself from coming under the assignment upon the failure or discontinuance of the suit. *Jewett v. Woodward*, 1 Edw. Ch. (N. Y.) 195.

Where a person becomes a creditor of one whom he knows to be insolvent, by buying a demand against him for less than the nominal amount thereof, he cannot, by prosecuting the demand to judgment, and recovering the whole amount, entitle himself to be considered a creditor to the whole amount. *Emerson's Case*, 16 Abb. Pr. (N. Y.) 457.

3. *Burt v. Perkins*, 9 Gray (Mass.) 317. If facts are known to a creditor, which give him reasonable cause to believe his debtor to be insolvent, and he also knows that the debtor knows the same facts, he has reasonable cause to believe that the debtor believes him-

self to be insolvent, and that a payment of the debt by him is made in fraud of the laws relating to insolvency. *Cozzens v. Holt*, 136 Mass. 237.

An insolvent debtor's conveyance of all his property to one creditor solely to secure his debt, although both knew at the time that the effect would be to deprive the other creditors of the power of securing their claim by legal process, is not a fraud at common law. *Giddings v. Sears*, 115 Mass. 505.

4. *Laforest v. His Creditors*, 18 La Ann. 292.

5. *Campbell v. Slidell*, 5 La Ann. 274. The act of 1878 provides that a judgment creditor may place a lien for his judgment on real estate of the debtor by causing to be recorded in the town clerk's office a certificate setting forth the judgment and describing the real estate, which lien may be foreclosed or redeemed like a mortgage. *Held* that the lien thus acquired is not dissolved by proceedings in insolvency on the part of the debtor, under the provision of the insolvent law that such proceedings shall dissolve all attachments and all levies of executions not perfected, made on the debtor's property within sixty days next preceding. Such a lien is a statutory mortgage rather than an attachment. And where the lien is placed upon land that had been attached in the suit in which the judgment was rendered, it is not to be regarded as a mere continuance of the attachment. *Beardsley v. Beecher*, 47 Conn. 408.

An assignment made by an archbishop of the Roman Catholic church in his individual capacity, for the payment of his individual debts, passes to the assignee no better or different title to the assigned property than the as-

signee's books to ascertain the condition of the estate.¹ The court may adjudge a party insolvent in an involuntary proceeding upon the return day of the order to show cause why he should not be adjudged insolvent, without waiting for a meeting of creditors.²

Where security is given by the principal on a note to the endorser or surety to indemnify him, such security enures to the benefit of the creditor.³

A creditor who has proved his own claim has no right in his own name to contest the claims of other creditors.⁴ There is

signor held, and *cestuis que trustent* may assert, as against the assignee and the creditors of the assignor, the same rights that they could against the latter if no assignment had been made. *Manix v. Purcell* (Ohio), 19 N. E. Rep. 572.

1. *McAuley v. His Creditors*, 4 La Ann. 52. A creditor of an insolvent debtor, against whom involuntary proceedings in insolvency have been instituted, cannot maintain a bill in equity to restrain the further prosecution of the proceedings, on account of the failure of the debtor to furnish to the messenger a schedule of his creditors before the choice of an assignee, and the consequent absence of notice to such creditors of the first meeting. *Shepard et al. v. Abbott*, 137 Mass. 224.

2. *Lyon v. Crosby*, 64 Cal. 34.

3. *In re Fickett*, 72 Me. 266.

Amount to be Proved.—A, owning land subject to a mortgage, conveyed his equity to B, who agreed with A to assume and pay the mortgage. On the mortgage becoming due, neither A nor B paid the same. The mortgagee subsequently endorsed the note secured by the mortgage in blank, without recourse, and delivered it to the wife of A, who paid for it out of her separate estate, and the mortgagee at the same time assigned the mortgage to her. B afterwards became insolvent. *Held*, that A could not prove, against B's estate in insolvency, a claim for the amount remaining unpaid on the mortgage. *Wilson v. Bryant*, 134 Mass. 291.

The owner of a parcel of land mortgaged it, subsequently conveyed his equity of redemption, and several years afterwards went into insolvency. The mortgagee sold the land under a power of sale contained in his mortgage, without obtaining any order of the insolvency court, and applied the proceeds

in part satisfaction of his debt. *Held*, that he was entitled to prove the balance of his claim against the estate of the insolvent; and that the Gen. Sts., ch. 118, § 27, did not apply. *Wilson v. Bryant*, 134 Mass. 291.

A creditor, who levies an execution, issued upon a judgment obtained by him against his debtor, on land of the debtor, which is set off to him, and seisin and possession thereof are received by him in full satisfaction of his judgment, is not entitled afterwards, if the debtor becomes insolvent, to tender a deed of release of the land to the assignee in insolvency, and be admitted as a creditor for the amount of the judgment, under the Gen. Sts., ch. 118, § 27, although the land, at the time of the levy, stood in the name of a third person. *Wareham Savings Bank v. Vaughan*, 133 Mass. 534.

Where sureties are preferred by a mortgage from the principal debtor, made in contemplation of insolvency, they should be regarded as creditor, within the meaning of the *Kentucky* act, 1856, as the mortgage enures to the benefit of the creditors, to whom the sureties are bound. *Thompson v. Heffner*, 11 Bush. (Ky.) 353.

4. *Freeland v. Mechanics' Bank*, 82 Mass. (16 Gray) 137. Creditors who have voluntarily presented their claims before an assignee, without questioning the validity of the assignment, are thereafter estopped from disputing its validity, though it was made at the instance or in behalf of one of the creditors. *Frelinghuysen v. Nugent*, 36 Fed. Rep. 229.

A creditor who, as soon as the debtor asserts a homestead right, denies it by proper pleadings, is not estopped to contest the right by accepting a *pro rata* share of the proceeds of an assignment in which the homestead was reserved. *Creager v. Creager* (Ky.), 9 S. W. Rep. 380.

nothing to prevent a creditor, after having bought his debtor's property at public auction, from giving it to a member of the debtor's family.¹

The creditor acquires no vested right in the estate by means of the assignment.² Where a debtor sells his property in contemplation of insolvency, and a creditor becomes the *bona fide* purchaser, he is entitled to stand as a preferred creditor to the extent of his actual payment therefor beyond his demand against the debtor.³

b. Notice of Insolvency.—The statutes of insolvency generally require that notice be given of the insolvency;⁴ and where such notice is required, an affidavit that it was so published is sufficient proof.⁵

1. *Winch v. James*, 68 Pa. St. 297.

2. *Mechanics & Bank Appeal*, 31 Conn. 63.

Composition with Creditors.—Some of the creditors of an insolvent signed an agreement of composition to release the debtor, on his turning over all of his property, etc., using the term "We, the subscribers, creditors," etc. *Held*, that such agreement was binding on a creditor who had signed it, although all of the creditors had not signed. *Lambert v. Shetler*, 71 Iowa 763.

When an insolvent debtor produces at a meeting of his creditors the affidavits and composition agreement required by *Maine* Rev. St., ch. 70, § 62, and they are duly filed in the insolvency court, a creditor, who is not a party to the agreement of composition, has not the right to examine the debtor upon all matters relating to his insolvency; but the examination must be limited to the questions whether the agreement was signed by the requisite proportion of the creditors, and whether the debtor had paid or secured to his creditors the percentage agreed upon. *Messer v. Storer*, 79 Me. 512.

3. *Southworth v. Casey*, 78 Ky. 395.

4. *Briggs v. Hobson*, 3 Ala. 404; *Clarke v. Ray*, 6 Cal. 600.

The order for the meeting of the creditors of an insolvent made May 21st, 1879, and fixing June 23rd, 1879, for the meeting, directed notice to be published at least once a week for four weeks in "The Woodland Democrat"; and the notice was published in "The Woodland Daily Democrat" on the 23rd and 30th of May, and on the 6th and 13th of June. *Held*, that the publication was sufficient. *Steele v. His Creditors*, 58 Cal. 244.

An affidavit in a proceeding in insolvency stating that the notice to creditors had been published "at least four consecutive weeks, beginning on the 31st of October, 1878, and ending on the 5th of December, 1878, both days inclusive," does not confer jurisdiction.

The words "at least once a week for four successive weeks" require, in effect, that there shall be four publications not more than seven days apart from each other. *Hernandez v. His Creditors*, 57 Cal. 333.

Distinguishing Ronkendorf v. Taylor, 4 Pet. (U. S.) 349.

5. *Schloss v. His Creditors*, 31 Cal. 201; *Barrett v. Carney*, 33 Cal. 530.

Under an amendment to the *California* insolvent act of 1852 (St. 1863, p. 750), the county court, on the filing of the insolvent's petition, is required to issue notice to the creditors calling them to meet on a day not less than 30 days thereafter. *Held*, that such a notice issued on December 7th, and returnable January 6th following, was sufficient. *Dean v. Grimes*, 72 Cal. 442.

Service of—Amendment of Petition.—The service of an attested copy of the creditors' application and the warrant of the judge, provided in St. 1878, ch. 74, § 15, of the insolvent laws of *Maine*, upon the debtor, is sufficient if left at his last and usual place of abode.

It will be sufficient to give the court jurisdiction, in the absence of fraud, if the creditors in their petition allege that they believe that their aggregate debts provable under the insolvent laws of *Maine* amount to more than one-fourth part of the debts provable against their debtor, and that they further believe and have reason to believe that such debtor is insolvent, and that it is for the best interest of the

creditors that the assets of the debtor should be divided as provided by the insolvent law.

Where an insolvent debtor, after an adjudication in insolvency, on examination upon his petition to this court to have such adjudication and proceedings in insolvency declared void because the requisite amount of his creditors did not join in the petition for insolvency, admitting his insolvency and that a large proportion of his creditors are willing to become parties to the insolvency proceedings, declines to answer proper enquiries, his petition will be dismissed—especially when it appears that the only purpose of his petition is to give effect to preferences in fraud of the insolvent law.

It seems that creditors not originally parties to the petition may by leave of court become parties thereto and prosecute the original application the same as the petitioning creditors could have done.

An amendment to the creditor's petition by adding new creditors, it seems would relate back to the commencement of the proceedings in insolvency. *In Re Cassius C. Roberts*, 71 Me. 390.

Proof by Affidavit—An affidavit presented in proceedings under the two-third act, as proof of service of the order requiring creditors to show cause why an assignment of the insolvent's estate should not be made, and he be discharged, as prescribed by the act of 1847 (§ 2, ch. 366, Laws of 1847), averred that deponent "served a printed notice, of which the following is a copy," it was objected that no notice followed the affidavit; in the printed appeal book a notice did follow the affidavit, and one preceded it. *Held*, that it did not appear that the affidavit was defective in this particular.

The affidavit averred that the printed notice was served "on each of the following named persons, on the days and in the manner next herein specified;" then followed a list of names under a column headed "names of creditors," and in another column, on the same line with each name the statement of the residence, save in one instance, where the word "unknown" was written. Following the list was this averment, "By depositing, 1860, April 9th, in the postoffice in the city of Brooklyn, a letter envelope directed to each of the foregoing creditors, at the place of residence hereinbefore designated, and

in each envelope was a printed notice, of which the following is a true copy, and on each envelope so directed was placed a postoffice stamp to pay the legal postage of each letter." *Held*, that the averments were sufficient to show service by mail upon each of the creditors named.

The residence of most of the creditors was stated in the affidavit as New York city. No number or street was named. *Held*, that this did not show such a disregard of the law as to vitiate the proceedings; that the requirement to give notice was dependent upon the place of residence being known to the insolvent; that service by letter could be no more perfect, as to the address, than the knowledge of the insolvent, and it could not be said that he did not serve the notices to the best of his knowledge, nor could it be said that the proof was not such as the officer might legally be satisfied with.

The name of one of the creditors was Charles Storrs. This name, so spelled did not appear in the list of creditors, but "Charles Stores" appeared, who was designated as assignee of a firm. *Held*, that it was a case of *idem sonans*, and was a sufficient designation of the creditor.

It appeared that two-thirds of the creditors, claiming to represent more than two-thirds of the debts, signed the petition; the liability of the insolvent as to a portion of these debts was as endorser. It appeared that the paper endorsed had been protested for non-payment, and the insolvent had thus become liable. *Held*, that on this account, and as the effect of the notice of discharge was to exonerate the insolvent from all liability incurred by endorsement, these debts were properly included.

It seems, however, that where the affidavit, to be effectual, must be made by one having and acting in a certain character, or personal capacity, the paper should state the name of the deponent, and that he has that character or capacity. *People v. Sutherland*, 16 Hun (N. Y.) 192.

Under *California* Insolvency act, § 7, requiring notice of an adjudication of insolvency, to be published and served, such notice is sufficient, although by a clerical error a wrong letter is used in the insolvent's name, the name being properly printed in two other places.—*Pope v. Kirchner* (Cal.), 19 Pac. Rep. 264.

*c. Non-Resident.*¹*d. Composition with Creditors.*²

12. The Insolvent or Assignor.—Where a person seeks the benefit of the insolvent law he must comply with all its requirements.³

Generally, no action can be maintained in the name of the insolvent after assignment.⁴

A debtor who fraudulently conceals his property from his creditors may be proceeded against as an insolvent, although his property is actually sufficient to pay his debts.⁵

An insolvent cannot maintain a bill in equity against his assignee for misconduct without first applying to the court of insolvency for relief.⁶ It is generally necessary that he should be a resident of the State in which the assignment is made.⁷ In the surrender of his property he is presumed to tell the truth.⁸

Payment made to an insolvent the day after he has made an assignment, though without notice, is void.⁹ After an insolvent has made an assignment, there is a resulting trust by law for the balance after paying his debts.¹⁰

1. As to nonresidents, see CONFLICT OF LAWS. 3 Am. & Eng. Encyc. of Law, 614, *et seq.*; DEBTOR AND CREDITOR, 5 Am. & Eng. Encyc. of Law, 179.

2. As to compositions with creditors, see COMPOSITION WITH CREDITORS, 3 Am. & Eng. Encyc. of Law, 385.

Composition Induced by Fraud.—Rev. St. Me., ch. 70, § 62, provides that after a composition with creditors a creditor may maintain an action against the insolvent for the balance of his debt, when the signature of any creditor to the composition has been obtained by fraud, or when the debtor has knowingly made a false statement of a material character in the affidavit or schedules required of him. *Held*, that the statute requires the existence of wilful fraud or falsehood; mere defects or mistakes in the proceedings, which are not fraudulent, are insufficient. *Cobbossee Nat. Bank v. Rich* (Me.), 16 Atl. Rep. 506.

3. *Burdon v. His Creditors*, 20 La. Ann. 364; *Hulshizer v. Kocker*, 20 N. J. (Spen.) 390.

One who has assigned land subject to a mortgage has no such interest remaining therein as will give force to a contract with the holder of the mortgage that the latter shall bid the land in, and hold it as security for his own demand, and to pay other debts of the assignor. *Monteith v. Hogg* (Oreg.), 20 Pac. Rep. 327.

4. *Keiwan v. Latour*, 1 Har. & J. (Md.)

289; *Stoever v. Stoever*, 9 S. & R. (Pa.) 434.

An insolvent debtor may, with the consent of his assignee, bring an action in his own name upon a contract entered into by him before his insolvency. *Herring v. Downing*, 146 Mass. 10.

Under the insolvent law the debtor has no control over the prosecution or settlement of suits against his estate; this power is lodged with the assignee; thus, in a cause pending in the supreme court, the judgment below, against the objection of the debtor, was affirmed in accordance with a stipulation between the creditor and the assignee, and a motion, filed by the debtor at a subsequent term, to have the cause brought forward and heard, was dismissed; and this on the ground that the debtor was not a party to the proceedings. *Brattleboro Bank v. Waite*, 57 Vt. 608.

5. *Blake v. Sawin*, 10 Allen (Mass.) 340.

6. *Lincoln v. Bassett*, 9 Gray (Mass.) 355.

7. *Hogan v. Hutton*, 20 N. J. (Spen.) 82; *Case of Senior*, 2 Ashm. (Pa.) 118.

Residence is a question of intention and the enquiry is *quo animo*; the party either removed from or out of the State. *Case of Casey*, 1 Ashm. (Pa.) 126.

8. *Hewlett v. Hewlett*, 4 Edw. (N. Y.) Ch. 7.

9. *Wickersham v. Nickolson*, 14 S. & R. (Pa.) 118.

10. *Ross v. McJunkin*, 14 S. & R. (Pa.)

364.

One can make an assignment for the benefit of his creditors without being insolvent; and the assignment will be valid unless creditors can show that it was made with the fraudulent intent of hindering them.¹

The insolvent is entitled to notice of proceedings instituted against him in insolvency.²

A person who removes to and becomes an inhabitant of a State, and owes debts contracted therein, is entitled to the benefit of the insolvent law, although the sole purpose of his change of domicile and of contracting debts there was to obtain the benefit of such law.³

1. *Munson v. Ellis*, 58 Mich. 335; *Weaver v. Leiman*, 52 Md. 708.

Assignor May be Solvent.—It is claimed that the assignment is void because the footings of the assets, as shown by the inventory, far exceed the debts, as shown by the footings of the amount due to the creditors, and that only insolvent debtors can make a valid assignment. But we think this is a mistaken view of the law. A person may be insolvent, in the proper signification of that term, although his assets may exceed his liabilities. A person may be said to be insolvent when he is unable to pay his debts as they mature in the ordinary course of his business, and this seems to have been the condition of the assignors in this case. Moreover, a person, whether insolvent or not, may legally execute a conveyance of his property to a trustee or assignee to pay his indebtedness if he have any. Such conveyance would not be void upon its face, nor intrinsically so. Creditors could attack its validity upon the ground that it was made with the intent to hinder, delay or defraud them, and unless they could establish such intent the assignment would be valid. *Munson v. Ellis*, 58 Mich. 335.

Dismissal of Proceedings for Inexcusable Delay.—It is not an abuse of discretion for the court to dismiss a proceeding in insolvency, upon motion of the debtor, for unreasonable delays in its prosecution. But after such dismissal the proceedings may be commenced anew. *Kornahrens v. His Creditors*, 64, Cal. 492.

2. Only one mode of notification to the alleged insolvent debtor of the institution of the proceedings against him is provided by the *Maryland* statute (1880, ch. 172), and that is by the service of a summons upon him. By that process he is to be warned to appear and show cause against the proposed

adjudication against himself and his property. It was alleged in the petition in this case that the debtor had departed from the jurisdiction and was beyond the reach of the only process provided for by the statute. The summons that issued against him was returned without service, and not even a copy, as was directed by the preliminary order of the court, was left at his last place of abode within the jurisdiction. On appeal from the order of adjudication, it was *held*:

1st. That in such state of case it was not within the power or jurisdiction of the court below to proceed on an *ex parte* hearing to adjudicate the party an insolvent, and appoint a trustee whereby all the property of the debtor was divested out of him and transferred to such trustee.

2nd. That while this court reversed the order appealed from, yet inasmuch as the debtor had appeared to the proceedings after the order of adjudication was passed, the case should be remanded in order that he might have an opportunity to show cause against the adjudication prayed for, and to have the benefit of trial as provided by the statute; *Whyte v. Betts Machine Co.*, 61 Md. 172.

3. *McConnell v. Kelley*, 138 Mass. 372.

The fifth section of the *Connecticut* insolvent act (Gen. Sts. p. 379) provides that "when a writ of attachment shall have been issued upon a claim founded on contract of one hundred dollars or more, upon which writ shall have been endorsed the affidavit of the plaintiff or his attorney that he believes such claim to be justly due, if the officer serving the same, after making demand of all such debtors as are found within his precincts, cannot find sufficient property to satisfy such attachment, . . . the plaintiff may petition the

13. Partnership—(See PARTNERSHIPS).—A *bona fide* sale, for a valuable consideration, by one partner to another, of all the partnership assets and effects, is valid, although the firm and both partners are at the time insolvent.¹

A surviving partner has power to commence proceedings in insolvency which will include the estate of the firm.²

court of probate for the appointment of a trustee to take possession of the property of such defendant for the benefit of his creditors. *Held*, that the officer serving the writ was bound to attach real estate, if he could find sufficient to satisfy the claim. Also that it made no difference that the real estate was encumbered, so long as the equity of redemption was of sufficient value. *Hawes's Appeal*, 50 Conn. 317.

Actual knowledge, by a debtor, of the filing of a petition in insolvency against him is not sufficient to support an indictment against him, on the *Massachusetts* Gen. Sts., ch. 118, § 106, for secreting a portion of his estate after "notice" of such filing. *Commonwealth v. Martin*, 130 Mass. 465.

1. *Howe v. Lawrence*, 9 Cush. (Mass.) 553.

An assignment for a commissioner of insolvency, upon proceedings against a partnership of "all the estate, real and personal, of said insolvent debtors" passes the separate estate of each partner. *Judd v. Gibbs*, 3 Gray (Mass.) 539.

Materials charged and shipped by the partnership in their usual course of business, to works of one partner on the day of the failure of all the partners, are to be treated as the property of that partner and not of the partnership. *Fisher v. Minot*, 10 Gray (Mass.) 260.

The question whether, under proceedings in insolvency instituted by a surviving partner, money found upon the person of a deceased partner, and mingled with other money, which is admitted to be his own, is partnership or private property, is a question of fact, which, if a dispute arise in reference to it, must be submitted to a jury. *Durgin v. Coolidge*, 3 Allen (Mass.) 554.

A sale by one partner of the whole partnership property to a partnership creditor, though made with an intent of giving a preference to such creditor, the partnership being insolvent, and without the knowledge or consent of the other partner, if not tainted with

actual fraud is valid. *Mabbett v. White*, 12 N. Y. 442.

A contract given by one partner to another to assume all the debts of the firm, and save him harmless therefrom, is not such a claim as may be proved against the estate of the obligor in insolvency until there has been a breach. It is not a contingent debt nor a contingent liability, for until the breach, there is no liability. The contingency is whether there ever will be a debt or liability. Nor is there any claim for unliquidated damages, for until the breach there are no damages to be assessed. *Fernald v. Johnson*, 71 Me. 437.

2. *Adams Bank v. Rice*, 2 Allen (Mass.) 480; *Salsbury v. Ellison*, 7 Colo. 167.

If two partners sign a petition in insolvency and one of them is killed before its presentation to the court, a warrant which is afterwards issued thereon, in ignorance of his death, may be treated as having been issued on the petition of the surviving partner. *Durgin v. Coolidge*, 3 Allen (Mass.) 554.

Where partners severally file their petitions in insolvency, the insolvency court acquires no jurisdiction over the estate of the copartnership, and discharges of the individual members of the firm cannot be made operative as to the debts of the firm. *Glenn v. Arnold*, 56 Cal. 631.

A, a citizen of this commonwealth (Massachusetts), who was a creditor of the firm of B, which was a limited partnership composed of B as general partner and C as special partner, brought an action against B in another State, and summoned as trustee there a person who was indebted to the firm of B. Soon after, B was adjudged insolvent upon involuntary proceedings, in which C was not mentioned, and of which he was not notified; and an assignment of B's estate was duly made to assignees, who undertook the settlement of the affairs of the firm of B. Subsequently the action of A against B was prosecuted to final judgment, and A received the amount of his claim from the trus-

A petition by a partnership for the benefit of the insolvent laws must aver the individual insolvency of the partners,¹ and it must show the surrender of all the petitioner's property, not merely of the partnership property.²

The assignee of the estate of both partners under distinct proceedings in insolvency must administer the estate of the partnership.³ An assignment by an insolvent firm of all its assets works a dissolution of the partnership.⁴

An insolvent firm cannot, by voluntarily assuming the individual debt of one of its members, and giving to the creditor of such member a judgment note for the amount of such debt, prefer such creditor to the firm creditors. It may do so, however, if there be a moral obligation on its part to pay the debt of the individual member.⁵

Where there are no available net proceeds of partnership assets, and no solvent partner, the partnership creditors share the separate estate concurrently with the separate creditors.⁶

In an action to obtain a decree against defendants ordering

tee. *Held*, in an action by the assignees of B's estate against A to recover the sum so received by the latter, that it was not necessary to have joined C as a codefendant in the action of A against B, and that this action could not be maintained. *Lawrence v. Batcheller*, 131 Mass. 504.

An assignment by a member of a firm of all his property of every description for the benefit of creditors, under the provisions of the *California* Civil Code, does not preclude him from applying for and receiving a discharge under the insolvent law. *Dresbach v. His Creditors*, 63 Cal. 187.

Cases Distinguished.—Neither of the cases entitled respectively *Meyer v. Kohlman*, 8 Cal. 44; *California Furniture Company v. Halsey*, 54 Cal. 315; *Glenn v. Arnold*, 56 Cal. 631; *Freeman v. Campbell*, 56 Cal. 639; and *In re Baker v. Hamilton*, 55 Cal. 302, went further than to hold that by the Insolvent act of May 4, 1852, and the act amendatory thereof and supplemental thereto, no provision was made for the relief of an insolvent partnership, and, as a consequence, that the insolvency court under those acts could not administer partnership property nor prevent partnership creditors from subjecting such property to the payment of their debts. In none of the cases mentioned was it *held* that, under the acts referred to, an individual member of a firm could not be discharged from his individual liability for firm debts.

Nor, in our opinion, does such result necessarily or logically follow from the doctrine of those cases. *Hawley & Co. v. Campbell*, 62 Cal. 442.

A person who holds out and recognizes another as a copartner is estopped to deny the partnership, and an assignment of the firm property by himself in the firm name, requiring releases of all accepting creditors, in which the nominal partner does not join, is void as to the firm's creditors. *County of Baylor v. Craig (Tex.)*, 6 S. W. Rep. 305.

1. *Hansom v. Paige*, 3 Gray (Mass.) 239; *Dearborn v. Keith*, 5 Cush. (Mass.) 224.

2. *Meyer v. Kohlman*, 8 Cal. 44.

3. *Harmon v. Clark*, 13 Gray (Mass.) 114.

4. *Burrill on Assign.* (3rd ed.) 402; *Gordon v. Freeman*, 11 Ill. 14; *Parsons on Part.* 400.

An assignment by one partner works a dissolution of the partnership. *Conrad v. Buck*, 21 W. Va. 396.

5. *Walker v. Marine Bank*, 98 Pa. St. 574.

6. The provision of *Maine* Stat. 1878, ch. 74, § 54, which, in case of insolvency of a partnership and its several members, appropriates the net assets of each estate to its own debts, and the surplus of each to the creditors remaining of the other, is applicable only when there is available joint estate and all the partners are insolvent. *Harris v. Peabody*, 73 Me. 262.

that a partnership debt be satisfied out of the partnership assets, it is no defence that the defendants have been individually discharged in insolvency from their debts.¹

A joint proceeding against several as partners will not lie under the insolvent law of Maryland, but such proceeding must be taken against each separately.²

The assets of a partnership should be divided *pro rata* among all the creditors of the partnership.³

When there are no available net proceeds of partnership assets, and no solvent partner, the partnership creditors share in the separate estate concurrently with the separate creditors.⁴

Separate assignments in insolvency by the several members of a copartnership of all their property, made to the same assignee, convey to the assignee their partnership property.⁵ One of two partners with the consent of the other may make an assignment, and a partner absconding, his consent will be implied.⁶

A preference of individual debts of a partner in an assignment of the firm is void.⁷

14. Corporations.—An assignment to receivers passes the property of the insolvent corporation precisely in the same condition and subject to the same equities as they were held by the corporation.⁸

If the question of insolvency is doubtful, and the conduct of the managers of the corporation appears to have been fair and honest, the company should have the benefit of the doubt, as a corporation should not be disturbed in the proper transaction of its business, unless its condition is hopeless.⁹

A corporation generally has, like an individual, power to go into insolvency when unable to pay its debts,¹⁰ unless such

1. Freeman v. Campbell, 56 Cal. 639.

2. Armstrong v. Martin, 57 Md. 397. Neither the California Insolvency act of May 4th, 1852, or the supplementary act of March 31st, 1876, apply to partnerships. *In re Baker & Hamilton*, 55 Cal. 302.

3. Watkins v. Fakes, 5 Heisk. (Tenn.) 185.

4. Harris v. Peabody, 73 Me. 262.

5. Boughton v. Crosby, 47 Conn.

577.

An assignment by a firm, under the Minnesota insolvent laws, which is ambiguous as to whether the partnership property only, or the separate property of the partners, as well, is conveyed, will be rather construed in the latter sense, since in the former it would be invalid. And a reservation of exemption therein adds force to this construction, since a firm has no exemptions. *Security Bank v. Beede*, 37 Minn. 527.

6. Sullivan v. Smith, 15 Neb. 476.

A partner who has not joined in an assignment of the firm assets may thereafter ratify the same and a creditor cannot question its validity. *Adee v. Cornell*, 93 N. Y. 572.

7. Scheele v. Healy, 10 Daly (N. Y.) 92; *Vernon v. Upson*, 60 Wis. 418; *Willis v. Bremner*, 6 Wis. 622.

There is a very full and complete collection of authorities in vol. 25, N. W. Rep. 666, in note to *Auley v. Ostermann*.

8. *Receivers v. Patterson G. L. Co.*, 23 N. J. L. 283.

Receivers of insolvent corporations are the agents of all creditors. *Mechanics' Bank v. Bank of New Brunswick*, 3 N. J. Eq. 437.

9. *Brundred v. Paterson M. Co.*, 4 N. J. Eq. 294.

10. 2 Kent's Com., p. 398; *De Ruyter v. Trustees*, 3 Barb. Ch. (N. Y.) 124; *De Ruyter v. Trustees*, 3 N. Y. 238.

right is restricted by its charter or some statutory enactment.¹

In some instances it has been held that such action on the part of the corporation will work a dissolution of the corporation.² It is said that the better opinion seems to be, and the one sustained by authority, that it does not affect the corporate franchise, and does not dissolve the corporation.³

This right is not affected by a provision in its charter that the stockholders shall be individually liable for its debts.⁴

15. What Claims May be Proved.—A holder of special stock of a corporation, which is illegally issued, may prove against the estate of the corporation in insolvency the amount paid by him for the stock, deducting any dividends received, although he did not rescind the contract before the insolvency.⁵ One who lends money after publication of notice of the filing of a petition in insolvency against the borrower, but before the issuing of the warrant, is not entitled to prove his claim against the estate.⁶ A creditor of an insolvent bank whose assets are *in custodia legis* under decree of court, will be let in to prove his debt after the day fixed for proofs, if he is not guilty of laches; but if he fail to make application to do so until after the fund is distributed, having full knowledge of the proceeding, he will be barred of his right.⁷

In a contest between the creditors of an insolvent, the notes or obligations do not make in themselves conclusive proofs of the debts apparently due them; they must be supported by such additional evidence of the claim as will satisfy the judge of its fairness.⁸

It is no objection to the proof in insolvency of a promissory note against the maker that an accommodation endorser holds

1. Hurlbut v. Carter, 21 Barb. (N. Y.) 221; Burr v. McDonald, 3 Gratt. (Va.) 215; Ang. & Ames on Corp. (10th ed.) 191; Hill v. Reed, 16 Barb. (N. Y.) 280; Haxtun v. Bishop, 3 Wend. (N. Y.) 13; Bank Comm'rs v. Bank of Brest, Harr. (Mich.) 106; Catlin v. Eagle etc., 6 Conn. 233; Pope v. Brandon, 2 Stew. (Ala.) 401; State v. Maryland Bank, 6 Gill & J. (Md.) 205; Warner v. Mower, 11 Vt. 385; Flint v. Clinton Co., 12 N. H. 431; Buell v. Buckingham, 16 Iowa 285; McCallie v. Walton, 37 Ga. 611; Ring v. Real Estate Bank, 13 Ark. 563; Dana v. Bank of United States, 5 W. & S. (Pa.) 223; United States v. Bank of United States, 8 Rob. (La.) 262; Hopkins v. Gallatin etc. Co., 4 Humph. (Tenn.) 403; Bank of United States v. Huth, 4 B. Mon. (Ky.) 423; Town v. Bank etc., 2 Doug. (Mich.) 530.

2. Smith v. New York Consolidated etc., 18 Abb. Pr. (N. Y.) 419; Abbott v.

American etc. Co., 33 Barb. (N. Y.) 578; Bank Commissioners v. Bank of Brest, Harr. (Mich.) 106; Buell v. Buckingham, 16 Iowa 284.

3. Burrill on Assign. (3rd ed.) 85, 401; Ang. & Ames on Corp., § 191; State v. Bank of Maryland, 6 Gill & J. (Md.) 205; Hurlbut v. Carter, 21 Barb. (N. Y.) 224; Ringo v. Real Estate Bank, 13 Ark. 563.

4. Pope v. Brandon, 2 Stew. (Ala.) 401.

The power may be exercised by a quorum of the board of directors at a meeting at which a bare quorum is present. Buell v. Buckingham, 16 Iowa 284.

5. Reed v. Boston Machine Co., 141 Mass. 454.

6. Spurr v. Dean, 139 Mass. 84.

7. Gleen v. Farmers' Bank, 84 N. Car. 631; Gleen v. Farmers' Bank, 80 N. Car. 97.

8. Johnson v. His Creditors, 16 La. Ann. 177.

security from the maker which has not been surrendered, and that the proof is offered at the endorser's request.¹

A claim for damages not liquidated, which arises from a breach of contract, is provable.²

The qualified liability of a stockholder in a corporation is not a debt that can be proved against the estate of an insolvent.³

1. *Meed v. Nelson*, 9 Gray (Mass.) 55; *Provident Ins. Co. v. Stetson*, 12 Gray (Mass.) 27.

What Provable.—A promissory note is not provable in insolvency against the estate of an endorser before its maturity. *Stowell v. Richardson*, 3 Allen (Mass.) 64.

A bond of indemnity, given for the protection of an attaching officer, who has not been compelled to pay, or sued, for his acts, does not constitute a debt which is provable in insolvency against obligees. *Kingman v. Towle*, 5 Allen (Mass.) 133.

Promissory notes may be proved against the estate of the maker in insolvency, although the beneficial interest in them has become vested in his wife, if the legal title to them has not been transferred to her. *Stearns v. Bullens*, 8 Allen (Mass.) 581.

The holder of a bill of exchange, no part of which has been paid, may prove it in full in insolvency against the estate of each party thereto, and receive a dividend from each upon the whole claim, provided he does not receive in all more than the entire amount; but any proof sought to be made after he has been paid a part of his claim can only be for the balance. *Sohier v. Loring*, 6 Cush. (Mass.) 537.

2. *Lothrop v. Reed*, 13 Allen (Mass.) 294.

3. *Bangs v. Lincoln*, 10 Gray (Mass.) 600.

Miscellaneous.—Proving a claim against a corporation and receiving a dividend thereon will not bar a suit against the corporation for the rest of the debt. *Coburn v. Boston etc. Co.*, 10 Gray (Mass.) 243.

A creditor of an insolvent corporation who holds collateral security from a stockholder therein, may prove his whole debt against the corporation in insolvency without first applying the security in payment or surrendering it to the assignees. *Cabot Bank v. Bodman*, 11 Gray (Mass.) 134.

Proof of Claims.—A lease provided that if the lessees should be declared bankrupt or insolvent, or should make

an assignment for the benefit of creditors, the lessors might re-enter, and, in their discretion, relet the premises, at the risk of the lessees, who should be responsible till the end of the term for the rent and taxes reserved in the lease to them, and should be credited only with such amounts as should be by the lessors actually realized. The lessees became insolvent, and before the publication of notice in insolvency proceedings, the lessors re-entered. *Held*, that the lessors' claim was contingent in its nature, and could not be proved against the lessees' estate in insolvency. *Bowditch v. Raymond*, 146 Mass. 109.

Miscellaneous Cases.—A made a mortgage to B to secure a sum then due and future advancements; and afterwards commenced proceedings in insolvency, at which time there was due under the mortgage a certain sum. Prior to the insolvency, B procured certain notes, given by A to him for advances under and secured by the mortgage, to be discounted by C, and endorsed the notes, but did not assign the mortgage, to C; and, at the time of A's insolvency C owned the notes, which constituted a certain portion of the debt secured by the mortgage. At a meeting of A's creditors, the notes were proved by C. The assignee in insolvency advertised for sale the right in equity to redeem the mortgaged estate from the mortgage, representing that there was due thereon the sum which was due at the time of insolvency, which sum the assignee knew before the sale included the amount of the notes; and sold the same to B for a certain sum. At another meeting of the creditors, the assignee presented his account, setting forth the sale, charging himself with the sum received from B, and charging, as a loss upon the property by reason of the mortgage, the difference between that sum and the appraised value of the property; and this account was allowed by the court. *Held*, on a petition to set aside the decree allowing the account, that C was entitled to prove the notes against A's estate in insolvency, with-

out first having recourse to B, who was also entitled to hold his mortgage as security against his liability as endorser on the notes; and that the assignee was not chargeable with the amount of the notes. *Viles v. Harris*, 130 Mass. 300.

A conveyed a parcel of land to B by a quitclaim deed, in which he reserved to himself and wife a life estate therein, and covenanted that the premises were free from all encumbrances suffered by him, except said life estate. After this conveyance, but before the deed was recorded, A mortgaged the land to a bank to secure the payment of a promissory note. On the same day, a previous mortgage on the land, given by A's grantor to the bank, and which A had agreed in the deed to him to pay, and existing at the time of A's conveyance to B, was discharged; each mortgage being for the same amount. A died, his estate was represented insolvent, and commissioners were appointed under the statute. *Held*, that the bank could not prove before the commissioners its claim against A's estate for the full amount of the note, while it still held the mortgage. *Bristol Co. Savings Bank v. Woodward*, 137 Mass. 412.

An action to foreclose mechanics' liens must be commenced within ninety days after the liens are filed, notwithstanding the insolvency of the debtor. A debt so secured is not provable under the insolvency act, and the commencement of foreclosure proceedings are not stayed by any of its provisions. *Bradford et al. v. Dorsey et al.*, 63 Cal. 122.

If an attachment is dissolved under the *Massachusetts* Pub. Sts., ch. 157, § 46, by the debtor going into insolvency, and the attaching officer refuses to deliver up the goods on demand by the assignee in insolvency, the creditor is not entitled to prove, under § 139, as a claim against the estate, the expenses subsequently incurred by the officer in keeping the goods. *Russell Paper Company v. Smith*, 135 Mass. 588.

A bank discounted a draft of a firm, consisting of A, B and C; and, as a condition of making the discount, required security to be given for the whole debt of the firm to it, including previous advances as well as the draft. A and B accordingly transferred to the bank promissory notes of the firm owned by them respectively, given for advances made by them to the firm,

and payable on demand. The firm and the individual members of it became insolvent. The draft had been paid before the insolvency proceedings were begun, but some of the previous advances had not been. *Held*, that the bank could prove the notes against the estate of the firm in insolvency, after having already proved for the whole amount of the unpaid advances. *Miller's River National Bank v. Jefferson*, 138 Mass. 111.

A creditor of an insolvent debtor, who has a mortgage of real estate of the debtor as security for his claim, and who joins with the assignee in insolvency in making sale of the property, without the order of the judge of insolvency, cannot be allowed, under the *Massachusetts* Gen. Sts., ch. 118, § 27, to prove the residue of his claim, after applying the proceeds of the sale. *Smith v. Warner*, 133 Mass. 71.

Where a judgment is obtained against an insolvent debtor, after the first publication of the notice of issuing the warrant, the judgment is not provable against his estate; because at the time of such publication it was not in existence, and the original debt is not provable because it is merged in the judgment. *Sampson v. Clark*, 2 Cush. (Mass.) 173.

Under the *Alabama* revised code a claim must be filed after the estate is declared insolvent. *Clement v. Nelson*, 46 Ala. 634.

Allowance of Claims.—Upon petition of a receiver in insolvency proceedings for instructions, the court advises him to disallow any claims which he considers not true and just, leaving the claimants to come to this court upon exceptions to such disallowance, if they shall see fit, within 30 days after notice to them of the disallowance and of this condition. *In re Eddy*, 15 R. I. 474.

Upon application for an extension of time within which claims against the estate may be filed, said unproved claims being small in amount, divided among many claimants, the receiver being satisfied the claims are just, and having nearly, if not quite, enough money in his hands to pay all just claims, proved and unproved, and nearly all creditors who had proved their claims being willing that the time should be extended, 30 days were allowed the creditors within which to prove their claims. *In re Eddy*, 15 R. I. 474.

The claim of a ward who has reached

16. Fraudulent Conveyances—(See also ASSIGNMENTS FOR THE BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCE)—*a. Construction of Statute of Frauds.*—The statute of frauds, as the statute of 13 Elizabeth is known, in reference to fraudulent conveyances, has been adopted universally in the United States.¹

While it was formerly doubted whether this did not cause all assignments for the benefit of creditors to be void, it seems to be now settled that it does not apply to such cases,² unless in instances where it appeared that assignments were fraudulent in intent and in effect.³

her majority, against her guardian, for funds held by him as guardian, is not provable against his insolvent estate, under Pub. St. Mass., ch. 157, § 26, relative to the proof of debts in insolvency, or St. Mass. 1884, ch. 293, providing that "equitable liabilities shall be decreed to be debts provable against estates in insolvency," where the amount due has not been determined by the probate court, and no judgment has been recovered on the guardian's bond. *Murray v. Wood*, 144 Mass. 195.

1. 1 Story's Eq. Jur., § 253; 4 Kent Com. [462-463] 510.

2. Burrill on Assign. (3rd ed.) 450-465.

3. Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under the operation of the statute of fraudulent conveyances. It is not embraced within its words, which only apply to such as are contrived in malice, fraud, collusion, or covin. to the end, purpose and intent to delay, hinder and defraud creditors. *Hafner v. Irwin*, 1 Ired. (N. Car.) 490.

The fact that creditors may be delayed or hindered, is not of itself sufficient to vacate such a deed, if there is an absence of a fraudulent intent. Every conveyance to trustees interposes obstacles in the way of legal remedies of the creditors, and may to that extent be said to hinder and delay them. *Dance v. Seaman*, 11 Gratt. (Va.) 778, 782.

One of the most remarkable cases of a debtor being allowed to defeat the execution of some creditors in favor of

all, is where a debtor voluntarily assigns over his property for the benefit of creditors, and such assignment is valid, though made for the express purpose of defeating a particular creditor, and that quite independently of any statute enabling a debtor to enter into arrangements with his creditors. May on Fraudulent Conveyances, *105 (2nd ed.)

Assignment for Creditors.—The conveyance was made in contemplation of insolvency, and recites that the grantor was apprehensive that he would not be able to make a fair distribution of his property without an assignment. And it authorizes the sale of the property by the trustees, "either at public or private sale, and with such notice of sale, and in such manner, as they shall think most expedient and beneficial for his creditors," and out of the proceeds to pay, first, the costs and expenses and compensation of the trustees; and, second, that the balance be paid out to all his creditors in proportion to the amount of their respective demands, hoping and expecting that the fund will be sufficient to pay all and leave the grantor a balance, which, it is provided, should be paid back to him. The intrinsic evidence of fraud in the deed relied on is, that by its terms, the trustees had the discretion to sell at private sale, and upon credit, and that provision was made that in case any surplus should remain after payment of debts it should be paid back to the grantor. The statute for the prevention of fraud and perjuries provides that every gift, grant or conveyance of property made or obtained with intent to defraud creditors, shall be deemed void and of no effect. Whether there was fraud in the transaction presented in this case, is a matter of fact to be established by proof, and the *onus probandi* is thrown upon the party impeach-

b. Void Assignments.—Assignments have been held void as conflicting with the statute of frauds where the time of sale,¹ or of collection² by the assignee, or of finally closing the trust,³ has been by the assignment unreasonably or indefinitely postponed;

ing the deed. And where an instrument is ambiguous or indefinite and in one meaning is inoperative and void, and the other operative and valid, the latter is to be adopted in preference to the former. It is argued that an assignment in trust for creditors, which, by its provisions, tends to hinder and delay creditors is fraudulent and void. The provision of the statutes of 13 Elizabeth, which was held to be declaratory of the common law in England, and which is said to have been followed literally in the statutes of fraud in New York, declares "every conveyance or assignment," 133, etc., "made with intent to hinder, delay or defraud creditors," etc., void. The provision in the *Ohio* statutes omits the words "hinder and delay." But I am not aware that this difference of phraseology is the foundation of any material distinction, in legal effect, between the English statute and that of Ohio. That hindering and delaying of a creditor which would bring an assignment within the operation of the statutes of England, would, I apprehend, constitute a fraud under the statutes of Ohio. As early as the case of *Pickstock v. Lyster*, *Maule & S.* 371, where a person being insolvent had, pending a suit against him by one of his creditors, assigned all his effects to trustees for the benefit of all his creditors, it was *held* that the assignment, although it prevented the suing creditor from reaching his debtor's effects by legal process, was not fraudulent within the operation of the statutes of frauds, although made with intent to delay the plaintiff in the suit in the collection of his debt by legal process. It is true that such an assignment, even where creditors are to be paid *pari passu*, is, in one sense, to hinder and delay them in the collection of their debts, or by withdrawing the property from the reach of any legal process to which they may wish to resort. This statute is to be construed according to its reasonable intent and object. And assignments, although designed manifestly to deprive particular creditors of speedy remedies at law, and thus hinder and delay them in the collection of their debts, or to deprive

some of that full satisfaction of their debts which, by their superior diligence in prosecuting their suits they would otherwise certainly have obtained, are upheld as valid and effectual, although, in one sense, there is a manifest intent to hinder and delay one or more creditors in such assignment, yet there is no intent to cheat or defraud them; and, by a reasonable construction, such hinderance and delay only as would operate as a fraud and are designed as a fraud, come within the operation of the statute. When a man finds himself in failing circumstances and unable to pay all his debts he can do no act more just and equitable than to surrender and assign his property in trust for the benefit of his creditors. In such situation all the law can reasonably demand is a faithful application of all his property to the payment of all his debts; and when this object is accomplished by an assignment or deed of trust, for the benefit of all his creditors, the hinderance and delay which may operate to the prejudice of particular creditors is simply an unavoidable incident to a just and lawful act. And such mere incident to such laudable act cannot be held to vitiate the transaction as fraudulent until the maxim that equality is equity, in the distribution of the property of an insolvent, shall have been repudiated, and the highest act of justice which can be done by a debtor in contemplation of insolvency shall be deemed an act of dishonesty. If authority be necessary to sustain so plain a proposition, reference is made to *Muir v. Howell*, 4 East 1; *Wilder v. Winne*, 6 Cow. (N. Y.) 284; *Hoffman v. Mackall*, 5 Ohio St. 132.

1. *Hafner v. Irwin*, 1 Ired. (N. Car.) 490; *Hardy v. Skinner*, 9 Ired. L. (N. Car.) 191; *Rundlett v. Dole*, 10 N. H. 465; *Farmers' Bank v. Douglass*, 11 Sm. & M. (Miss., 469; *Ward v. Trotter*, 3 T. B. Mon. (Ky.) 1; *Johnson v. Thweatt*, 18 Ala. 745.

2. *Storm v. Davenport*, 1 Sandf. Ch. (N. Y.) 135.

3. *Richardson v. Stapleton*, 60 Miss. 97; *Arthur v. Commercial etc. Bank* 9 Sm. & M. (Miss.) 394.

where the assignee has been expressly authorized to sell at retail and on credit,¹ or on credit simply;² where the assignment has been made with a view to prevent a sacrifice of property;³ where the proceeds of the assigned property have been directed to be used in defending all suits which might be brought to recover their debts;⁴ where creditors who should sue have been expressly debarred from the benefit of the assignment,⁵ or postponed until all the other creditors are paid.⁶ Under a Californian statute, all voluntary assignments by a debtor in failing circumstances will be held void.⁷

Also where there is a reservation of a use or benefit of the grantor or his family or any person not a creditor.⁸ Where there is a reservation of surplus after paying specified debts, leaving other debts unpaid;⁹ where there is a reservation of a power of revocation;¹⁰ where it is provided that the transaction shall be kept a secret until the creditor shall have secured certain advantages to himself.¹¹

1. *Carlton v. Baldwin*, 22 Tex. 731; *Rapalee v. Stewart*, 27 N. Y. 311; *Moir v. Brown*, 14 Barb. (N. Y.) 39; *Lawrence v. Norton*, 15 Fed. Rep. 853; *Muller v. Norton*, 19 Fed. Rep. 720; *Burdick v. Post*, 12 Barb. (N. Y.) 168; *Nicholson v. Leavitt*, 2 Seld. (N. Y.) 510; *Meacham v. Sternes*, 9 Paige (N. Y.) 406.

But where a discretion was given the assignee to sell on credit if he thought it to be to the interest of the creditors, the deed will be held valid. *Hoffman v. Mackall*, 5 Ohio St. 138; *Livesay's Ex. v. Beard*, 22 W. Va. 585.

2. *Barney v. Griffin*, 2 N. Y. 365; *Nicholson v. Leavitt*, 6 N. Y. 510.

An assignment requiring a credit to be given beyond that authorized by law on sales by executors and administrators would in general be deemed conclusive evidence of an intent to hinder and delay creditors, and therefore void. *Conkling v. Coonrod*, 6 Ohio St. 612.

3. *Van Nest v. Yoe*, 1 Sandf. Ch. (N. Y.) 4; *Vernon v. Morton*, 8 Dana (Ky.) 247. See *contra*, *Cason v. Murray*, 15 Mo. 378.

4. *Planck v. Schermerhorn*, 3 Barb. Ch. (N. Y.) 644; *Mead v. Phillips*, 1 Sandf. Ch. (N. Y.) 83.

An assignment for the benefit of creditors provided that the assignee should pay over to the creditors, under the direction of the court, "a *pro rata* share to each, equal in amount due them, at the same rate per cent. if less than the full sum due them, or to each

of them." It was further provided that, if any creditor should not receive the full sum due him, the receipt of any just *pro rata* share of the amount due should be deemed a satisfaction of the demand, and so by him accepted. *Held*, that such an assignment was void on its face, as providing that creditors should accept a *pro rata* share of their claims in full satisfaction. *Sperry v. Gallaher* (Iowa, 1889), 41 N. W. Rep. 586.

5. *Spence v. Bagwell*, 6 Gratt. (Va.) 444; *Berry v. Riley*, 2 Barb. (N. Y.) 307.

6. *Marsh v. Bennett*, 5 McLean (U. S.) 117.

A conveyance by an insolvent debtor in trust for assenting creditors cannot be avoided except for fraud at the suit of a creditor who does not assent. *Nat'l etc. Bank v. Eagle etc. Co.*, 109 Mass. 38.

7. *Dana v. Stanford*, 10 Cal. 269.

8. *Mackie v. Cairns*, 5 Cow. (N. Y.) 549; *Murray v. Riggs*, 15 Johns. (N. Y.) 571; *Kellog v. Richardson*, 19 Fed. Rep. 71; *Lawrence v. Norton*, 15 Fed. Rep. 853; *Baldwin v. Peet*, 22 Tex. 708; *Barney v. Griffin*, 2 N. Y. 365.

9. *Goodrich v. Downs*, 6 Hill (N. Y.) 438; *Barney v. Griffin*, 2 Comst. (N. Y.) 365; *Whallon v. Scott*, 10 Watts (Pa.) 237; *Planters' etc. Bank v. Clarke*, 7 Ala. 765; *Janney v. Barnes*, 11 Leigh (Va.) 100; *Sheppards v. Turpin*, 3 Gratt. (Va.) 373.

10. *Hoffman v. Mackall*, 5 Ohio St. 135.

11. *Hafner v. Irwin*, 1 Ired. (N. Car.) 490.

The reservation of the surplus to the grantor after payment of all the creditors will not make it fraudulent.¹

c. Void Conveyances and Sales.—In a suit to avoid a deed as fraudulent under the insolvent laws, the complainant must allege and prove that the grantor was indebted at the time, and that he made it or caused it to be made with a view of taking the benefit of the insolvent laws.²

A transfer of goods from a failing firm in satisfaction of a debt is not void because of the knowledge of the transferee that such firm is failing.³

A bill of sale, absolute on its face by an insolvent debtor, and delivery of possession of the goods and in pursuance of it, is fraudulent and void if accompanied with a secret trust from which the debtor may ultimately derive a pecuniary benefit.⁴

The mere fact of the insolvency of a decedent does not invalidate a mortgage given by him.⁵

d. Who Can Set Aside.—Where a failing debtor makes a conveyance void as against creditors under the insolvent law, it cannot be set aside by such creditors except by proceedings under the insolvent law.⁶ A court of equity may usually vacate such deeds.⁷

The assignee in some States has power to bring an action to set aside a conveyance void as defrauding creditors.⁸

1. Conkling v. Carson, 11 Ill. 503; Miller v. Stetson, 32 Ala. 166; Knapp v. McGowan, 96 N. Y. 75; Hoffman v. Mackall, 5 Ohio St. 135; Hall v. Denison, 17 Vt. 318; McFarland v. Birdsell, 14 Ind. 126; Banning v. Sibley, 3 Minn. 389.

2. Faringer v. Ramsey, 4 Md. Ch. 33.

When an absolute deed by the party insolvent to a third party is in fact a mortgage, the insolvent trustee will take the property in dispute into his exclusive possession and control, free from the interference of the mortgage. Waters v. Riggins, 19 Md. 536.

An instruction that the trustee of the insolvent could not recover against the vendee of the goods unless the jury was satisfied that the sale was void by the insolvent laws would be erroneous, for it might be void by the statute of Elizabeth. Dietus v. Fuss, 8 Md. 148.

A court of equity may vacate a deed executed by an insolvent debtor, but has no power to decree a sale of the property by the trustee. Jamison v. Chesnut, 8 Md. 34.

3. Walsh v. Kelley, 42 Barb. (N. Y.) 98.

A sale by an insolvent debtor of his property on credit is valid as against creditors, if made in good faith and for

a good consideration, and without any intent to hinder or defraud creditors. Scheitlin v. Stone, 43 Barb. (N. Y.) 634.

4. Burrill on Assign. (3rd ed.) 441, 494.

5. Evans v. Pence, 78 Ind. 439. *Ex parte* McClenachan, 2 Yeates (Pa.) 502.

6. Berkeley etc. School v. Jarvis, 32 Conn. 412.

7. Jamison v. Chesnut, 8 Md. 34.

8. Huntsecker v. Heineg, 11 S. & R. (Pa.) 250; Englebert v. Blanlot, 2 Whart. (Pa.) 240; Tams v. Bullitt, 35 Pa. St. 308; Freeland v. Freeland, 102 Mass. 475; Filley v. King, 49 Conn. 211.

Knowledge of Transferee.—In a suit by an assignee to recover the value of personal property mortgaged by the insolvent, such mortgage covering practically all the property the latter had, it is proper to instruct the jury that defendant had reasonable cause to believe that the debtor made the mortgage to him in contemplation of insolvency, and in fraud of the provisions of the insolvency law, if such a state of facts was brought to his notice as would lead a prudent business man to the conclusion that the debtor was un-

17. **Preferences**—*a. At Common Law.*—It is a settled rule of the common law that a debtor in failing circumstances may not only dispose of his property for the use and benefit of his creditors generally, but may, by such a conveyance, give a preference in payment to one creditor before another, or to one class of creditors before another class.¹ And this rule applies equally to corporations as well as to individuals.²

able to meet his obligations as they matured, in the ordinary course of business, and that the presumption of fraud arising from the unusual character of the mortgage could only be overcome by proof on defendant's part that he took the proper steps to find out the pecuniary condition of the debtor, and in good faith used all reasonable means for that purpose. *Buffum v. Jones*, 144 Mass. 29.

In a suit by an assignee to recover the value of personal property mortgaged by the insolvent, such mortgage covering practically all the property the latter had, the question whether a mortgage was in the usual and ordinary course of business of the debtor is one of fact for the jury, and the opinion of witnesses upon the question is inadmissible. *Buffum v. Jones*, 144 Mass. 29.

Defendant's son called on him at an early hour in the morning, handed him the notes in controversy, without any explanation or direction as to their use, simply saying that he had sold out and was going away, and without any enquiry by defendant. Defendant applied the notes to a debt due him from his son. The notes were not transferred in the usual course of business, which, by R. L. Vt., § 1861, is *prima facie* evidence of fraud. He knew that his son had sold his entire business to one person. He supposed his son was solvent, and a short time before had released a mortgage for what his son owed him, on the son's application, who stated that he was going to sell out; but he did not enquire of his son why he was going to sell out, or attempt to ascertain his son's financial condition. *Held*, that he was chargeable with knowledge of his son's insolvency, and must account to the son's assignee for the notes. *Reed v. Moody* (Vt.), 15 Atl. Rep. 345.

1. *Burrill on Assign.* (3rd ed.) 193; 2 *Kent's Com.* *531; 1 *Tucke's Com.* *335; *Brashear v. West*, 7 Pet. (U. S.) 608; *Mackie v. Cairns*, 1 Hopk. (N. Y.) 373; *Grover v. Wakeman*, 11 Wend.

(N. Y.) 187; *Hafner v. Irwin*, 1 Ired. (N. Car.) 496; *Webb v. Daggett*, 2 Barb. (N. Y.) 11; *Richards v. Levin*, 16 Mo. 599; *Pickstock v. Lyster*, 3 Maule & S. 371; *King v. Watson*, 3 Price 6; *Marshall v. Hutchinson*, 5 B. Mon. (Ky.) 298, 305; *State v. Bank of Md.*, 6 Gill & J. (Md.) 205; *Marbury v. Brooks*, 7 Wheat. (U. S.) 556; *Buffum v. Green*, 5 N. H. 71; *Moffat v. McDowall*, 1 McCord. (S. Car.) Ch. 434; *Moore v. Collins*, 3 Dev. (N. Car.) 126; *Brown v. Minturn*, 2 Gal. (U. S.) 557; *Stevens v. Bell*, 6 Mass. 339; *Wilt v. Franklin*, 1 Binn. (Pa.) 502; *Grimes v. Farrington*, 19 Neb. 44; *Leonard v. Green*, 34 Minn. 137; *Whitfield v. Stiles*, 57 Mich. 410; *Bierbröwer v. Polk*, 17 Neb. 268; *Carter v. Reney*, 62 Wis. 552; *Berry v. O'Conner*, 33 Minn. 530; *Nelson v. Garey*, 15 Neb. 531; *Farwell v. Jones*, 63 Iowa 316; *Smith v. Diedrick*, 30 Minn. 60; *Messersmith v. Devendorf*, 54 Wis. 498; *Lord v. Devendorf*, 54 Wis. 491; *Hills v. Stockwell*, 33 Fed. Rep. 432; *Means v. Montgomery*, 23 Fed. Rep. 421; *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 894; *Martin v. Hausmen*, 14 Fed. Rep. 160; *Moline etc. Co. v. Rummell*, 14 Fed. Rep. 155; *Smith v. Craft*, 12 Fed. Rep. 856; *Lake Shore B. Co. v. Fuller* (Pa.), 1 Atl. Rep. 731; *Fuller etc. Co. v. Lewis*, 101 N. Y. 674; *Grubbs v. Morris*, 103 Ind. 106; *Ross v. Sedgwick*, 69 Cal. 247; *Wood v. Franks*, 67 Cal. 32; *Baily v. Kansas M. F. Co.*, 32 Kan. 73.

2. *Catlin v. Eagle Bank*, 6 Conn. 233; *State v. Bank of Md.*, 6 Gill & J. (Md.) 205. See, however, *Rouse, trustee v. The Merchants' National Bank of Cincinnati*.

A corporation for profit, organized under the laws of this State, after it has become insolvent, and ceased to prosecute the objects for which it was created, cannot, by giving some of its creditors mortgages on the corporate property to secure antecedent debts without other consideration, create valid preferences in their behalf over the other creditors, or over a general assignment

The Supreme Court of the United States has laid down the broad rule that a debtor may prefer one creditor, pay him fully, and exhaust his whole property, leaving nothing for others equally meritorious.¹ This rule has been admitted in England, and under a stringent system of bankrupt laws,² and in States where insolvent laws were in force.³

The debtor may exercise this preference not only by the payment of money, but in the form of an assignment or appropriation of property;⁴ and this preference may be by a direct transfer of property,⁵ or by way of security,⁶ or by operation of law, as by judgment;⁷ or by transferring property in trust to a third person to hold and dispose of for the benefit of creditors.⁸

While this right has generally been admitted to exist where not denied by statute, yet it has often been severely condemned,⁹

thereafter made for the benefit of creditors.

The judgment of the court below establishing the plaintiff's claim, and directing the trustee to allow the same in the administration of the trust, is affirmed. The judgment giving the mortgages priority over the assignment is reversed, and on this branch of the case, judgment for the trustee will be entered. 46 O. S. (June 18th, 1889.)

1. *Clarke v. White*, 12 Pet. (U. S.) 178; *Tompkins v. Wheeler*, 16 Pet. (U. S.) 106.

2. *Hopkins v. Gray*, 7 Mod. 139; *Cock v. Goodfellow*, 10 Mod. 497; *Burrill on Assign.* (3rd ed.) 193.

3. *Wall v. Lakin*, 13 Met. (Mass.) 167; *United States v. Bank of United States*, 8 Rob. (La.) 404.

4. *Cason v. Murray*, 15 Mo. 378; *Young v. Dumas*, 39 Ala. 60; *Wright v. Linn*, 16 Tex. 34; *Cooper v. McClun*, 16 Ill. 435; *Heydock v. Stanhope*, 1 Curt. (U. S.) 474; *Garr v. Hill*, 1 Stock. (N. J.) 210.

5. *Edrington v. Rogers*, 15 Tex. 188; *Powers v. Green*, 14 Ill. 386; *Eastman v. McAlpin*, 1 Kelly 157; *Hickley v. Farmers' Bank*, 5 Gill & J. (Md.) 377; *Bruce's Admrs. v. Smith*, 3 Harr. & J. (Md.) 499; *Hall v. Denison*, 17 Vt. 310; *Wedgery v. Haskell*, 5 Mass. 153; *Nostrand v. Atwood*, 19 Pick. (Mass.) 284; *United States v. King, Wall.* (C. C.) 21.

6. *Stevens v. Bell*, 6 Mass. 339; *Mussey v. Noyes*, 26 Vt. 471; *Curtis v. Leavitt*, 15 N. Y. 197; *Davis v. Anderson*, 1 Kelley 176; *Anderson v. Tydings*, 3 Md. Ch. 167; *Waters v. Cornly*, 3 Harr. (Del.) 117; *Johnson v. Whitwell*, 7 Pick. (Mass.) 71.

7. *Guy v. McIlree*, 26 Pa. St. 92; *Blakey's Appeal*, 7 Pa. St. 449; *Williams v. Brown*, 4 Johns. Ch. (N. Y.) 682; *Wilder v. Winne*, 6 Cow. (N. Y.) 284.

8. *Nostrand v. Atwood*, 19 Pick. (Mass.) 284; *Stevens v. Bell*, 6 Mass. 339.

9. **Condemning Preferences.**—In the case of *Riggs v. Murray*, 2 Johns. Ch. (N. Y.) 577, CHANCELLOR KENT used the following language in reference to it: "As we have no bankrupt system, the right of one insolvent to select one creditor and to exclude another is applied to every case, and the consequences of such partial payments are extensively felt and deeply deplored. Creditors out of view, and who reside abroad or at a distance, are usually neglected. This checks confidence in dealing and hurts the credit and character of the county. These partial assignments are, no doubt, founded, in certain cases, upon meritorious considerations, yet the temptation leads strongly to abuse and to the indulgence of improper motives."

In *Atkinson v. Jordon*, 5 Ohio 293, the following description of its workings was given: "The practice among speculating creditors of shattered and desperate circumstances, of accumulating property upon credit with a desire of securing the means of satisfying the claims of confidential creditors, who contribute in various ways to keep up the credit upon which the property has been procured, and then passing these effects so procured into the hands of trustees to be protected from legal process, and to be exhausted in satisfying these preferred

and is now abridged or denied by statute in many of the States.

b. Statutory Enactments and State Decisions.—The question of preference is now very much controlled by the statutes of the various States, no two of which are perhaps just alike. In the notes, some of the more important decisions are given.¹

claims, leaving all other creditors without a farthing, can hardly be justified on any sound moral or legal principle. Instances are frequent of merchandise procured from an honest trader, on credit, being handed over in bulk to trustees, to secure endorers and other confidential creditors. Equity delights in equality, and it is becoming a grave question whether courts of justice should longer countenance a sinking debtor in preferring one creditor to another in the distribution of his effects." See *Beers v. Lyon*, 21 Conn. 610; *Barker v. Hall*, 13 N. H. 301; *Peck v. Merrill*, 26 Vt. 686, 692; *Pierson v. Manning*, 2 Mich. 446; *Nichols v. McEwen*, 17 N. Y. 22; *Huff v. Roane*, 22 Ark. 184.

An examination of the following authorities will show that the right is decided to exist in nearly all of the States where not removed by statute:

1 Am. Lead. Cases (Harr. & Wad.) 95; 2 Kent's Com. *532; *Marbury v. Brooks*, 7 Wheat. (U. S.) 556; *Clarke v. White*, 12 Pet. (U. S.) 178; *Pearpont v. Graham*, 4 Wash. (U. S.) 232; *Halsey v. Whitney*, 4 Mas. (U. S.) 213; *Lawrence v. Davis*, 3 McLean (U. S.) 177; *Putnam v. Hubbell*, 42 N. Y. 106; *Cameron v. Montgomery*, 13 S. & R. (Pa.) 128; *Ingraham v. Wheeler*, 6 Conn. 277; *Nostrand v. Atwood*, 19 Pick. (Mass.) 281; *Allen v. Gardiner*, 7 R. I. 22; *Mussey v. Noyes*, 26 Vt. 471; *Atkinson v. Jordan*, 5 Ohio 273; *McColgan v. Hopkins*, 17 Md. 395; *McCullough v. Sommerville*, 8 Leigh (Va.) 415; *Gordon v. Cannon*, 18 Gratt. (Va.) 387; *Moffatt v. McDowall*, 1 McCord Ch. (S. Car.) 434; *Alemant v. Russell*, 5 Ired. Eq. (N. Car.) 183; *Bellamy v. Bellamy*, 6 Fla. 62; *Robinson v. Rapelye*, 2 Stew. (Ala.) 86; *Rankin v. Lodor*, 21 Ala. 380; *Layson v. Rowan*, 7 Rob. (N. Y.) 1; *Wright v. Linn*, 16 Tex. 34, 42; *Pearson v. Rockhill*, 4 B. Monr. (Ky.) 296; *Cason v. Murray*, 15 Mo. 378; *Cross v. Bryant*, 2 Scam. (Ill.) 37; *Hollister v. Loud*, 2 Mich. 314; *Huff v. Roane*, 22 Ark. 184; *Lay v. Seago*, 47 Ga. 82.

1. *Alabama*, preferences may be made. *Clayton v. Johnson*, 36 Ala. 406.

California, preference voids assignment. C. Code, 3449, 3469.

Colorado, preference prohibited. *Doggett v. Herman*, 16 Fed. Rep. 812; *Campbell v. Colorado etc. Co.*, 9 Colo. 60; *Campbell v. Colorado etc. Co.* (Colo.), 7 Pac. Rep. 291.

Connecticut, forbidden. Acts 1885, p. 491; *Croswell v. Allis*, 25 Conn. 301; *Robertson v. Todd*, 31 Conn. 555; *Quinebang Bank v. Brewster*, 30 Conn. 559; *Berkeley etc. School v. Jarvis*, 32 Conn. 412; *Utley v. Smith*, 24 Conn. 290.

A merchant, finding that he was in failing circumstances, proposed to his largest and most pressing creditor that he should take back the goods he had sold him, and apply them at cost price to the payment of his account. He made this proposition, not with the intention of going into insolvency, but with the view and hope, which he communicated to the creditor, of reducing his stock and cutting down his expenses, and thus of continuing in business. The creditor, finding that the merchant could not sell the goods as a whole to anyone else, and that he was unable to borrow money to meet the bill, took the goods back. A few days later the merchant's store was closed by attachment, and he was forced into insolvency. Held, that these facts did not warrant the conclusion that the return of the goods was made "with a view to insolvency," and that the transfer was, therefore, not invalidated by Gen. St. Conn., p. 378, § 1, providing that preferences made "with a view to insolvency" shall be void. *Hayden v. Allyn*, 55 Conn. 280.

Dakota, forbidden. C. C., Secs. 2027-2046.

Delaware, forbidden. Laws of Del., vol. 15, ch. 187.

District of Columbia, permitted; common law prevails.

Florida, permitted; common law prevails.

Georgia, permitted, but limited by statute. Code, 1952-3. *McWhorten v. Wright*, 5 Ga. 555.

Idaho, not permitted. Law, §§ 5875-5932.

Illinois, not permitted. *Hurd*, 156.

Indiana, preferences not permitted in

assignment, but may be made by a *bona fide* sale or mortgage. R. S. 2662. *Wilcoxon v. Annesly*, 23 Ind. 285.

Iowa, not permitted in assignment. *Farwell v. Jones*, 63 Iowa 316; *Van Patten v. Burr*, 52 Iowa 518.

Kansas, not permitted. Stat. 384.

Kentucky, not permitted. *White v. Graves*, 7 J. J. Marsh. (Ky.) 523; *Terrell v. Jennings*, 1 Metc. (Ky.) 450; *Applegate v. Murrill*, 4 Metc. (Ky.) 22.

Whenever the debtor contemplates insolvency, and, with the design to prefer one or more creditors, does an act which enables the favored creditor, through the forms of legal proceedings, to obtain a preference he could not obtain without such act of the debtor, it comes within the act of 1856. *King v. Moody*, 79 Ky. 63.

Louisiana, not permitted within a year prior to assignment.

An insolvent sold his property to a creditor for an alleged consideration of \$3,500. The sale was afterwards rescinded, and the insolvent surrendered the property to his creditors. *Held*, that these acts were not sufficient, under Rev. St. La., § 1802, *et seq.*, prohibiting preference of creditors, to debar the insolvent from the benefit of the insolvent laws. *Kolman v. His Creditors*, (La.) 3 So. Rep. 382; *Dwoal v. Acdreay*, 1 La. Ann. 243.

A contract by which an insolvent debtor, in fraud of creditors, transferred to a creditor, in satisfaction of his debt, a number of notes and accounts, and paid the difference in cash, if subject to revocation, must be revoked as a whole; and the payment made, though "of a just debt in money," being part and parcel of the illegal contract, must fall with it. *State Nat. Bank v. Monroe Cotton Press Co.* (La.), 2 So. Rep. 605.

In an action by creditors to revoke a transfer of property, made by an insolvent banker, where the evidence established that part of the money delivered consisted of the identical bank notes and cash which the debtor, in his capacity as treasurer of a corporation, had received from the stockholders thereof, and which he had set aside in a particular drawer by itself as the property of the corporation, *held*, as to such moneys, that they were the property of the corporation which the treasurer was bound to deliver, and the corporation had the right to receive, and that such delivery is not subject to revocation. *State Nat. Bank v. Cotton Press Co.* (La.), 2 So. Rep. 605.

Where the creditor, knowing the insolvency of the debtor, takes from him for an antecedent debt goods on which he has no privilege as vendor, the preference is illegal. *Florence v. Nolan*, 4 La. Ann. 329.

Maine, not permitted.

If a creditor within four months of the commencement of insolvency proceedings against his debtor receives property from such debtor in settlement of an unmatured claim, it will be deemed a fraudulent preference under the insolvent law when the creditor obtained the property through the agency of the debtor's son, whom he employed for that purpose, and who knew the debtor's financial condition. *Mathews v. Riggs* (Me.), 13 Atl. Rep. 48.

The giving of security when a debt is created, if free from fraud, is not against the provisions of the insolvent law. A bill of sale given in good faith which would be binding on the vendor is binding on his assignee. The assignee in insolvency stands in the place of the insolvent, and takes the property subject to all valid claims and liens. Creditors electing to avoid a fraudulent conveyance, take the property as it was when transferred and subject to all liens then existing. An exchange of one set of securities for another of equal value is no preference, and may be made by one, though insolvent. *Hutchinson v. Murchie et al.*, 74 Me. 187.

In order to invalidate security taken for a debt as being a preference under the clause of the insolvent law which makes such provision in case the creditor has reasonable cause to believe the debtor insolvent, it is not enough that the creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency. *King v. Storer et al.*, 75 Me. 62; *Porter v. Bullard*, 26 Me. 448; *Randall v. Lunt*, 51 Me. 246.

Maryland, not permitted. *Manrq v. Gittings*, 1 Har. & J. (Md.) 492; *Harding v. Stevenson*, 6 Har. & J. (Md.), 264.

Under Code Md. art. 48, providing that preferences contained in deeds made by merchants, bankers, etc., being insolvent or in contemplation of insolvency, shall be void, provided the grantor be proceeded against, etc., the making of a deed of assignment for the benefit of creditors, which recites that the debtor is insolvent, and contains preferences, constitutes an act of in-

solvency, and is avoided upon the proper proceedings. Although the preferred creditors reside in another State, and have agreed to take the deed in satisfaction of all pre-existing debts, yet the deed is not such a contract as that its obligation is protected against State insolvency laws, since it must be taken to have been accepted with regard to the *lex loci rei sitæ*, and the original debts remain in force. *Brown v. Smart* (Md.), 14 Atl. Rep. 468.

The honest belief of a person who knows himself to be insolvent at the time of showing preference to creditors that he would be able to go on in business, is no defence to his other creditors' petition to have him declared an insolvent. *Castleberg v. Wheeler* (Md.), 12 Atl. Rep. 3.

Massachusetts Insolvent Laws.—A conveyance by way of preference, made by an insolvent debtor, in contravention of the provisions of the insolvent law of *Massachusetts*, while the United States bankrupt act of 1867 was in force, is a sufficient cause for instituting proceedings in insolvency against the debtor after the repeal of the bankrupt act. A petition for a warrant to seize the estate of an insolvent debtor, under the Gen. Sts., ch. 118, § 103, which alleges that he has made a mortgage of his personal property to secure the payment of a pre-existing debt to the mortgagee, with intent to secure to the latter a preference, and to defraud his creditors, the debtor being at the time insolvent and having reasonable cause to believe himself insolvent, need not allege that the mortgagee knew or had reasonable cause to believe that the debtor was insolvent. *Lothrop v. Highland Foundry Co.*, 128 Mass. 120; *Abbott v. Shepherd*, 142 Mass. 17.

A guardian who had misappropriated money belonging to his ward, being insolvent, within six months before the filing of a petition in insolvency against him, and with a view to give a preference to his ward, deposited his own money in a savings bank in his name as guardian of the ward. *Held*, that his assignee in insolvency could maintain a bill in equity to recover the amount so deposited, although the ward was ignorant of the misappropriation and of the fact of the guardian's insolvency. *Bush et al. v. Moore et al.*, 133 Mass. 108; *Crowninshield v. Ketrledge*, 7 Met. (Mass.) 520; *Penniman v. Cole*, 8 Met. (Mass.) 490; *Ex parte Jordon*, 9 Met. (Mass.) 292; *Stevens v.*

Blanchard, 3 Cush. (Mass.) 169; *Holbrook v. Jackson*, 7 Cush. (Mass.) 136.

An agreement by a creditor who has received an unlawful preference to surrender the property and share *pro rata*, does not purge the illegality. *Blodgett v. Hildredth*, 11 Cush. 311.

Michigan.—No preference permitted. *How. St. Ch.* 303.

Act 193 of 1883, the purpose of which was to prevent preferences among creditors and to distribute the debtor's property equally, is void. It is inoperative in omitting to provide for notice to parties concerned; for any record of the proceedings and review thereof; and for any means of giving effect to its provisions. It is unconstitutional as violating (1) the limitations on judicial power, since it gives a judge at chambers power which only a court should exercise, in the final disposition of the debtor's property; (2) the provision which secures the right of trial by jury, since it looks to a summary disposition of cases which necessarily turn on questions of fact; (3) the prohibition against taking property without "due process of law;" (4) the prohibition against imprisonment for debt, in that it allows a circuit judge to issue the writ of *ne exeat* at discretion; (5) the prohibition against impairing the obligation of contracts, since it deprives creditors of their remedies. It also attempts to exercise the questionable right of legislating upon the claims of foreign creditors, and to place them on a better footing than domestic ones; and it is as capable of being used to defraud as to protect creditors. *Risser et al. v. Hoyt et al.*, 53 Mich. 185.

See *Cross v. Cross*, 55 Mich. 280; *Heinemann v. Hart*, 55 Mich. 64; *Kellogg v. Root*, 23 Fed. Rep. 525.

Minnesota, no preferences.

A petition under Laws 1881, ch. 148, § 2, against an insolvent debtor, on the ground that he has confessed judgment in favor of one of his creditors, need not allege that the creditor thereby obtained a preference. *In re Pauline Graeff*, 30 Minn. 476.

Minnesota insolvent law (Laws 1881, ch. 148), does not render preferential mortgages fraudulent or void as respects the mortgagor's creditors, except in proceedings under it. *Berry v. O'Connor*, 33 Minn. 29.

The insolvent law of 1881 is not unconstitutional because of the manner in which the claims of creditors against the insolvent estate are to be estab-

lished. The determination of the receiver respecting such claims is not conclusive, and one aggrieved thereby may have a judicial determination in the district court. A conveyance by an insolvent debtor, preferring creditors, may be avoided by subsequent insolvency proceedings instituted by creditors against the debtor, under section 2 of the act. In such case the receiver may maintain an action to have such conveyance adjudged void. *Weston, Receiver, v. Loyhed*, 30 Minn. 221; *In re Lindeke*, 34 Minn. 282; *Leary v. Graeff*, 30 Minn. 476.

A provision in an insolvent law providing that a preferential conveyance made in fraud of the provisions of the statute shall be void, is to be construed as meaning simply that it is voidable only in favor of proceedings under and in aid of the law. A creditor who is not a party to the insolvency proceedings, but is claiming the property by virtue of an attachment or judgment against the insolvent debtor, can claim no benefit from this provision. *Smith v. Brainerd*, 37 Minn. 479.

A conveyance of property or a payment may constitute a preference, although the motive for making it be merely to secure an extension of credit, so as to be enabled to go on in business. *Corliss v. Jewett*, 36 Minn. 364.

Mississippi, common law exists.

Missouri, preferences invalidate assignment. 1 Rev. St. 354; *Freund v. Yeagerman*, 26 Fed. Rep. 812; *Clapp v. Northmeyer*, 25 Fed. Rep. 71; *Kerbs v. Ewing*, 22 Fed. Rep. 693.

Montana, common law.

Nebraska, no preferences. Insolvent law. *Nelson v. Gary*, 15 Neb. 531.

Nevada, insolvent law.

New Hampshire, insolvent law.

An insolvent debtor may give a preference to one creditor, by paying his debt in full, to the exclusion of all the rest of the creditors, provided it be done in good faith. *Buffan v. Green*, 5 N. H. 71.

New Jersey, preferences not allowed, except as to mortgage and judgment creditors. Rev. Sts., p. 36-37.

It is the inherent right of a debtor to prefer creditors in the entire absence of legal or actual fraud, though not in and by an assignment. *Owen v. Arvis*, 26 N. J. L. 23; *Garretson v. Brown*, 26 N. J. L. 425.

New Mexico, common law.

New York, assignments are statutory or under the common law. Under the

former there can be no preference; under the latter there may be. Code. 2149-2187.

An assignment by a debtor is conclusive evidence of his insolvency at the time, and if, by such assignment, a preference is given to one or many of his creditors, it is a bar to his discharge. *Morewood v. Hollister*, 6 N. Y. 309.

Where an insolvent in contemplation of obtaining a discharge, confessed a judgment on which his property was sold, his discharge was set aside as fraudulent in law, though the judgment was confessed to a trustee for the benefit of his creditors without preference. *Matter of Hurst*, 7 Wend. (N. Y.) 239.

The assignment of a chose in action will prevent its passing by a general assignment to the assignee under the insolvent and assignment laws, though the debtor and subsequent assignees have no notice. *Muir v. Schenck*, 3 Hill (N. Y.) 228.

North Carolina, preferences allowed.

Ohio, preferences cannot be given in deed of assignment, but may be given before assignment by sale or mortgage. *Bagaley v. Waters*, 7 Ohio St. 359; *Floyd v. Smith*, 9 Ohio St. 546. See *Rouse v. Merchant Nat. Bank*, 46 O. S. (June 18th, 1889), as to corporations.

Oregon, preferences not permitted.

Pennsylvania, preferences allowed.

Rhode Island, preferences forbidden.

South Carolina, preferences not permitted.

A preference, to be under and within the means of the prison bounds act, must be fraudulent. *Robinson v. Amy*, 1 Rich. (S. Car.) 289; *McKenzie v. Garzizer*, 1 Rich. (S. Car.) 234.

Tennessee, no preferences allowed.

Flash v. Wilkerson, 22 Fed. Rep. 689; *Flash v. Wilkerson*, 20 Fed. Rep. 257.

Texas, preferences allowed.

A creditor took title to more of the property of an insolvent debtor than was necessary to satisfy his claim, and paid him for the excess. *Held*, that though a failing debtor in Texas may prefer a creditor, he cannot transfer his property to such creditor, receiving a partial money consideration therefor, and by so doing cut off the rights of other creditors. *Black v. Vaughan* (Tex.), 7 S. W. Rep. 604.

Utah, common law prevails.

Vermont, no preferences allowed.

Mortgages void under a State insolvency law are not freed from its operation because owned by a national bank.

Where it is declared that a preference is a fraud in law if made within the time limited, it is not fraudulent if made before the time, and mortgages and deeds of trust executed prior thereto and recorded within the time limited are valid.¹

18. Distribution of Assets—*a. To Whom Payable.*—Distribution to creditors comprises the whole object and aim of insolvency proceedings.² All creditors who have properly presented their claims are entitled to share in the distribution.³ But where an assignment is upon express terms, creditors, in order to participate, must comply with the terms;⁴ and where preferences are made and permitted, preferred creditors must be first paid.⁵ Only

Witters *v.* Sowles, 32 Fed. Rep. 758.

A bank is affected with its cashier's knowledge of his insolvency, so that a preferential transfer to it by him within four months of the filing against him of a petition of insolvency is void, under R. L. Vt. 1860. Witters *v.* Sowles, 32 Fed. Rep. 762*.

Securities deposited by a cashier with his bank in lieu of an equal amount of his own paper, vest at once in the bank, and, if so deposited more than four months before a petition filed in insolvency against the cashier, are not within R. L. Vt., § 1860. Witters *v.* Sowles, 32 Fed. Rep. 762*.

R. L. Vt., § 1860, providing that transfers made by the debtor within four months of the filing of a petition in insolvency contemplates immediate action on such petition, and a petition filed three months after such transfer by one creditor, which is acted on two months later at the instance of another, will not avoid the transfer. Witters *v.* Sowles, 32 Fed. Rep. 758; Witters *v.* Sowles, 33 Fed. Rep. 540.

Under R. L. Vt., § 1860, declaring void all transfers made by the debtor within four months of the filing of the petition in insolvency; and section 1966, providing that chattel mortgages shall not be valid against any person except the mortgagor, his executors and administrators, unless the property changes hands, or the mortgage is recorded,—a chattel mortgage executed more than four months, but recorded only ten days, before the filing of a petition in insolvency against the mortgagor, is valid. Gilbert *v.* Vail (Vt.), 14 Atl. Rep. 542.

Stevens *v.* Gosselin, 58 Vt. 38; Clay *v.* Towle, 78 Me. 86.

Virginia, preferences allowed.

Washington Territory, not allowed.

Wisconsin, not allowed. Winner *v.* Hoyt, 66 Wis. 227; Bachhaus *v.* Sleeper,

66 Wis. 68; Batten *v.* Smith, 62 Wis. 92.

Sec. 2, ch. 349, Laws of 1883 (providing that every sale of property made by an insolvent debtor "within sixty days prior to the making of any such assignment [for the benefit of creditors], and in contemplation thereof or of insolvency, shall be void and of no effect"), does not render any sale void unless an assignment is actually made within sixty days thereafter, or, perhaps, unless the sale was made in contemplation of an application by the vendor for the benefits of the insolvent act. Whether in the latter case the sale would be void is not determined. Anstedt *v.* Bentley, 61 Wis. 629.

The mere fact that a husband is insolvent will not preclude him from exercising his legal right of repaying his wife, in preference to his other creditors, money which he or his firm borrowed of her. Brickley *v.* Walker, 68 Wis. 563.

Wyoming, not allowed.

1. Gilbert *v.* Vail (Vt. 1888), 14 Atl. Rep. 544; Bump on Bankruptcy (10th ed.) 796; Jones on Chattel Mort., § 364.

2. Burrill on Assign. (3rd ed.) 586.

3. Burrill on Assign. (3rd ed.) 587.

The rule of law that the personal estate is the primary fund for the payment of debts applies as well to the distribution of estates of insolvents as to the distribution of the estates of decedents. But the rule is applicable only to the distribution of an actual fund, and not a fictitious one. Appeal of Scott (Pa.), 8 Atl. Rep. 402.

4. Lea's Appeal, 9 Pa. St. 504; Jewett *v.* Woodward, 1 Edw. Ch. (N. Y.) 195.

It should be remembered that such conditions very often invalidate the assignment. See *infra*, VOID ASSIGNMENTS.

5. Burrill on Assign. (3rd ed.) 587-589.

those who were creditors at the time the assignment was made can participate.¹

Where there is a difficulty in determining the mode and order of payment, the court may be applied to for instructions.²

A creditor for usurious interest cannot participate.³

b. How Paid.—The distribution is made either in one payment, or in successive payments or dividends.⁴ Interest should be allowed on all debts.⁵

c. Notice of Payment Should be Given.—Independently of any statute provision, notice should always be given of a distribution.⁶

d. Order of Payment—(1) *Claims of United States.*—The United States have the exclusive privilege of being entitled to priority of payment over other creditors in all cases of the insolvency or bankruptcy of their debtor.⁷

1. A debt subsequently originating is not entitled to payment out of the trust estate. *Rome etc. Bank v. Eames*, 4 Abb. Dec. (N. Y.) 83.

And where a note was made the day after the assignment was executed and delivered, it was held that it could not be included in the assignment, nor could the assignor by antedating the note, vary the effect of the instrument. *Sheldon v. Smith*, 28 Barb. (N. Y.) 594; *Power v. Alger*, 13 Abb. Pr. (N. Y.) 284.

A judgment recovered after his assignment on a previous cause of action is valid, and the judgment creditor is entitled to participate in the distribution. *Pittsburg etc. R. Co.'s Appeal*, 3 Grant (Pa.) 68.

2. *Pratt v. Adams*, 7 Paige (N. Y.) 615.

Such application may be made either by motion or bill in equity. *Codwise v. Gelston*, 10 Johns. (N. Y.) 507, 521.

All parties should have notice of the application. *Anon v. Gelp'ke*, 5 Hun (N. Y.) 245; *Stone v. Miller*, 62 Barb. (N. Y.) 431; *People v. Soper*, 7 N. Y. 431; *Wheeler v. Perry*, 18 N. H. 307; *Dimmock v. Bixby*, 20 Pick. (Mass.) 368.

3. *Pratt v. Adams*, 7 Paige (N. Y.) 639.

To What Debts Applied.—An assignment made under the provisions of the assignment or insolvent law only provides for the payments of such debts as could be recovered against the bankrupt or insolvent himself, either at law or in equity. It therefore follows as a necessary consequence, that every creditor who comes in to prove a debt un-

der such an assignment must be prepared to show a claim which was valid and recoverable against the person whose property has been assigned. But in the case of a voluntary assignment, where the assignor creates his own trusts, a creditor who comes in to claim a share of the fund under it must be content to take such share of it as the assignor intended to give him, and cannot claim that which was intended to be given to the assignees in trust for others. A creditor of the assignor, whether provided for by the assignment or not, who wishes to repudiate the trust of the assignment on the grounds that they are illegal and a fraud upon the honest creditors, must apply to set aside the assignment as fraudulent and void against him as a creditor, instead of coming in under the assignment itself as a preferred creditor or otherwise. *Pratt v. Adams*, 7 Paige (N. Y.) 615.

4. *Burrill on Assign.* (3rd ed.) 426.

5. *Matter of Murray*, 6 Paige (N. Y.) 204.

6. *Burrill on Assign.* (3rd ed.) 599; *U. S. v. U. S. Bank*, 8 Rob. (La.) 262.

Notice is required by statute in many States.

7. *Burrill on Assign.* (3rd ed.) 600; *U. S. Statutes*, 1797-1799; *U. S. Statutes at Large*, 515; *U. S. Rev. Statutes*, § 3466; *United States v. Fisher*, 2 Cranch (U. S.) 358.

Reason of Rule.—The right of priority of payment of debts due the government is a prerogative of the crown, well known to the common law. It is founded not so much upon any personal advantage to the sovereign as upon

And this priority has been held to extend to debts due after the assignment as well as those due before.¹ But it has been held that this priority of the United States only extends to assignments that are voluntary, and not to involuntary or legal insolvencies.²

To entitle the United States to priority, the assignment must have been a general one,³ as distinguished from a partial one.⁴

This right of priority of the United States can be avoided by no act of the debtor.⁵ Incorporations are included as well as private individuals.⁶

It only attaches on the residue of the fund in the assignee's hands after payment of expenses incurred in its collection.⁷ A surety who has paid money to the government has the same right of priority.⁸ Local laws of a State cannot create a priority in favor of other creditors which will supersede the claim of the United States.⁹

(2) *Taxes and Debts Due State*.—Taxes assessed upon the property assigned, and debts due the State, usually occupy the next place in the order of priority.¹⁰

motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative may be clearly traced in these statutes, and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation; like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms. U. S. v. Bank of N. Car., 6 Pet. (U. S.) 34.

1. U. S. v. Bank of N. Car., 6 Pet. (U. S.) 29.

2. Theluson v. Smith, Pet. (C. C.) 195.

3. U. S. v. Bank U. S., 8 Rob. (La.) 262; U. S. v. McLellan, 3 Sumn. (U. S.) 345; Conrad v. Atl. Ins. Co., 1 Pet. (U. S.) 386; U. S. v. Hove, 3 Cranch (U. S.) 73; U. S. v. Hunter, 5 Mas. (U. S.) 229; U. S. v. Clark, 1 Paine (U. S.) 629; U. S. v. Howland, 4 Wheat. (U. S.) 108; U. S. v. Monroe, 5 Mas. (U. S.) 572.

4. Burrill on Assign. (3rd ed.) 604, 190.

5. U. S. v. Mott, 1 Paine (U. S.) 188.

6. Beaston v. Farmers' Bank of Del., 12 Pet. (U. S.) 102.

7. U. S. v. Hunter, 5 Mas. (U. S.) 229.

8. Hunter v. U. S., 5 Pet. (U. S.) 173; U. S. v. Hunter, 5 Mas. (U. S.) 229.

9. Field v. U. S., 9 Pet. (U. S.) 182.

Section 3466 of the Revised Statutes, ante, p. 447, which, in certain cases therein mentioned, gives to the United States priority of payment of debts due to it, does not apply to its demands against an insolvent national bank. Cook Co. Nat. Bank v. United States, 107 U. S. 445.

10. Burrill on Assign. (3rd ed.) 607.

This is usually regulated by statute.

All taxes of every description assessed against the assignor, upon any personal property held by him before his assignment, shall be paid by the assignee or trustee out of the proceeds of the property assigned, in preference to any other claims against the assignor. R. Stat. Ohio, § 6355.

A claim against the estate in insolvency of the collector of taxes of a town, for taxes collected and unaccounted for by him, is one entitled to priority in the order for a dividend, as a "debt due to" the town, under the Pub. Sts., ch. 157, § 104, cl. 1. Bent v. Hubbardston, 138 Mass. 99.

Stat. 1879, ch. 154, § 15, requiring "city taxes to be paid in full," is applicable to an insolvent's estate, in which no dividend had been made until after that statute took effect, although proceedings in insolvency were commenced

(3) *Rent*.—In many cases the landlord of the assignor's premises is entitled to a preference over other creditors, arising from his right to distrain the goods assigned.¹

(4) *Labor, etc.*—It is now provided by statute in a great many of the States that certain claims for labor shall be entitled to a preference.²

(5) *Secured Creditors*.—In some courts it has been held that a secured creditor is entitled to receive a dividend on the entire claim on demand for which he is liable as surety to an amount sufficient to pay him in full;³ others have held that he can only

prior to the enactment of the statute. *Belfast v. Fogler*, 71 Me. 403.

1. *Burrill on Assign.* (3rd ed.) 607; see *Morris v. Parker*, 1 Ashm. (Pa.) 187.

Rent accruing after the tenant has made an assignment for creditors under the insolvency law of the State is not provable as a claim or debt against the estate. *Wilder v. Estate of Bristol*, 37 Minn. 248.

The court of insolvency may order the assignee of an insolvent estate to pay out of the assets a reasonable sum for the use of leasehold property, by the messenger and assignee, for the storage, sale, and delivery of goods of the insolvent estate, until the lease is disclaimed by the assignee in the manner provided in the Pub. Sts., ch. 157, § 26. *Abbott v. Stearns et al.*, 139 Mass. 168.

An action for use and occupation will not lie against the assignee in insolvency of a debtor who, at the time of filing of his petition, was a tenant at will of certain premises, merely upon proof that the goods of the insolvent were allowed to remain on the premises for about two months thereafter, and that during said time the assignee entered with workmen, who for several days were engaged in removing the goods. *Wales v. Chase et al.*, 139 Mass. 538.

2. See statute of different States.

The *Ohio* statute is as follows: That every person who shall have performed any labor as an operative in the service of the assignor shall be entitled to receive out of the trust fund, before the payment of general creditors the full amount of the wages due to such person for such labor, not exceeding three hundred dollars, performed within twelve months preceding the assignment. R. S., § 6355.

Certain citizens made subscriptions to the stock of a railroad company

whose road was in process of construction. These subscribers were interested as property owners in the completion of the road. The subscriptions were to be made to the company and by the company turned over to these subscribers. The latter entered into a contract for grading, tieing and bridging a certain portion of the road at a designated cost, the subscriptions to be collected by those engaged in this work, and if more than sufficient to pay for the work, the surplus was to be returned to the company. It was further agreed that the company should give either stock or transportation notes, in payment for materials furnished and work done, to each individual subscriber in proportion to his subscription. Of the subscriptions \$6,000 were thus collected and work done under the contract to the amount of \$9,900. Further work was suspended by reason of the insolvency of the company and a sheriff's sale of its property. In the distribution of the proceeds of said sale the parties who had done the work under the above contract claimed to participate therein as creditors and contractors and to be paid out of the proceeds of the sale. *Held*, that their claims were properly rejected.

One who contracts to furnish five thousand ties to a railroad is not a contractor and preferred creditor under the joint resolution of 1843 of the General Assembly.

Sub-contractors and laborers employed by sub-contractors are not within the protection of the resolution of 1843. The act of April 4th, 1862, does not enlarge the class of persons protected by the resolution of 1843; it merely aids in the remedy. *Hart's Appeal*, 96 Pa. St. 355.

Richardson v. Thurber, 104 N. Y. 606; *First Nat. Bank v. Baker*, 68 Wis. 442.

3. *Keim's Appeal*, 27 Pa. St. (3 cases)

receive a dividend on the balance remaining unpaid after exhausting the secured property.¹ If some creditors have other security, and their dividends with their security will more than pay their debts, the assignee must redeem the security for the benefit of the other creditors.²

42; *Morris v. Alwine*, 22 Pa. St. 441.

In the latter case a creditor had a bond for a large amount, secured by mortgage, and the dividend allowed to creditors from the avails of personal property was 8.26%, of which the creditor's portion (\$1,650) of the whole debt (\$20,000) was set apart for future disposition, and he afterwards received \$17,938 from his mortgage, it was held that he was entitled to receive the dividend on the whole debt in addition to what he received on the mortgage. *Patten's Appeal*, 45 Pa. St. 151; *Miller's App.*, 35 Pa. St. 481.

1. *Midgely v. Slocomb*, 2 Abb. Pr. (N. Y.) N. S. 275; *Midgely v. Slocomb*, 32 How. Pr. (N. Y.) 423; *Wurtz v. Hart*, 13 Iowa 515; *Dickson v. Chorn*, 6 Iowa 19.

2. *Allen v. Danielson*, 15 R. I. 480.

Mortgages of a decedent were not invalidated by the insolvency of his estate; but under §§ 108 and 109, 2 R. S. 1876, p. 534, were preferred debts as to the personality. *Evans v. Pence*, 78 Ind. 439.

As to payment of preferred creditors having other security, see *Besley v. Lawrence*, 11 Paige (N. Y.) 581; *Strong v. Skinner*, 4 Barb. (N. Y.) 546.

As to payment of debts due the assignee himself. See *Gibbs v. Cunningham*, 4 Md. Ch. 322; *French v. Townes*, 10 Gratt. (Va.) 513.

When a note is allowed by the commissioners against the insolvent estate of a deceased surety, and afterwards a dividend is paid on the note by the trustees of the insolvent principals, who have assigned, in the final distribution of such surety's estate by the probate court, the owner of the note is entitled to a dividend only on the balance, and not on the amount so allowed. *Lowell et al. v. French*, 54 Vt. 193.

After execution of the mortgage in suit, and prior to the commencement of the action, the mortgagor was adjudged insolvent, and a stay of proceedings ordered. No judgment herein was asked for any deficiency after sale of the mortgaged property, but the same was waived.

Held, the order in the matter of the

insolvency staying proceedings did not prevent plaintiff from foreclosing his mortgage lien. *Montgomery v. Merrill et al.*, 62 Cal. 385.

Where the insolvent law provides that a secured creditor may release and deliver up to the assignee the property held as security, and be admitted as a creditor for the whole of his debt, the proof of the whole claim, without a release, would not of itself operate to discharge or release the security. Only the assignee could avail himself of the right which this provision of the act was intended to secure for the benefit of the estate. A mortgagee who has proved his debt against the estate of the mortgagor without discharging his mortgage, is not thereby estopped to claim under it against a subsequent attaching creditor who has not proved his debt. *Smith v. Brainard*, 37 Minn. 479.

The Massachusetts insolvent law provides that a creditor of an insolvent debtor, who is secured by a pledge of the debtor's property, may have the same sold, apply the proceeds towards paying the debt, and prove up the residue before the assignee; or else he may deliver up and release the pledge, and prove the whole debt before the assignee, and, "if any property pledged is not released and delivered up, the creditor shall not be allowed to prove any part of his debt" (Pub. St., ch. 157, § 28). *Held* that, when a creditor of an insolvent debtor, who holds security which comes within the terms of this statute inadvertently, by mistake either of law or fact, proves his whole debt, without disclosing his security, and before he has derived any advantage, or the creditors have suffered any detriment, from his acts, takes proper measures to waive and abandon his proof, and to pursue his rights as a secured creditor, according to law, he does not thereby waive or forfeit his security, and the unsecured creditors do not thereby acquire an equitable right to it, which can be enforced by the assignee. *Nichols v. Smith*, 143 Mass. 455.

Claim by Second Mortgagee.—Where

real estate of an insolvent, subject to two power of sale mortgages, has been sold under the power contained in the first mortgage, and the holder of the first mortgage has accounted with the holder of the second mortgage, and delivered to her the balance after settlement of his own claim, the holder of the second mortgage is entitled to prove the balance of her claim against the insolvent estate. Pub. St. Mass., ch. 157, § 28, providing a method for proof of claims by creditors having "a mortgage or pledge of real or personal estate of the debtor, or a lien thereon," does not apply to such a case. *Washburn v. Tisdale*, 143 Mass. 376.

A and B each held promissory notes signed by C and endorsed by D for C's accommodation. In pursuance of an arrangement agreed to by all the parties, C executed to D mortgages of real estate, conditioned to save D harmless from all loss by reason of his signing or endorsing any notes for or on account of C. C went into insolvency, and D, although not in insolvency, became in fact insolvent before the proceedings in insolvency were begun by C. A offered the notes held by him for proof at the first meeting of the creditors of C, and they were allowed in full, against the objection of unsecured creditors; and A voted on the proof and controlled the election of the assignee. B did not offer his notes for proof, but petitioned the court of insolvency to have the property conveyed by the mortgages sold, and the proceeds of the sale applied to the payment of his notes; and that he might be admitted as a creditor for the balance of his debt. All parties consented that the petition might be granted. The mortgaged premises were sold pursuant to a decree of the court, and the proceeds of the sale were ordered to be applied in part payment of B's notes, and he was admitted to prove for the balance of his debt. A thereupon filed a bill in equity under the Pub. Sts., ch. 157, § 15, praying that the decree of the court of insolvency might be set aside, and that part of the proceeds of said sale might be ordered to be paid to A; or, if he was not entitled to such part, that it might be paid over to the assignee for the benefit of the creditors generally. *Held*, that the decree of the court of insolvency should be so modified that A and B should share in said proceeds proportionately to the amount of the notes held by

each; and that each should prove against the general assets for the residue of the notes. *Franklin Co. Nat. Bank v. First Nat. Bank of Greenfield et al.*, 138 Mass. 515.

C borrowed of Mrs. P \$6,000, and gave his promissory note to her for that amount, embracing in it the stipulation to pay all attorneys' fees expended in collecting it, and depositing with her as collateral security \$8,000 in certificates of stock in a certain bank. C made default in the payment of his note, and died; and P recovered judgment in the circuit court against the bank on the certificates of stock in an amount exceeding the sum due on the note. Upon appeal to this court it was *held* that she was only entitled to recover the amount due for loaned money, there being no proof as to the attorneys' fee. P entered a *remittitur* of all above the amount due for the loan, and judgment was rendered accordingly. During the pendency of that suit C's estate was placed in the hands of a receiver, and was being administered in the chancery court as an insolvent estate; and P. probated against it her claim for \$6,000. A dividend of 20 per cent was decreed upon all probated claims, thereby awarding a *pro rata* of \$1,200 to P; but the receiver refused to pay anything to P until the termination of litigation between her and the bank. After that litigation terminated, she obtained from the chancery court an order directing the receiver to pay her so much of the dividend theretofore decreed to her as was necessary to liquidate her attorneys' fees in her suit against the bank, which she proved to be \$1,050. From that order the other creditors of C appealed. *Held*, that the order appealed from was erroneous. P was entitled to a *pro rata* on the amount of her attorneys' fees, that being the extent of her claim against C's estate after her *remittitur*, and to no more; and her rights in this respect were not enlarged by the existence of the former decree awarding her a dividend of \$1,200, such decrees being interlocutory and subject to the control of the court till the winding up of the estate. *Meacham et al. v. Pinson*, 60 Miss. 217.

A savings bank, which holds two promissory notes made by the same person, the payment of one of which is secured by a mortgage of land, and of the other not, is not entitled to apply the surplus proceeds of a sale of the

19. Discharge—*a. Definition.*—It is the act by which a person in confinement under some legal process, or held on an accusation of some crime or misdemeanor, is set at liberty; the writing containing the order for his being so set at liberty is also called a discharge.¹

b. To Whom and When Granted.—It does not apply to the case of a person imprisoned under the bastardy act.² An arrest was not generally necessary to entitle a person to a discharge.³ The failure of a creditor to file a proper schedule of the debts and of his property will debar him from a discharge until he does comply with such arrangements.⁴ The giving of a security for a pre-existing debt may invalidate the discharge, although the debtor agreed to give such security when the debt was contracted, it having been in fact given not until afterward.⁵

land, under a power in the mortgage, to the payment of the unsecured note, if the sale is made after the publication of a petition in insolvency against the maker of the notes, who is afterwards adjudged an insolvent, although the first publication of the time and place of the sale under the mortgage is made, and read by the mortgagor, before the publication of the petition in insolvency. *Tallman v. New Bedford etc. Bank*, 138 Mass. 330.

1. *Bouv. Law Dict.*

In this country, where imprisonment for debt has generally been abolished by a discharge, is usually meant that by virtue of some act of an insolvent debtor in compliance with a statute of bankruptcy or insolvency, he is absolved from all future liability for his then existing debts. This may be said to be one of the distinguishing features of an insolvent or bankrupt law.

2. *Lower v. Wallick*, 25 Ind. 68.

Nor does it exempt one from the liability to arrest for failing to pay sums afterward falling due for the support of a bastard. *Comm. v. Miller*, 12 Phila. (Pa.) 569.

3. *Trail v. Snouffer*, 6 Md. 308.

4. *Teackle v. Crosby*, 14 Md. 14.

But the omission to do so must be fraudulent and wilful. *Whiton v. Nichols*, 3 Allen (Mass.) 583.

5. *Blodgett v. Hildreth*, 11 Cush. (Mass.) 311.

Miscellaneous.—To entitle a merchant or trader to a discharge in insolvency, he must, under Rev. St. Me., ch. 70, § 46, have kept for the period material to the enquiry "a cash-book and other proper books of account," and this requirement is absolute, and

the motive of the insolvent in not keeping such books is entirely immaterial. *Jones v. First Nat. Bank*, 79 Me. 191.

False swearing by the insolvent, in material matters, before the insolvency court, deprives him of a discharge, under Rev. St. Me., ch. 70, § 46; and if he swears falsely in such matters, the presumption of fraudulent intent on his part is conclusive.

The insolvent act of California, § 49, which provides that "no discharge shall be granted, or, if granted, shall be valid, if the debtor, or any other person on his account, has influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation," does not require that the pecuniary obligation shall be in writing, or one that can be enforced in the courts, and a mere verbal promise is sufficient. *Estudillo v. Meyerstein*, 72 Cal. 317.

One petitioning for his discharge as an insolvent debtor filed a schedule showing an indebtedness of about \$49,000, and assets consisting only of personalty, such as household goods, upon which there was a mortgage. It was shown that a homestead once owned by the debtor had been conveyed to his wife; that the latter had given a mortgage upon it to secure a loan to the husband; and that the value of the homestead exceeded the exemption by about \$650. *Held*, that it could not be said, as a matter of law, that there was any intent to defraud creditors, as Rev. St. Wis., § 2323, relating to fraudulent conveyances, provides that the question of fraudulent intent shall be deemed one of fact. *Mabbett v. Davis* (Wis.), 41 N. W. Rep. 531.

Under the Pub. Sts., ch. 157, § 93, providing that a discharge shall not be granted, or valid, if the insolvent debtor, "being a merchant or tradesman, has not kept proper books of account," it is a question of fact in each case whether the debtor has kept such books as will enable a competent person examining them to ascertain the true state of his affairs; and it cannot be ruled, as matter of law, that the failure to keep a cash book invalidates a discharge. *Wilkins v. Jenkins*, 136 Mass. 38.

Where, in an action on a promissory note, a discharge in insolvency, under the *California* Insolvent act of 1852, was pleaded, and the court, after reading to the jury certain sections of that act, and of the amending act of 1876, relating, not only to fraud and misconduct on the part of the insolvent as avoiding the discharge, but also to the form of the proceedings, instructed them that any failure to comply with said sections would avoid the discharge, *held* error, as not only submitting the question of fraud or misconduct, but also of literal compliance with the formal requirements of the statute, which was a matter of record to be passed on by the court. *Dean v. Grimes*, 72 Cal. 442.

If such instructions mean that the jury should scrutinize the petition, schedule, and affidavit in the insolvency proceedings for any false statement of the insolvent, they are erroneous as omitting to charge on the fraud necessary to avoid the proceedings. *Id.*

An instruction that the statute being novel and extraordinary, and in derogation of common law, everything bearing on the question of jurisdiction must appear affirmatively, *held* error, as the jurisdiction of a county court is a question for the court; and, if the record shows want of jurisdiction, it should not have been admitted in evidence. *Id.*

Under section 8 of the *California* Insolvent act of 1876, forbidding preferences, and declaring void all assignments of parts of the insolvent's estate within two months of the filing of his petition, an instruction that a failure to comply with said section would avoid the insolvent's discharge is erroneous, since the only penalty prescribed by the statute for attempting to prefer a creditor within the two months is a recovery of the property by the assignee. To constitute a fraud which will avoid the discharge, the transfer must have

been made out of the usual course of business. *Id.*

In such case the sole question for the jury is whether the defendant, having had the benefit of the insolvent act, "had concealed any part of his property or estate, or given (knowingly) a false schedule, or committed any fraud under the provisions of the act" of 1852, and its amendments. *Id.*

In *Maine* the following law applies: At any time after four months, debtor may apply for his discharge. The discharge, when granted, releases the insolvent from all debts provable against his estate, except those created by the fraud or embezzlement of the insolvent or by his defalcation as a public officer or while acting in any fiduciary character. (§§ 47, 49.) No discharge is granted, or, if granted, is valid: (1) If the debtor has sworn falsely; (2) if he has concealed any property, books or papers; (3) if within four months, having reason to believe himself insolvent, he has preferred any creditor, or has caused his effects to be attached; (4) if he has destroyed, altered, mutilated or falsified any of his books, documents, papers, writings or securities, or has removed or allowed to be removed, any property, with intent to defraud his creditors; (5) if he has made any fraudulent payment, gift, transfer or assignment of any part of his property; (6) if, having knowledge that any person has proved a false debt against his estate, he has not disclosed the same to the assignee within thirty days after such knowledge; or, (7) if, being a merchant or trader, he has not kept proper books of account. The discharge is null and void, if the debtor, or any one in his behalf, has procured the assent of any creditor thereto by any pecuniary consideration or promise of future preference. (§ 46.) No discharge releases any person liable for same debt with the insolvent, either as partner, joint contractor, endorser, surety or otherwise. (§ 48.) Any creditor desiring to test the validity of the discharge on the ground that it was fraudulently obtained, may, within two years after the date thereof, apply to the court which granted it to annul the same. (§ 49.) No claim purchased after commencement of proceedings can be set off against a claim due the estate prior to such purchase. (§ 50.) No creditor can commence or maintain any suit against the insolvent until after a discharge is refused, nor is

c. When Valid and a Good Defence.—A discharge in bankruptcy is a good defence to a creditor's bill founded on a judgment obtained before the discharge,¹ or to a judgment rendered on a contract induced by fraud;² or to a judgment on a debt which itself as a simple debt would not be barred thereby;³ or to a judgment on a contract obtained against the bankrupt after the commencement of the bankruptcy proceedings.⁴ It also releases the bankrupt from a contingent liability, such as that of a surety on a bond.⁵

All creditors who assent to a discharge by participating in the proceedings are barred.⁶

Property acquired "by descent, gift, devise bequest, or in the course of distribution," is not liable for debts contracted prior to the discharge.⁷ It is a bar to the recovery of damages for the conversion of goods, though such damages are alleged by way of aggravation in an action of tort for breaking and entering plaintiff's close.⁸ It operates as well upon debts arising *ex delicto* as upon those arising *ex contractu*.⁹ A discharge will operate on a note, but not on the mortgage which secures it.¹⁰

d. When invalid, or not a good defence, it is a general rule that a discharge only operates against claims which were provable as debts under the insolvency proceedings.¹¹ A debt due the United States is not barred by a discharge.¹² A legal lien upon property, secured before the bankruptcy proceedings, is not affected by the discharge.¹³ And the discharge of the mortgagor is no defence to an action to foreclose his mortgage, but it will bar a judgment against him for a deficiency.¹⁴

Debts created by fraud,¹⁵ or arising from defalcation of

a debtor liable to arrest or imprisonment on a claim due nonresidents after a discharge is granted. (Act of 1885, ch. 319.)

1. *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12.

2. *Palmer v. Preston*, 45 Vt. 154; *Shuman v. Strauss*, 34 N. Y. Supr. 6.

3. *Hubbell v. Flint*, 15 Gray (Mass.) 550.

4. *Monroe v. Upton*, 50 N. Y. 593.

5. *Jones v. Knox*, 46 Ala. 53; s. c., 7 Am. Rep. 583.

And this may be as surety on a bond not directly for the payment of money, such as one for the return to an officer of property attached by him. *Payne v. Able*, 7 Bush (Ky.) 344; s. c., 3 Am. Rep. 316; or the official bond of a constable; *McMinn v. Allen*, 67 N. Car. 131; or that of a collector, *U. S. v. Throckmorton*, 8 Nat. Bank Reg. 309. See *Sanders v. Best*, 17 C. B. (N. S.) 731.

6. *Clay v. Smith*, 3 Pet. (U. S.) 411.

7. *Pollitt v. Parsons*, 2 Har. & J. (Md.) 61.

8. *Bickford v. Barnard*, 8 Allen (Mass.) 314.

9. *Luther v. Deyo*, 19 Wend. (N. Y.) 629.

10. *Lunning v. Brady*, 10 Cal. 265.

11. *Houston v. State*, 34 Tex. 542; *Pierce v. Wilcox*, 40 Ind. 70.

12. *U. S. v. Herron*, 20 Wall. (U. S.) 251.

13. *Jones v. Lellyet*, 39 Ga. 64; *State v. Recorder etc.*, 21 La. Ann. 401; *Barstow v. Hansen*, 2 Hun (N. Y.) 333.

14. *Roberts v. Wood*, 38 Wis. 60.

15. *In re Wright*, 36 How. Pr. (N. Y.) 167; *In re Robinson*, 36 How. Pr. (N. Y.) 176; *In re Patterson*, 2 Ben. (U. S.) 155; *Stewart v. Emerson*, 8 Nat. Bank Reg. 462.

An insolvent debtor shown to have committed any "kind of fraud to the prejudice of his creditors, whether it is specially denounced in the statute or

a public officer, or in some fiduciary capacity, are not barred.¹

A discharge of one of several partners or joint debtors is no defence to an action against the others therein.² It is no defence to a surety in a bond by which he is bound, on some contingency, to pay his principal's debt, such as one to secure the payment of damages and costs in an injunction case,³ or release property from an attachment;⁴ or a bail bond,⁵ that his principal has been discharged.

A debt for defalcation as guardian is not affected by a discharge.⁶ A contract made prior to the passage of the law is

not, may be proceeded against and condemned, under Rev. St. La., § 1803. *Mayewski v. Creditors* (La. 1888), 4 So. Rep. 9.

To support a charge of fraud under the insolvent law of *Louisiana* it is unnecessary to show that the mass of creditors have been injured by the fraudulent acts of the insolvent debtor, whereby the amount of property applicable to their demands has been reduced. It will suffice to show that the insolvent obtained goods, under a false and fraudulent pretence, from a single, individual creditor. *Mayewski v. Creditors*, 4 So. Rep. 9.

Where a creditor of an insolvent accepts the dividend under a composition with creditors, and gives a receipt reciting that it is according to the composition confirmed by the court, he waives his right to allege that the discharge was invalid as to him, on the ground that his claim antedated the statutes under which the discharge was obtained, though he appeared at the hearing when the composition was proposed, and raised such objection. *Eustis v. Bolles*, 146 Mass. 413.

1. *Stow v. Parks*, 1 Chand. (Wis.) 60.

What Is Held to be Fiduciary Within This Meaning. This has been held, however, not to apply to the failure of an administrator, entrusted with bills as collateral, to a debt due the estate, and apply the proceeds as directed. *Croan v. Cotting*, 104 Mass. 245; s. c., 6 Am. Rep. 232; or the failure of an agent to account for and pay over to his principal moneys collected by him as agreed. *Grover etc. Co. v. Clinton*, 8 Nat. Bank Reg. 113.

But it does apply to the case of an agent who converts to his own use moneys entrusted to him solely for the purpose of being invested by him on bond and mortgage. *Flagg v. Ely*,

Edm. S. C. (N. Y.) 206; and that of an attorney who fails to pay over money collected for his client. *Heffren v. Jayne*, 39 Ind. 463; s. c., 13 Am. Rep. 281; *Flangan v. Pearson*, 42 Tex. 1; s. c., 19 Am. Rep. 40. See, however, *Wolcott v. Hodge*, 15 Gray (Mass.) 547.

An auctioneer, who receives money for goods sold by him, also acts in a fiduciary capacity, and his discharge is no bar to a suit, therefore.

The obligation of a bank receiving money in its ordinary capacity from customers is not fiduciary. *In re Bank of Madison*, 9 Nat. Bank Reg. 184.

Commission merchants and factors act in a fiduciary capacity, and claims against them for the proceeds of goods sold by them, which have been converted by them to their own use or not paid over on demand, are not barred by a discharge. *Gay v. Farran*, 2 Cin. (Ohio) 426; *Banning v. Bleakley*, 27 La. Ann. 257; s. c., 21 Am. Rep. 554; *Lemcke v. Booth*, 47 Mo. 387. In matter of *Seymore*, 6 Int. Rev. Rec. (U. S.) 60. *In re Kimball*, 6 Blatchf. (U. S.) 292.

A receipt reciting, "Rec'd of H. \$5,000.00 for the purchase of stocks and margins on the same, for which I agree to acc't for on demand," held, under the *Massachusetts* statute not to be such a fiduciary debt as a discharge would bar. *Halpine v. May*, 100 Mass. 498.

3. Matter of *Levy*, 2 Ben. (U. S.) 169; *Payne v. Able*, 7 Bush (Ky.) 344; s. c., 3 Am. Rep. 316; *Elsworth v. Caldwell*, 18 Abb. Pr. (N. Y.) 20.

2. *Eastman v. Hibbard*, 54 N. H. 504; s. c., 20 Am. Rep. 157.

4. *Holyoke v. Adams*, 1 Hun (N. Y.) 223.

5. *Claffin v. Cogan*, 48 N. H. 411.

6. *Halliburton v. Carter*, 10 Nat. Bank Reg. 357.

not affected by a discharge under it.¹ It does not bar a debt due the State.² It is no bar to one who had no notice of the proceedings.³ A discharge granted after the repeal of the law, without a saving clause in the application, is void.⁴

Where the court has jurisdiction in the matter, mere irregularities in the proceedings will not render the discharge void.⁵

1. *Wyman v. Mitchell*, 1 Cow. (N. Y.) 316.

A discharge under the *Vermont* Insolvent law does not bar a debt contracted before its passage, the creditor in no way becoming a party to the proceedings in insolvency. Nor is such debt discharged though merged in a judgment rendered after the discharge, and which judgment is the basis of this action. A law discharging such debt is unconstitutional. *Cotway v. Seamons*, 55 Vt. 8; s. c., 45 Am. Rep. 579; *Percy v. Foote*, 36 Conn. 102.

2. *People v. Herkimer*, 4 Cow. (N. Y.) 345; *People v. Rossiter*, 4 Cow. (N. Y.) 143.

A discharge under the insolvent laws releases the debtor from a judgment previously rendered against him on behalf of the State, and will protect him from a *ca. sa.* on such judgment, and if arrested the court will discharge him on motion. *State v. Walsh*, 2 Gil & J. (Md.) 406.

A discharge in insolvency does not release the insolvent from arrearages of state, county, or town taxes, as the insolvency statute contains no words declaratory of such intention. *Inhabitants of Cape Elizabeth v. Skillin*, (Me.) 12 Atl. Rep. 543.

3. *Wetherbee v. Martin*, 16 Gray (Mass.) 518.

4. *State v. Shinn*, 5 N. J. L. 553.

5. *Cobbossee Nat. Bank v. Rich* (Me. 1889), 16 Atl. Rep. 506.

Miscellaneous.—The legal debt of an obligor in a bond is contracted at the time of making the bond and a discharge in insolvency granted to the obligor after making the bond, although prior to breach of the condition will bar his liability. *State v. Culler*, 18 Md. 418.

If a person gets a note discounted at a bank, and on the maturity of the note, having on deposit a sum insufficient to pay the note gets another note discounted at the same bank and deposits the proceeds to his account, and then draws his check on the bank for the amount of the first note payable to the bank as holder, this is a payment of

that note, within the Gen. Sts., ch. 118, § 87, which, if the other conditions mentioned in the statute exist, will forfeit his right to a discharge in insolvency. It is within the discretion of the presiding judge, after a case has been committed to the jury, to refuse to give them further instructions; and to the exercise of this discretion no exception lies. *Phillips's Case*, 132 Mass. 233.

Although the statute requires an accurate description of the insolvent's estate, a statement of "debts due petitioner, \$—," is sufficient after discharge, as against collateral attack. *Id.*

Nor will it avoid the discharge that debts were omitted from the inventory, it appearing that they were worthless, and barred by limitation. *Id.*

A discharge under the *Vermont* insolvent law is not a bar to recovery on a note owned by one who, when the discharge was granted, was a citizen of another State, and in no way a party to the insolvency proceedings, though the note was executed in *Vermont*, of which State both parties were then citizens. *Roberts v. Atherton* (Vt.), 15 Atl. Rep. 159.

Rev. St. Me., ch. 70, § 49, which provides that the certificate given to the insolvent shall be conclusive evidence in his favor of the fact and regularity of such discharge, applies as well to discharges obtained under a composition as to those in regular insolvency proceedings.

Section 62 requires the debtor to produce at a meeting of the creditors an affidavit signed by him, to be sworn to before the judge, that "my assets and liabilities are correctly stated in the schedule hereunto annexed." *Held*, that where the affidavit produced was in due form, but from inadvertence of either judge, register, or party, the schedules and affidavit were filed away without being annexed, the discharge was not thereby rendered void.

It is not a legal objection to a debtor's discharge that the schedule of assets lodged with the messenger was adopted as a schedule for use in the composition proceedings, though to

e. Effect Upon Rights of Insolvent.—A debtor discharged under the insolvent laws cannot sue or be sued in respect to the property transferred under such law for the benefit of creditors.¹

An insolvent maker of a promissory note who has obtained his discharge is liable to an endorser who paid the note before the discharge.²

A discharge, void as to its effect in relieving the defendant from the payment of his debts is equally inoperative to protect him from imprisonment.³

Discharges are personal, and do not operate to discharge one who is a joint debtor with the insolvent.⁴ A discharge vests in his trustees all his real and personal property.⁵

The fact that the debtor was not actually insolvent does not affect the discharge.⁶

The effect of a discharge in insolvency is to be determined by the law in force at the time it is granted, and not by the law in force at the time the proceedings in insolvency are begun.⁷

f. How Proven, etc.—The discharge of an insolvent can only be proved by the record or by parol; but unless the existence of the record be first shown, other evidence is inadmissible.⁸

A certificate of discharge is conclusive as to all facts stated in it, except acts of fraud specified⁹ in the statute.

furnish new and separate schedules would be a more commendable practice.

The discharge cannot be invalidated by proof that creditors holding the requisite amount of claims did not assent to the composition under which the discharge was obtained, the record showing that the agreement presented to the judge was on its face sufficient, and the judge having adjudged it to be so. *Cobbossee Bank etc. v. Rich* (Me. 1889), 16 Atl. Rep. 506.

1. *Hall v. McPherson*, 3 Bland (Md.) 529; *Young v. Willing*, 2 Dall. (U. S.) 276.

2. *Frost v. Carter*, 2 Cai. (N. Y.) Cas. 311.

3. *Witt v. Follett*, 4 Wend. (N. Y.) 501.

An insolvent discharge, after a verdict and before judgment, in an action of trespass, does not protect a defendant from imprisonment. *Hodges v. Chace*, 2 Wend. (N. Y.) 248.

4. *Elsworth v. Caldwell*, 27 How. Pr. (N. Y.) 188.

The discharge of a husband under the insolvent laws does not operate to discharge the wife from her obligation to pay a promissory note, of which she and her husband were the makers. *Allers v. Forbes*, 59 Md. 374; s. c., 43 Am. Rep. 557.

5. *McAlister v. Samuel*, 17 Pa. St. 114; *Moncure v. Hanson*, 15 Pa. St. 385.

6. The fact that a petitioner for the benefit of the insolvent laws is not actually insolvent, does not affect the validity of his discharge, nor oust the jurisdiction of the insolvent court. In such case the surplus remaining in the hands of the trustee, after payment of debts, belongs to the insolvent by way of resulting trust, and is not held by the trustee under any express trust for the benefit of the petitioner. *Weaver v. Leiman*, 52 Md. 708.

7. *Batten v. Sisson*, 133 Mass. 557.

8. *Loughry v. McCullough*, 1 Pa. St. 503; *Karch v. Comm.*, 3 Pa. St. 269.

The acknowledgment by a debtor of his indebtedness and insolvency is evidence thereof between the parties. *Guy v. McIlree*, 26 Pa. St. 92.

In an action on an insolvent's bond the record of his discharge is not conclusive that he gave the creditors notice required by law. *Berens v. Rasch*, 9 Phila. (Pa.) 45.

9. *Lester v. Thompson*, 1 Johns. (N. Y.) 300.

The certificate of an insolvent is not conclusive evidence of the facts therein stated; but when offered in evidence,

g. Must be Plead.—A discharge will not avail as a defence unless pleaded;¹ and a neglect to plead it, although arising from ignorance of the law, will not be aided by the court.² It must be pleaded specially,³ and it should show that the court that granted it had jurisdiction.⁴

It is a matter of record, and should be pleaded as such.⁵ If obtained too late to be pleaded originally, or by amendment, the defendant's remedy is by motion to stay execution.⁶

*h. Extra Territorial Effect.*⁷

*i. New Promise.*⁸—A discharge will only protect a debtor when he claims its protection, and he may revive an obligation barred by his discharge by means of a new promise made after the filing of the petition in bankruptcy, and either before or after his discharge.⁹

To be effective, the new promise must be distinct, specific, un-

the court may look into the record of the proceedings in insolvency, in order to determine whether the certificate was properly granted. *Gardner v. Nute*, 2 Cush. (Mass.) 333.

Evidence, etc.—Action on a promissory note. The defendant pleaded a discharge in insolvency. *Held*, that the plaintiff might show in answer to the plea that the defendant had intentionally omitted certain real property owned by him from the schedule annexed to his petition. *Dean v. Baker et al.*, 64 Cal. 232.

A debtor, after his discharge in insolvency, wrote to his creditor expressing his desire to pay all his debts, and his hope and trust that he would be able to pay the debt of his creditor in future, mentioning partial payments made, and regretting that he could not do more. *Held*, insufficient to prevent the operation of his discharge. *Kenny v. Brown*, 139 Mass. 345.

A motion to set aside a decree of final discharge in insolvency rests largely on the discretion of the *nisi prius* court, and will not be reviewed except in case of an abuse of that discretion. *Longnecker v. His Creditors* (Cal.), 17 Pac. Rep. 220.

The *Massachusetts* St. of 1879, ch. 245, § 4, making a certificate of discharge in insolvency conclusive evidence of the fact and regularity of the discharge, unless annulled by the court which granted it, is applicable to a certificate granted after its passage upon proceedings begun before, although the action in which the discharge is pleaded was begun before the passage of the statute. *Upham v. Raymond*, 132 Mass. 186.

The *Massachusetts* St. of 1879, ch. 245, § 4, making a certificate of discharge in insolvency conclusive evidence of the fact and regularity of the discharge, unless annulled by the court which granted it, is constitutional, and is applicable to a certificate granted after its passage upon proceedings begun before. *Kempton v. Saunders*, 130 Mass. 236.

1. *Jenks v. Opp*, 43 Ind. 108; *Rudge v. Rundle*, 1 Thomp. etc. (N. Y.) 649.

If he neglects to do so, the court will not afterwards relieve him on motion. *Price v. Peters*, 15 Abb. Pr. 197.

2. *Ackerman v. Van Houten*, 5 Hals. (N. J.) 332.

3. *Cross v. Hobson*, 2 Cai. (N. Y.) 102.

4. *Morgan v. Dyer*, 10 Johns. (N. Y.) 161; *Wyman v. Mitchell*, 1 Cow. (N. Y.) 316.

5. *Murphy v. Richards*, 5 W. & S. (Pa.) 279.

6. *Cornell v. Dakin*, 38 N. Y. (11 Tiff.) 253; *World Co. v. Brooks*, 7 Abb., N. S. (N. Y.) 212.

7. See as to extra territorial effect, *CONFLICT OF LAWS*, 3 Am. & Eng. Encyc. of Law 622.

A discharge in insolvency by an insolvent court of Oregon to one of its citizens is no bar to an action brought by a citizen of another State in Oregon, when such creditor was not a party to the insolvency proceedings. *Main v. Messner* (Oreg.), 20 Pac. Rep. 255.

8. See also **LIMITATIONS**.

9. *Hornthal v. McRae*, 67 N. Car. 21; *Chabot v. Tucker*, 39 Cal. 434.

After a discharge in insolvency, as where the cause of action is barred by

ambiguous, certain, and satisfactorily proved.¹ If the promise is conditional, the performance of the condition must be shown.²

the statute of limitations, a new promise is necessary in order that an action may be brought upon a prior liability. It is the new promise and not the former liability that is the cause of action, and it must be so pleaded. *Chabot v. Tucker*, 39 Cal. 434.

1. *Richardson v. Brecker*, 7 Colo. 58; *Stern v. Nussbaum*, 47 How. Pr. (N. Y.) 489; *Landas v. Roth*, 109 Pa. St. 621.

2. **Sufficient Promise**—A debtor, after proceedings in insolvency had been begun, wrote to his creditor: "My last meeting of insolvency comes off the last of this month, when I intend to receive my discharge. I wish I could give you some money, as you ask, but cannot at present. I shall not take any notice of your abuse of me till I have paid you the amount I owe you, which I shall surely do." *Held*, in an action on the debt, that the letter did not take the debt out of the operation of a discharge in insolvency subsequently obtained. *Dennan v. Gould*, 141 Mass. 16.

A debtor wrote, "I think I see my way clear to pay you \$200, and interest I owe you. I am in hopes another two years will enable me, from my present income, to clear off all pressing debts."

Rest assured that not a day of pecuniary freedom will pass over my head without you hearing from me." *Held*, insufficient. *Pierce v. Seymour*, 52 Wis. 272.

"I am sorry that you had to pay the notes of Frank Pellond and myself, upon which you were surety for us. I cannot at this time pay you the money, but propose to pay you my share, which I am told is about \$413. I hope to be able to pay soon, but will let you know in a few days," was *held* to be sufficient. *Rolfe v. Pellond*, 19 N. W. Rep. 970.

Also, "If I ever get able I will pay you every dollar I owe you and all the rest. You can tell all as soon as I get anything to pay with I will pay. As for giving note, it is no use. I will pay just as quick without it," *held* sufficient. *Devereaux v. Henry*, 19 N. W. Rep. 697.

Insufficient Promise.—The plaintiffs declare upon a promissory note for \$3,764.58, dated March 20th, 1867, payable one day after date, with interest. The defendant appeared and pleaded

his discharge in bankruptcy in bar to the action. The plaintiffs replied a new promise in writing made while the proceedings in bankruptcy were pending. They promise the plaintiffs to collect their debt. They alleged that the promise is contained in the following letter, which is made a part of their replication, viz.:

Crockett's Bluff, Ark., Jan. 7th, 1868.
Messrs. Thos. H. Allen & Com.:

Dear Sir: I avail myself of this opportunity to give you fair statement of my pecuniary affairs. First: I failed to make a crop. Second: Find myself involved as security to the amount of five or eight thousand dollars; was sued and judgment was rendered against me at the last term of court for about four thousand dollars, sum sufficient to sell, all the available property that I am in possession of. I lost about three thousand dollars by persons taking the bankrupt law. This my situation, I was, as you can readily conclude, in a bad fix. To remain as I was at that time my property would be sold to pay security debts, and my just creditors would not get any part of it and that I would be reduced to insolvency, and still judgments against me. As a last resort concluded to render a schedule myself, in order to force a *pro rata* division of my effects. The five bales of cotton I shipped you were all my crop, to pay you for the meat that you had sent me to enable me to make the little crop that I did make. The cash that I requested you to send me was for myself and William F. Ferguson, to pay his hands for labor; and one hundred and fifty yards of the bagging was for W. F. Ferguson, and one barrel of the salt. I have been absent from home for the last two weeks; got home last night and have not seen him yet, but suppose he has shipped you some cotton. If he has not done so, I will see that he sends you cotton at once. Be satisfied all will be right. I intend to pay all my just debts if money can be made out of hired labor. Security debt I cannot pay. I shall have a hard time, I suppose, this season, but will do the best I can.

January 8th. Since the above was written I have seen William Ferguson. He says he shipped you two bales cotton ten or twelve days ago, and shipped

in my name, as the bagging was ordered by me for him. William Ferguson will be in Memphis betwixt this and the first of March, and will call and see you on business matters betwixt me and yourself. All will be right betwixt me and my just creditors. Don't think hard of me. Attribute my poverty to the unprincipled Yankee. Let me hear from you as usual. Yours very respectfully, A. H. Ferguson.

To this replication the defendant demurred. The demurrer was sustained by the circuit court, and the plaintiffs appeal to this court.

It is necessary to discuss but a single question. Does the letter defendant set forth in the replication contain a sufficient promise to pay the debt in suit? All the authorities agree in this, that the (see Hillard on Bankruptcy, 264 and 266 where cases are collected) promise by which a discharged debt is revived must be clear, distinct and unequivocal. It may be an absolute or a conditional promise, but in either case it must be unequivocal, and the occurrence of the condition must be averred if the promise be conditional. The rule is different in regard to the defence of the statutes of limitations against a debt barred by the lapse of time. In that case, acts or declarations recognizing the present existence of the debt have often been held to take a case out of the statute. Not so in the class of cases we are considering. Nothing is sufficient to revive a discharged debt unless the jury are authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt. Thus partial payments do not operate as a new promise to pay the residue of the debt. The payment of interest will not revive the liability to pay the principal, nor is the expression of an intention to pay the debt sufficient. The question must be left to the jury with instructions that a promise must be found by them to have been made before the debtor is bound. Hill. Bankr., 264-266, where the cases are collected. The plaintiffs in error contend that such promise is to be found in the letter of the defendant, forming a part of their replication. They rely chiefly on these expressions: "Be satisfied; all will be right." "I intend to pay all my just debts, if money can be made from hired labor." "Security debts I cannot pay," and on the

postscript where he adds, "All will be right betwixt me and my just creditors." There can be no more uncertain rule of action than that which is furnished by an intention to do right. How or by whom is the right to be ascertained? What is right in a particular case? ARCHBISHOP WHATELY says: "That which is conformable to the supreme will is absolutely right, and is called right simply without reference to a special end. The opposite to right is wrong." This announces a standard of right, but it gives no particle of aid. What may be right between the defendant and his creditors is as difficult to determine as if he had no such standard. It is not absolutely certain that it is right for a creditor seizing his debtor to say, pay me what thou owest, or that it is wrong for the debtor to resist such an attack. It is not unnatural that the creditors should think that payment of the debt was right and that it was the only right in the case. It is equally natural that the debtor should entertain a different opinion. The law holds it to be right that a debtor shall devote his entire property to the payment of his debts, and when he has done this that after acquired property shall be his own to be held free from the obligation of all his debts as well as security debts. Neither the supreme will, so far as we can ascertain it, nor the law of the land, requires that a debtor whose family is in need, or who is himself exhausted by a protracted struggle with poverty and misfortune, should prefer a creditor to his family; that he should appropriate his earnings to the payment of a debt from which the judgment of the law has released him, rather than to the support of his family or his own comfort. What an honest man should or would do under such circumstances it is not always easy to say. When, therefore, the debtor in this case wrote to the plaintiff: "Be satisfied, I intend to do right; all will be right betwixt my just creditors and myself," he cannot be understood as saying that he would certainly pay his debt, much less that he would pay it immediately, as the plaintiff assumes. What is or what may be right depends upon many circumstances. The principle is impracticable as a rule of action to be administered by the courts. There is no standard known to us by which we are able to say that it is wrong in the defendant not to pay the plaintiff's debt.

20. Exemptions.—Whatever, as a rule, is exempt from execution may be reserved by the debtor,¹ and an express reservation

We are of the opinion that the letter produced does not contain evidence of a promise to pay the debt in suit and that the judgment appealed from must be affirmed. *Allen v. Furgeson*, 85 U. S. 1.

Opposition to Discharge.—The court of common pleas of the county of Middlesex has not power to discharge under the insolvent laws a defendant from confinement he is undergoing in the county jail, by virtue of an execution against the body, issued by the recorder of the city of Perth Amboy, on conviction for violation of the ordinance of said city in relation to inns and taverns, beer saloons, etc. Proceedings under said ordinance are criminal in their character. The insolvent laws apply only to civil actions. *State v. Brophy*, 43 N. J. L. 589.

Any creditor of an insolvent may file his opposition to the debtor's discharge, and may withdraw the same at his pleasure, without the consent of the other creditors. *Brangon v. His Creditors*, 64 Cal. 394.

This court has no jurisdiction, under the *Massachusetts* Gen. Sts., ch. 118, § 16, of a petition in the nature of an appeal by a creditor from the decision of the court of insolvency granting a discharge to a debtor, although since the St. of 1879, ch. 245, § 4, the creditor cannot impeach the validity of the discharge in an action at law. *Kempton v. Saunders*, 132 Mass. 466.

Under the insolvent law of 1852, it was competent for the regularly elected assignee, being a schedule creditor, to file a written opposition to the insolvent's discharge on the ground of fraud in wilfully and knowingly omitting property from the schedule and executing sham deeds with intent to defraud creditors. Such an opposition having been stricken out by the court, *held*, error. *Hinkel v. His Creditors*, 63 Cal. 328.

Under the *Maryland* Insolvency act of May 4th, 1852, it was not required that a creditor should be a judgment creditor, in order to give him a status in court to oppose the application of an insolvent for a discharge. The setting aside by the court in which it was rendered of a judgment recovered by Van W. against D., on the ground that no notice was given to D.'s attorneys,

does not prevent Van W. from opposing, as a creditor under the Insolvency act of May 4th, 1852, the application of D., under that act, for a discharge, when the opposition filed by Van W. and the schedules filed by D. in the insolvency proceedings show that he is a creditor of D.; and it is error for the court, on motion, in the insolvency proceeding, to dismiss the opposition of Van W. on the ground that he has no status in court on which to make such opposition. *Davenport v. His Creditors*, 62 Md. 29.

1. *Garnor v. Frederick*, 18 Ind. 507; *Hollister v. Lond*, 2 Mich. 309; *Brooks v. Nichols*, 17 Mich. 38; *Smith v. Mitchell*, 12 Mich. 180; *Richardson v. Marqueeze*, 59 Miss. 80; *Dow v. Platner*, 16 N. Y. 562; *Mulford v. Shiek*, 26 Pa. St. 473; *Heckman v. Messinger*, 49 Pa. St. 465; *Sugg v. Tillman*, 2 Swan (Tenn.) 208; *Farquaharson v. McDonald*, 2 Heisk. (Tenn.) 404.

The homestead of an insolvent debtor passes to his assignee on the assignment of his estate by the court, when such homestead is liable to be taken on execution in payment of debts contracted before it was acquired; and the assignee may convey the homestead to one who has purchased the premises of him.

An assignee's deed, which describes the interest conveyed as "subject to the mortgagor's homestead right," means such right as he had against the order of assignment; and, whether the deed does or does not convey the homestead, it still remains vested in the assignee for the payment of such debts, and cannot be set up by the assignor. *Id. Tilden v. Cummins*, 15 Atl. Rep. 178.

A debtor excepted from an assignment for the benefit of creditors all property "exempt by law from attachment and execution." In a schedule, made a part of the assignment, mention was made of a quarter section of land "incumbered by a homestead filing," and described as "the exempt real property" of the debtor, "the same being the homestead property of the within assignor, valued at \$5,000." *Held* that, whether the value placed upon such quarter section was correct or not, the purpose of the assignor was to except from the assignment the whole of such land, and no interest in

INSOLVENT LAWS—INSPECTION.

of such property in the assignment is valid.¹ Some courts hold a specific mention of property must be made,² while others hold that it need not be specifically designated.³ The claim must be made with promptness,⁴ and will be lost by delay.⁵ It is too late after the property has been sold,⁶ and proceeds distributed. In another case, however, it was held that the assignor is under no obligation to make any selection of a homestead claimed by him as exempt;⁷ and the mere failure to claim the exemption until the morning preceding the sale will not lose him the right.⁸ Partners cannot claim any partnership property as exempt.⁹ The debtor cannot exempt property when there are judgments against him in which he has waived his right to exemptions.¹⁰

INSOLVENT LAWS.—See BANKRUPTCY.

INSPECTION.—See note 11.

it passed to the assignees. *Wilhoit v. Bryant* (Cal. 1887), 20 Pac. Rep. 561.

1. *Hildebrand v. Bowman*, 100 Pa. St. 580; *Mulford v. Shirk*, 26 Pa. St. 473; *Knight v. Waterman*, 36 Pa. St. 258; *Lininger v. Raymond*, 9 Neb. 40.

2. An assignment reserving "so much as I am by law allowed to retain free from execution," has been held void, the court saying: "How are excluded creditors to know what articles in particular are claimed under those acts (of exemption), if they are thrown into confusion with a large quantity of the same nature and description. The person claiming the benefit of exemption must set apart what the law allows him, that it may be known by all who are concerned, and separated from that part of his estate which is subject to his debts. But in this deed, it is included in the conveyance with the mass of his property and reserved in general terms. Creditors are not able to judge whether the quantity or kind of property specified in the law is claimed, as there is no separation or description of it." *Sugg v. Tillman*, 2 Swan (Tenn.) 208. An assignment reserving "property to the value of \$400 each which said" assignors "shall elect to retain as stock in trade under the laws of the State of Kansas exempting certain property from sale on execution or other process," was held void on its face. *Clark v. Robbins*, 8 Kan. 574; though the same court held an assignment by a partnership of all their property "except what is by law exempt," valid, the provision being nugatory, as none of the assigned property was exempt. *Dodd v. Hills*, 21 Kan. 707.

3. *Richardson v. Marqueze*, 59 Miss. 80; *Brooks v. Nichols*, 17 Mich. 38; *Hollister v. Loud*, 2 Mich. 309; *Garnor v. Frederick*, 18 Ind. 507; *Mulford v. Shirk*, 26 Pa. St. 473.

4. *Shaeffer's Appeal*, 101 Pa. St. 45; *Bowyer's Appeal*, 21 Pa. St. 210; *Morris v. Shafer*, 93 Pa. St. 489.

5. *Chilcoat's Appeal*, 101 Pa. St. 22.

6. *Chilcoat's Appeal*, 101 Pa. St. 22.

7. *Batten v. Smith*, 62 Wis. 92.

8. *Rice v. Nolan*, 33 Kan. 28.

9. *Ex parte Hopkins*, 104 Ind. 157.

10. *Shaeffer's Appeal*, 101 Pa. St. 45. An insolvent exchanged a quantity of wheat for a wagon and team, with a view of claiming the latter exempt. Held void.

List of Authorities. *Burrill on Assignments* (3d ed.); *Wait on Insolvent Corporations*, —; *Bishop on Insolvency* (4th ed.)

11. **Inspection Laws** within the meaning of art. 1, § 10, cl. 2, of the Constitution of the United States, which provides that "no State shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Such laws must provide for the examination of personal property, or, at all events, they must provide for an examination by some crucial test, and not by the taking of testimony or evidence. An act providing for the examination of immigrants to determine whether they are "habitual criminals, or pauper lunatics, idiots, or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacity to support themselves, and whether they . . . are affected with any infectious or conta-

gious disease," is not an inspection law. Said the court: "What laws may be properly classed as inspection laws under this provision of the constitution must be determined largely by the nature of the inspection laws of the States at the time the constitution was framed. In the opinion of this court, in the case of *Turner v. Maryland* (107 U. S. 38), . . . there is an elaborate examination of these statutes, many of which are cited. Similar citations are found in a foot note to the report of *Gibbons v. Ogden*, 9 Wheat. (U. S.) 119. We feel quite safe in saying that neither at the time of the formation of the constitution nor since has any inspection law included anything but personal property as a subject of its operation. . . . In addition to what is said above, it is apparent that the object of these New York enactments goes far beyond any correct view of the purpose of an inspection law. The commissioners are to 'inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals, or pauper lunatics, idiots or imbeciles, . . . or orphan persons, without means or capacity to support themselves, and subject to become a public charge.' It may be safely said that these are matters incapable of being sufficiently ascertained by inspection. What is an inspection? Something which can be accomplished by looking at, or weighing or measuring the thing to be inspected, or applying to it at once a crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever." *People v. Com. Gen. Transatlantique*, 107 U. S. 59.

They may provide for the examination of articles imported, and those intended for domestic use, as well as for the examination of those intended for exportation. Said the court in *Neilson v. Garza*, 2 Woods (U. S.) 287: "No doubt the primary and most usual object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets. CHIEF JUSTICE MARSHALL, in *Gibbons v. Ogden*, says: 'The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use. 9 Wheat. (U. S.) 203; Story on the Const., § 1017.' But in *Brown v. Maryland*, he adds, speaking of the time when inspec-

tion takes place: 'Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board a vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection is a tax which is frequently, if not always, paid for service performed on land.' 12 Wheat. (U. S.) 419; Story on the Const., § 1017. So that, according to CHIEF JUSTICE MARSHALL, imported as well as exported goods may be subject to inspection; and they may be inspected as well to fit them for domestic use as for exportation. Bouvier defines inspection as the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Law Dict. The removal or destruction of unsound articles is undoubtedly, says CHIEF JUSTICE MARSHALL, an exercise of that power. *Brown v. Maryland*, 12 Wheat. (U. S.) 419; Story on the Const., § 1024. 'The object of the inspection laws,' says JUSTICE SUTHERLAND, 'is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the State in foreign markets.' *Clintman v. Northrop*, 8 Cow. (N. Y.) 46. It thus appears that the scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and to those intended for domestic use as well."

They may regulate the character of the package containing an article of commerce without providing for the examination of the article itself. A law providing that a product of a State shall be put in packages of a certain form and of certain prescribed dimensions, rendered necessary either on account of the nature and character of such product, or to enable the State to identify the product of its own growth, and to furnish the evidence of such identification in the markets to which they are exported, is an inspection law. *Turner v. Maryland*, 107 U. S. 38.

They may require the article to be brought to a warehouse for examination instead of requiring the inspector to go to the article. Said the court, in *Turner v. Maryland*, 107 U. S. 38: "It being

INSTANTER—INSTEAD OF—INSTRUCTIONS.

INSTANTER.—See note 1.

INSTANTLY.—See note 2.

INSTEAD OF.—In the place or room of.³

INSTITUTION.—See note 4.

INSTRUCTIONS—(See TRIAL; PRACTICE; ERROR; EXCEPTION; JURY; VERDICT).

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lawful to require the article to be subjected to the prescribed examination by a public officer before it can be accounted a lawful subject of commerce, it is not foreign to the character of an inspection law to require that the article shall be brought to the officer instead of sending the officer to the article. It is a matter as to which the State has a reasonable discretion."

1. "The term *instanter* means, it is said, that the act shall be done within twenty-four hours (*Price v. Simpson*, 1 Taunt. 343; *Tidd*, 567, 641, 674); but a doubt has been suggested by whom the account of hours is to be kept, and whether the term *instanter*, as applied to the subject matter, may not more properly be taken to mean 'before the rising of the court,' when the act is to be done in court; or 'before the shutting of the office on the same night,' when the act is to be done there. *Tidd*, 567, 641; *King v. Johnson*, 6 East 587, n." 3 Chitty Pr. 111. The New York courts have adopted the former of these meanings. *Harman v. Glover*, 10 Wend. (N. Y.) 617; *Sabin v. Johnson*, 7 Cow. (N. Y.) 421. But the Illinois courts have adopted the latter. *Northrop v. McGee*, 20 Bradw. (Ill.) 108; *Montague v. Hanchett*, 20 Bradw. (Ill.) 226.

2. In an Inquisition of a Coroner's Jury or in an Indictment for Murder.—The time of death is not sufficiently set out in an inquisition of a coroner's jury that after describing the cause of the death and the nature of the injuries sustained by the deceased, proceeds as follows: "of which, etc., the said N. B. . . . instantly died." Said DENMAN, C. J.: "The time when the death took place is not pointed out with sufficient accuracy and precision; the words are, 'of which blow, shock and concussion the

deceased instantly died.' And on this point it was contended that the word *instantly* was equivalent to the words 'then and there.' Then or *ad tunc* involves the precise time at which the accident happened, something done at the same time and moment. *Instantly* means some time after, that is, *instantly* upon, and immediately following, but not at the same moment. But the word 'instantly' is not sufficient, and the words '*instanter*' and '*incontinenter*,' according to the whole course of precedent, do not dispense with the words *ad tunc et ibidem*." *Queen v. Brownlow*, 8 Dowl. 157; s. c., 3 Pen. & D. 52. A similar averment is likewise insufficient in an indictment for murder. *State v. Lakey*, 65 Mo. 217.

3. Section 1, ch. 245, of the Laws of New York of 1853, provides as follows: "Instead of the toll authorized to be demanded and received on plank roads by § 35 of ch. 210 of the Laws of 1847, the following rates of toll may hereafter be demanded and received," etc. Said the court in a case arising under this section: "The term 'instead of' means in the place or room of; and the plain intent of the legislature was to supersede section 35 by section 1; and the result was, that section 35 was repealed by implication. The intent could not have been more patent had that section read that section 35 is hereby amended so as to read as follows." *Southport Plank Road Co. v. Russell* (N. Y. Sup. Ct.), 7 N. Y. St. Rep. 596.

4. The term "institution" is sometimes used as descriptive of the establishment or place where the business of a society or association is carried on; at other times it is used to designate the organized body. *Gerke v. Purcell*, 25

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1. **Definition.**—An instruction, as used in law, is the written or oral address of the presiding judge, in jury trials, delivered at the close of the arguments of counsel, to the jury, informing them of the law applicable to the cause at trial, and their duties thereunder.¹

Ohio St. 244; *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201; *Morris v. Lone Star Chapter etc.* (Tex.), 5 S. W. Rep. 519; s. c., 68 Tex. 698.

By the term institution is to be understood an organization which is permanent in its nature, as contradistinguished from an undertaking which is transient and temporary. *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201; *Indianapolis v. Sturdevant*, 24 Ind. 391.

1. It is synonymous with the term "charge," which is defined to be "The exposition by the court to the jury of those principles of the law which the latter are bound to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit."

"The essential idea of a charge is that it is authoritative as an exposition

of the law, which the jury are bound by their oath and moral obligations to obey." *Bouv. Law Dict., tit. Charge.*

The purpose of instructions is to give to the jury a statement of law applicable to the particular case, to declare what presumptions of law are applicable to the facts, and declare the legal effect of certain evidence. The object is thus pointed out in a *Kansas* case: "The purpose of an instruction is to assist the jury in correctly applying the law to the facts of the case; and it not unfrequently happens that a general statement of the rights and obligations of the parties to a transaction assist materially to a clear understanding of the particular obligation claimed to have been violated." *Sawyer v. Sauer*, 10 Kan. 470.

And the instructions must be predicated upon the whole evidence; it will not do to state abstractly general princi-

2. Instruction Must be Upon the Law—*a. Generally.*—It is an old, settled rule of law that in trials by jury the judge decides questions of law, and the jury questions of fact.¹ In other words, the court must not invade the province of the jury.²

ples of law, or to state the law upon any isolated fact in the case to the exclusion of other facts which are in evidence. This defect in a charge was pointed out in *Morris v. Platt*, 32 Conn. 75, and a new trial was granted. The court say: "The charge as given informed the jury what the great principle of law of self-defence is, and correctly, but that was not all to which the defendant was entitled, . . . when the facts are admitted, or proved, and found, it is for the court to say what the law, as applicable to them, is." *Proffatt on Jury Trials*, § 311.

The longest charge known was delivered in the celebrated *Tichborne Case*, in which the court was eighteen days in delivering it to the jury. *Am. L. R.*, Ap. 1874.

1. *Co. Litt.* 155-156; *Fost. Cr. L.* 256.

The jury, in an action at law, are judges of the facts, and the judge has no power or right to give binding instructions, where no conclusive fact is proven; and even if he thinks the testimony to establish a material fact was incredible he cannot instruct the jury to cast it aside. *Curry v. Curry*, 114 Pa. St. 367.

2. Invading Province of Jury.—The court has no right to direct as to the weight the jury shall give to any evidence submitted to them. *State v. Huffman* (Oreg.), 16 Pac. Rep. 640.

Where the evidence conflicted without any apparent preponderance on either side, it was error to instruct the jury to find for defendant. *Adams v. Berg* (Miss.), 3 So. Rep. 465.

In a trial to a jury, when questions are presented for special findings, which assume as true material facts in issue, the submission of such questions is properly refused. *Elliott v. Reynolds*, 38 Kan. 274.

In an action for personal injuries, an instruction which refers for the particulars of the alleged injury and negligence to plaintiff's petition, and then states the gist of the action, and submits the questions of fact to the jury, is not erroneous as assuming the facts stated in the petition as true. *Hotel Ass'n v. Walters*, 23 Neb. 280.

In an action of ejectment, the issue was as to the location of the true boundary line. Three of the plaintiff's witnesses, surveyors, testified to the exact location of a certain hickory tree which they claimed to be a corner; one of the defendant's witnesses testified that he believed the hickory stump to be the true corner at that point, and always believed it to be, and another witness said that there was no dispute as to the line from the hickory. In the charge to the jury, the court used this language: "Mr. McRoberts, and those who agree with him, are of opinion they have found a true line by measuring from the hickory that they claim is evidently a corner. Yet there is no mark here." *Held*, that this was calculated to weaken the effect of plaintiff's testimony, and thus mislead the jury. *Bughman v. Byers* (Pa.), 12 Atl. Rep. 357.

Plaintiff had introduced testimony to show that a certain stump which is 197 rods distant from the starting point is the stump of a tree called for at that distance in the line of the patent under which plaintiffs claimed. Referring to this testimony, the judge remarked: "It would be a marvel in surveying if they found, right at the end of the distance called for in the original survey, the stump of the identical tree." *Held*, that not only is this inaccurate as a general proposition, but was calculated to unduly weaken the effect of plaintiffs' evidence on that point. *Brightman v. Byers*, (Pa.), 12 Atl. Rep. 357.

It is not reversible error to refuse to charge that the burden of proof is on plaintiffs to show that they had complied with the contract sued on when the proof fully authorizes a finding in plaintiffs' favor. *Howard v. Britton* (Tex.), 9 S. W. Rep. 73.

A statement by the presiding judge that he declines to give a requested instruction because there is no evidence in the case to justify it, is not in conflict with *Rev. St. Me.*, ch. 82, § 83, which provides that "the presiding justice shall rule and charge the jury . . . upon all matters of law arising in the case, but shall not during the trial, in-

cluding the charge, express an opinion upon issues of fact arising in the case." *Pillsbury v. Sweet* (Me.), 14 Atl. Rep. 742.

An instruction, in a suit on a note, that plaintiff's failure to return all his property to the tax assessor would not vitiate the note sued on, is properly refused as an unnecessary comment upon the evidence. *Bogie v. Nolan* (Mo.), 9 S. W. Rep. 14.

Defendant's request to charge that, prior to the adoption of Code Proc. N. Y., or prior to the present constitution, plaintiff, being a party, was not a competent witness in his own behalf, and that it is under that constitution he is enabled to be a witness, and the question as to his credibility is entirely one for the jury, and that they have a right, in considering the case, to wholly reject his evidence, was properly refused when the court said: "I charge you, without any reference to the constitution, that the plaintiff's testimony, as that of every other witness, is to be considered by you, and believed or disbelieved according as your good sense and judgment govern you;" no exception being taken to the words "as that of every other witness," and the attention of the court not being called to that phrase by the general exception. *West v. Manhattan Ry. Co.*, 1 N. Y. Supplement 519.

In an action for injuries to plaintiff's pier, the court refused to charge "that it was an improper use of the pier to moor heavy boats to the spiles," but charged that the defendant was liable for damage occasioned by neglect of its servants, and that it was their duty, if the pier was not safe to moor boats to, to refrain from so doing, and not to tie boats to spiles so as to break them off. *Held*, that the first charge was properly refused, as involving a question of fact, and that the charge given properly submitted the question. *N. J. Steam-Boat Co. v. New York*, 109 N. Y. 621.

When counsel have referred, in their speeches to the jury, to the interest of witnesses, it is not error for the court to instruct the jury that if the interest or employment of a witness has impaired or biased his judgment, such fact may be considered by them in weighing the value of his testimony. *McDonell v. Rifle Boom Co.* (Mich.), 38 N. W. Rep. 681.

It is not error to refuse the following instructions in a suit for injuries received on a railroad track: "The positive testi-

mony of a witness who said he heard the whistle blow is entitled to more weight than the negative testimony of a witness who says he did not hear it,"—since it is the province of the jury to pass upon the weight and credibility of the testimony of every witness. *Sibley v. Ratliffe* (Ark.), 8 S. W. Rep. 686.

Defendant's driver, in charge of a beer wagon, was driving rapidly through a public street of a city, and at a crossing collided with plaintiff, who was crossing the street on foot, and injured her. In an action for damages defendant asked the court to rule that "if the jury believed that, at the time of the alleged accident, the defendant's driver was travelling in an ordinary manner, the defendant is not liable for an injury resulting from the use of the public street." *Held*, that this was properly refused, as it assumed the very point in controversy, the question being whether the driver was travelling over the public crossing with the ordinary care requisite when passing such a point. *Schmidt v. Magill* (Pa.), 14 Atl. Rep. 383.

After a charge that the "preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or statement," and that the jury should consider the "opportunities of the witnesses for seeing or knowing the particular things about which they testify, their conduct and demeanor, their interest or lack of interest in the suit, the probability or improbability of the truth of their statements," it is not error to add: "If, however, the witnesses testify differently to the same fact, are all of them of equal candor, fairness, intelligence and truthfulness, and equally well corroborated by all the other evidence, and are upon an equal footing as to interest in the result of the suit, then the preponderance of evidence as to that fact would be determined by the number of witnesses," especially when the greater number of witnesses are on the side of the party complaining of the instruction. *Northern Pac. R. Co. v. Holmes* (Wash. T.), 18 Pac. Rep. 76.

It is for the jury to determine the truth or falsity of testimony, and it is improper for the court in its instructions to call the attention of the jury to facts which may have tended to influence the testimony of the witness whose credibility it is their duty to pass upon,

b. Admissibility of Evidence.—It is the exclusive province of the court to decide upon the admissibility of evidence, and it is none the less so where, in order to make such determination, the court is obliged to examine and pass upon questions of fact;¹ and it is error to submit such questions to the jury.²

Whether there be any evidence or not is a question for the judge; whether it be sufficient evidence is a question for the jury.³ Whether a witness is incompetent by reason of interest,⁴ or want of religious belief,⁵ whether one person sustains such relations to another that the declarations of the former are admissible in evidence against the latter;⁶ whether a proper foundation has been laid for the admission of secondary evidence of a lost instrument of writing,⁷ are all questions for the judge, and not for the jury.⁸ So in all cases the question whether a witness is competent to testify concerning the matters in issue is a question of law for the court.⁹

c. Construction of Pleadings.—It is the province of the court to determine from the pleadings what allegations are admitted and what denied.¹⁰ It is, therefore, the duty of the court to state the issues to the jury without referring them to the pleadings to ascertain what the issues are.¹¹ The judge should inform the

or to otherwise weigh the evidence before them. *Long v. State*, 23 Neb. 33.

It is proper for the court to state to the jury for what purpose certain testimony was received, but error to state to them what such testimony tends to prove, without submitting to them at the same time the question of its credibility. *Davis v. Gerber* (Mich.), 37 N. W. Rep. 281.

Where the evidence showed that plaintiff visited defendant's mill on business of his own, and, asking to see an employe, was directed to him, and in the search was injured, a charge submitting to the jury whether the plaintiff entered the mill on the defendant's invitation is error. *Galveston Oil Co. v. Morton* (Tex.), 7 S. W. Rep. 756.

The cases referred to above in the Reporters will be found in the various States' reports for the years 1887, 1888, 1889.

1. *Robinson v. Ferry*, 11 Conn. 460; *Carter v. Bennett*, 6 Fla. 283; *Scott v. Coxe*, 20 Ala. 294; *Gorton v. Hadsell*, 9 Cush. (Mass.) 508; *Clayton v. Anthony*, 6 Rand (Va.) 285; *Carrico v. McGee*, 1 Dana (Ky.) 6.

The court cannot instruct on the sufficiency. *Chesapeake etc. Co. v. Knapp*, 9 Pet. (U. S.) 545; *Strother v. Lucas*, 12 Pet. (U. S.) 410. Or on the weight and credibility of the evidence. *Bur-*

dell v. Denig, 92 U. S. 716; *Crane v. Morris*, 6 Pet. (U. S.) 598.

2. *De Graffenreid v. Thomas*, 14 Ala. 681; *Ratliff v. Huntly*, 5 Ired. L. (N. Car.) 545; *Thomason v. Odune*, 31 Ala. 108; *Robinson v. Ferry*, 11 Conn. 460; *Thompson's Charging the Jury*, 5.

3. *Greenl. on Ev.*, § 49; *Carpenters v. Hayward*, Dougl. (Mich.) 360; *Chandler v. Van Roeder*, 24 How. (U. S.) 227; *Wittowsky v. Wasson*, 71 N. Car. 451.

4. *Cook v. Mix*, 11 Conn. 432.

5. *Wakefield v. Ross*, 5 Mason (U. S.) 16; *People v. Mattison*, 2 Cow. (N. Y.) 433 n.; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98.

6. *Cliquot's Champagne*, 3 Wall. (U. S.) 114-140; *Clayton v. Anthony*, 6 Rand. (Va.) 285.

7. *Ratliff v. Huntly*, 5 Ired. L. (N. Car.) 545; *Graff v. Pittsburgh etc. R. Co.*, 31 Pa. St. 489; *Witter v. Latham*, 12 Conn. 392; *Donelson v. Taylor*, 8 Pick. (Mass.) 390.

8. *De France v. De France*, 34 Pa. St. 385.

9. *Cook v. Mix*, 11 Conn. 432; *Navis Admr. v. Williams*, 22 Ind. 368; *Reynolds v. Lounsbury*, 6 Hill (N. Y.) 534; *Choteau v. Searcy*, 8 Mo. 733; *Thompson Charging Jury*, 11.

10. *Potter v. Wooster*, 10 Iowa 334; *McKinney v. Hartman*, 4 Iowa 154.

11. *Dassler v. Wisley*, 32 Mo. 498.

jury specifically what the issues are.¹ Whether there is a variance between the pleadings and the proof is for the exclusive determination of the court.²

d. Construction of Written Instruments.—It is a well settled principle of law that written instruments are always to be construed by the court; and except where they contain technical words or terms of art, or where the instrument is introduced in evidence collaterally, and where its effect depends not merely upon the construction of the instrument, but upon extrinsic facts and circumstances, in which case the inference to be drawn from it must be left to the jury,³ it is error to submit the construction of a written contract to the jury; it is a question of law for the court.⁴ This extends to and embraces every species of writings, contracts,⁵ records,⁶ deeds,⁷ wills,⁸ and all others.⁹

Where the written contract requires parol explanation, it is equally the province of the jury to ascertain its terms, and of the

1. Missouri etc. Co. v. Hannibal etc. R. Co., 35 Mo. 84.

2. Brich v. Benton, 26 Mo. 161; Berry v. Dryden, 7 Mo. 324.

3. Goddard v. Foster, 17 Wall. (U. S.) 123.

The court should construe a written instrument, and not leave the construction to the jury. If parol evidence has been admitted to explain the instrument, the court should give a construction applicable to each phase of the case developed by the evidence. Long v. McCauley (Tex.), 3 S. W. Rep. 689.

4. Collins v. Benbury, 5 Ired. (N. Car.) L. 118; Wason v. Rowe, 16 Vt. 525; Moore v. Miller, 4 S. & R. (Pa.) 279; Vincent v. Huff, 8 S. & R. (Pa.) 381; Roth v. Miller, 15 S. & R. (Pa.) 100; Brown v. Hatten, 9 Ired. (N. Car.) L. 319; Rogers v. Colt, 21 N. J. L. 704; Perth Amboy Man. Co. v. Condit, 21 N. J. L. 659; Nash v. Drisco, 51 Me. 417; Illinois Central R. Co. v. Cassell, 17 Ill. 389; Williams v. Waters, 36 Ga. 454; Emery v. Owings, 6 Gill (Md.) 191; Cocheco Bank v. Berry, 52 Me. 293; Smith v. Faulkner, 12 Gray (Mass.) 257; Thomas v. Thomas, 15 B. Mon. (Ky.) 178; Shepherd v. White, 11 Tex. 346; Drew v. Towle, 30 N. H. 331; Streeter v. Streeter, 43 Ill. 155; Levy v. Gadsby, 3 Cranch (U. S.) 180; Eyser v. Weissgerber, 2 Iowa 463; Lapeer Ins. Co. v. Doyle, 30 Mich. 159; Goddard v. Foster, 17 Wall. (U. S.) 123; United States v. Hodge, 6 How. (U. S.) 279; Bliven v. New England Screw Co., 23 How. (U. S.) 420.

5. See authorities cited in preceding note.

6. Adams v. Betz, 1 Watts. (Pa.) 425.

7. McCutchen v. McCutchen, 9 Port. (Ala.) 650; Seaward v. Malotte, 15 Cal. 394; Bonney v. Morrill, 52 Me. 252; Venable v. McDonald, 4 Dana (Ky.) 336; Hodges v. Strong, 10 Vt. 247; Whittelsey v. Kellogg, 28 Mo. 404; Hurley v. Morgan, 1 Dev. & B. (N. Car.) 425; Morse v. Weymouth, 28 Vt. 824; Addington v. Etheridge, 12 Gratt. (Va.) 436; Poage v. Bell, 3 Rand (Va.) 586; Smith v. Clayton, 29 N. J. L. 357; Brown v. Huger, 21 How. (U. S.) 305; Am. Bank v. Inloes, 7 Md. 380; Dean v. Erskine, 18 N. H. 81; Stark v. Barrett, 15 Cal. 361; Montag v. Linn, 23 Ill. 551; Harris v. Doe, 4 Blackf. (Ind.) 369; Symmes v. Brown, 13 Ind. 318; Miller v. Shackleford, 4 Dana (Ky.) 264; Stevens v. Hollister, 18 Vt. 294; Cox v. Freedly, 33 Pa. St. 124; St. John v. Bumpstead, 17 Barb. (N. Y.) 100.

8. Magee v. McNeil, 41 Miss. 17; Downing v. Bain, 24 Ga. 372; Sartor v. Sartor, 39 Miss. 760; Wilson v. Whitfield, 38 Ga. 269; Roe v. Taylor, 45 Ill. 485; Riley v. Riley, 36 Ala. 496; Sullivan v. Honacker, 6 Fla. 372.

9. Kidd v. Cromwell, 17 Ala. 648; Long v. Rodgers, 19 Ala. 321; Turner v. Yates, 16 How. (U. S.) 14; Cahoon v. Ring, 1 Cliff. (U. S.) 592; Caldwell v. Dickson, 26 Mo. 60; Pickerell v. Carson, 8 Iowa 544; Leviston v. Junction R. Co., 7 Ind. 597; Carpenter v. Thirston, 24 Cal. 268; Richmond etc. Co. v. Farquar, 8 Blackf. (Ind.) 89.

court to define its meaning.¹ But where a contract has to be made out partly by written and partly by parol evidence, it is properly left to the jury to say whether it has been proved.²

e. Construction of Parol Contracts.—The construction of parol contracts is equally a question for the court. It is the province of the jury to determine whether there was such a contract, and what were its terms; and it is equally the duty of the court to declare to them, by proper instructions, its legal meaning and effect.³

f. The Construction of Written Laws.—The construction of statutes, constitutional ordinances, municipal ordinances and by-laws, and all other written laws, is for the court, and not for the jury.⁴ Likewise foreign laws are to be construed by the court.⁵

g. Definition of Words and Terms.—It is clearly within the province of the court to define technical terms and words to the jury.⁶

h. Negligence.—Whether a defendant or his servants have been negligent, or, on the other hand, whether the plaintiff was guilty

1. *Silverthorne v. Fowle*, 4 Jones L. (N. Car.) 362; *Hutchison v. Bowker*, 5 M. & W. 535; *Thompson's Charging the Jury*, 18.

2. *Bolckow v. Seymour*, 17 C. B. (N. S.) 107.

3. *Thompson's Charging the Jury*, 19; *Islay v. Stewart*, 4 Dev. & B. (N. Car.) 160; *Belt v. Goode*, 31 Mo. 128; *Judge v. Le Clare*, 31 Mo. 127; *De Ridder v. McKnight*, 13 Johns. (N. Y.) 294; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Short v. Woodward*, 13 Gray (Mass.) 86.

4. *Barnes v. Mayor*, 19 Ala. 707; *Fairbanks v. Woodhouse*, 6 Cal. 433; *Peoria v. Calhoun*, 29 Ill. 317; *Matters v. Shields*, 2 Metc. (Ky.) 553; *Carleton v. People*, 10 Mich. 250; *Ramsey Co. Super. v. Heenan*, 2 Minn. 330.

5. *Cecil Bank v. Barry*, 20 Md. 295; *Consequa v. Willings, Pet.* (C. C.) 225; *Charlotte v. Choteau*, 33 Mo. 194; *Livingstone v. Maryland Ins. Co.*, 6 Cranch (U.S.) 280; *Bowditch v. Solytk*, 99 Mass. 136; *Kline v. Baker*, 99 Mass. 253.

6. 1 Greenl. on Ev., § 5 (Redfield ed.); *Townshend on Slander and Libel*, 160; *Homer v. Taunton*, 5 H. & N. 667; *Barnett v. Allen*, 3 H. & N. 376; *Hoar v. Silverlock*, 12 Ad. & El. 624.

Thus, in an action for libel, it has been held by a learned federal judge that the court might properly explain to the jury the meaning of the words *crim. con.* and *flagrante delicto*. "Courts," said the learned judge, in

giving his judgment on this point, "take judicial notice of the meaning of words and idioms in the vernacular of the language, and no colloquium or innuendo is necessary to point out their meaning. Where the meaning is well settled by common usage, there is no use in calling persons to testify as to what was meant at the time they were uttered, or to explain their meaning if published in a newspaper. The words *crim. con.* are usually understood as an abbreviation for criminal conversation, and these terms have of themselves acquired a fixed and universal significance. Equally unobjectionable was the translation by the court of the words *flagrante delicto*. While a libel, published in a foreign language, would ordinarily be interpreted by witnesses skilled in the knowledge of both languages, there is a class of foreign words that have been so far anglicized by common use as to have become substantially a part of the language. Instances of these are *habeas corpus*, *bona fide*, *prima facie*, *a fortiori*, from the Latin, and a large number from the French and other modern languages. Whenever such words occur it is clearly within the province of the court to define them to the jury." *Thompson's Charging Jury*, 21.

A court in instructing the jury as to the meaning of a word should not mislead and confuse them by reading a whole opinion of the supreme court, whose main point is not analogous to

of contributing to the injury, will generally be a question for the jury,¹ though, in the view of some courts, it is a question for the court where there is no conflict as to the evidence.²

3. When Instruction May be Given to Return Verdict—*a. Where There Is No Evidence.*—Even under the rule of “scintilla of evidence,” where there is no evidence having a tendency to prove the issue,

the case at bar, though it contains a correct definition of the word, but should cull that part which is to the point. *Stewart v. Hunter* (Oreg.), 16 Pac. Rep. 876.

1. *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256; *Thatcher v. Great Western R. Co.*, 4 Upper Canada C. P. 543; *Sullivan v. Phila. etc. R. Co.*, 30 Pa. St. 234; *Crissey v. Hestonville etc. R. Co.*, 75 Pa. St. 83; *Memphis etc. R. Co. v. Whitfield*, 44 Miss. 467; *Zemp v. Wilmington etc. R. Co.*, 9 Rich. (S. Car.) 84; *Allender v. Chicago etc. R. Co.*, 37 Iowa 264; *Thompson's Charging Jury*, 22.

2. *Dublin v. Slattery*, 3 App. Cas. 1201; *Dascomb v. Buffalo R. Co.*, 27 Barb. (N. Y.) 221; *Biles v. Holmes*, 11 Ired. (N. Car.) L. 16; *Thrings v. Central Park R. Co.*, 7 Robt. (N. Y.) 616; *Foot v. Wiswall*, 14 Johns. (N. Y.) 304; *Van Lieu v. Scoville Manf. Co.*, 4 Daly (N. Y.) 554; *Flemming v. Western Pac. R. Co.*, 49 Cal. 253; *Pittsburg etc. R. Co. v. Evans*, 53 Pa. St. 250; *Grigsby v. Chappell*, 5 Rich. L. (S. Car.) 446; *Costello v. Landwehr*, 28 Wis. 522; *Louisville etc. Co. v. Murphy*, 9 Bush (Ky.) 522; *Gagg v. Vetter*, 41 Ind. 228.

“The case must go to the jury:

(1.) Where facts, if true, would constitute “evidence of negligence” are controverted. *Saltonstall v. Stockton, Taney* (U. S.) 11; *Pittsburg etc. R. Co. v. Andrews*, 39 Md. 329; *Chicago City R. Co. v. Young*, 62 Ill. 238; *Bernhardt v. Rensselaer R. Co.*, 32 Barb. (N. Y.) 166.

To illustrate: In *Maryland*, if it appear that the plaintiff was injured in consequence of having voluntarily put his arm out of the window of a railway coach, he cannot recover. Yet, if there is a conflict of testimony as to how his arm came to be thus exposed, the case must go to the jury. *Pittsburg etc. R. Co. v. Andrews*, 39 Md. 329.

(2.) Where, although the facts are not controverted, fair minded men might differ as to whether the inference of negligence should be drawn from

them. *Gaynor v. Old Colony etc. R. Co.*, 100 Mass. 208; *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Phila. etc. R. Co. v. Spearen*, 47 Pa. St. 300; *Seabrook v. Hecker*, 2 Robb (N. Y.) 201; *Haycroft v. Lake Shore P. Co.*, 64 N. Y. 636.

In other words where the facts do not amount to what the books term “evidence of negligence.” And where the court directs a verdict for the defendant, the plaintiff is entitled to have everything on which his right to recover depends and which the proof tended to establish, regarded as proof. *Stone v. Chicago etc. R. Co.*, 47 Iowa 82; *McClenaghan v. Brock*, 5 Rich. L. (N. Car.) 17.

(3.) Where, at the same time, the facts are in dispute and the inferences which fair minded men would draw from them are doubtful. *Nichols v. Sixth Avenue R. Co.*, 38 N. Y. 131; *Railroad Co. v. Stout*, 17 Wall. (U. S.) 405; *Fernandez v. Sacramento*, 4 Cent. L. J. 82; *Detroit etc. R. Co. v. Van Steinburg*, 17 Mich. 99; *State v. R. R. Co.*, 52 N. H. 529; *Gaynor v. Old Colony etc. R. Co.*, 100 Mass. 208; *McGrath v. Hudson River R. Co.*, 32 Barb. (N. Y.) 144; *Bridges v. North London R. Co.*, L. R. 7, H. L. 213; *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Vinton v. Schwab*, 32 Vt. 612; *Penn. Canal Co. v. Bentley*, 66 Pa. St. 34; *Wyatt v. Citizen's R. Co.*, 55 Mo. 485; *Jenkins v. Little Miami etc. R. Co.*, 2 Disney (Ohio) 49.

More briefly the question of negligence is said to be for the jury when there is a substantial doubt as to the facts or as to the inferences to be drawn from them. *Crissey v. Hestonville etc. R. Co.*, 75 Pa. St. 83; *Barton v. St. Louis etc. R. Co.*, 52 Mo. 253; and it is for the court only where the facts are undisputed, and the inference of negligence is clear. *Dickens v. New York etc. R. Co.*, 1 Abb. App. Dec. 504.

The foregoing doctrines apply in favor of the plaintiff as well as the defendant; so that, where the court can see from the undisputed evidence that the

the court may so instruct the jury.¹ If there is no evidence establishing the plaintiff's case, it is the right of the defendant to ask

defendant was guilty of negligence, it will set the verdict aside for the defendant and award a *venire de novo*. *Derwort v. Loomer*, 21 Conn. 245; *Thompson's Charging the Jury*, 23.

1. *Tison v. Yawn*, 15 Ga. 491; *Boland v. Mo. R. Co.*, 36 Mo. 484; *Meyer v. Pac. R. Co.*, 40 Mo. 151; *Vinton v. Schwab*, 32 Vt. 612.

"It is well established that where the testimony is all in one direction or where all the evidence for the plaintiff has been given, and it has no tendency whatever to prove the particular issue relied on to recover, and there is no question in regard to the credibility of the witnesses who have given evidence, the court may determine the whole case as a question of law. *WAGNER*, Judge in *Boland v. Missouri R. Co.*, 36 Mo. 484, 491; *Thompson's Charging the Jury*, 44.

Doctrine of "Scintilla of Evidence."—This doctrine is said to be that where there is *any* evidence, however slight, *tending* to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence. *Lewis v. Pratt*, 48 Vt. 358; *Muldowney v. Ill. etc. R. Co.*, 32 Iowa 178; *Meyer v. Pac. R. Co.*, 40 Mo. 151; *Matthews v. St. Louis Grain Elevator Co.*, 50 Mo. 149; *Brooks v. Somerville*, 106 Mass. 275; *Mercer v. Mercer*, 43 Ga. 323. And this is so although the judge may be of the opinion that the weight of the evidence is insufficient to support the issue. *Brown v. Lazalere*, 144 Mo. 383. "In other words," says JUDGE THOMPSON (charging jury 36), "when the facts offered in evidence by the plaintiff, if true, make out a *prima facie* case, the jury and not the judge, ought to pass upon them." On the other hand, where there is any evidence to sustain a verdict for the defendant, an instruction ordering the jury to find for the plaintiff is improper. *Holliday v. Jones*, 59 Mo. 482.

Not Followed in Federal Courts.—The judges are no longer required to submit a case to the jury merely because some evidence has been offered by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party adducing such evidence. Decided

cases may be found where it is *held* that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit: that before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge, not whether there literally is no evidence, but whether there is any evidence upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. *CLIFFORD*, Justice in *Marion Co. Comm. v. Clark*, 94 U. S. 284. See *Parks v. Ross*, 11 How. (U. S.) 373; *Hickman v. Jones*, 9 Wall. (U. S.) 201; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 637; *Pawling v. U. S.* 4 Cranch (U. S.) 222; *Pleasants v. Faut*, 22 Wall. (U. S.) 122; *Improvement Co. v. Munson*, 14 Wall. (U. S.) 448; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Bank of U. S. v. Smith*, 11 Wheat. (U. S.) 171.

Nor in the English Courts.—The *English courts* hold a similar doctrine to the federal courts. *Jewell v. Parr*, 13 C. B. 916; *Tomey v. London etc. R.*, 3 C. B. (N. S.) 150; *Whelton v. Hardisty*, 8 El. & Bl. 262; *Giblin v. McMullen*, L. R., 2 P. C. 335; *Rider v. Wombwell*, L. R., 4 Exch. 38.

Nor in Some of the States.—*Cooper v. Waldron*, 50 Me. 80; *Morton v. Frankfort*, 55 Me. 46; *Mason v. Lewis*, 1 Greene (Iowa) 494; *Bailey v. Kimball*, 26 N. H. 351; *Colt v. Sixth Ave. R. Co.*, 49 N. Y. 671.

In *Howard v. Smith*, 1 J. & S. (N. Y.) 128, in the Superior Court of N. Y., JUDGE SPENCER makes use of the following language:

"The decision of the question of fact in the case by the court when uncontested or when clearly established by the weight of testimony, narrows the issues and reduces the number of questions for the consideration of the jury and thus lessens its labors in reaching a verdict, and in this view is to be favored and sustained, to the full extent of the rules of law applicable to jury trials. The rulings of the court, however, in such cases are often subject to a review and reversal by the appellate courts, although a decision of the jury would have been final upon the same facts,

the court to charge the jury that the plaintiff cannot recover, and a refusal so to charge is error.¹

b. Where the Evidence Is Insufficient in Law.—Where the evidence which has been offered is not sufficient in law to make out

I hold that all questions of fact, that are contested to that degree by the evidence that sensible men might conscientiously arrive at different conclusions upon the same evidence, should be submitted to the decision of a jury. The rule of law I hold to be the same as in the case of directing a verdict by the court. The court has a right so to direct, when the facts are so clearly established on the trial, or the weight of the evidence is so strong that if, on a submission to a jury, it found a verdict against them the court would set it aside as against the evidence." This decision is commented on by JUDGE THOMPSON as worthy of attention. Thompson on Charging the Jury, 43.

1. Directing a Verdict.—When the evidence upon an issue is uncontradicted, and no circumstances appear in the case to discredit it, and it appears to the court that a verdict contrary to this evidence could not be supported, an express direction should be given to the jury to find in accordance with such evidence. *National Exchange Bank v. White*, 30 Fed. Rep. 413.

Where the defence in an action of *assumpsit* for goods sold to defendant, a corporation, is that the credit was not given to the corporation, but to its superintendent personally, and there is evidence tending to show that plaintiff believed he was dealing with the corporation, it is proper for the court to refuse to instruct the jury to find a verdict for the defendant. *Hart Mfg. Co. v. Mann's Boudoir Car Co.* (Mich.), 32 N. W. Rep. 820.

When the case is such that the court would be compelled to set aside a verdict, if rendered in favor of a party, because not reasonably supported by the evidence, the court may direct a verdict for the opposite party. *Thompson v. Pioneer Press Co.*, 37 Minn. 285.

While it is proper to direct the jury to render a general verdict, or to render a special verdict, it is bad practice to give them a general charge authorizing them to render a general verdict, and also, at the same time, submit to them special issues. Such a

course is calculated to mislead and confuse the jury. *Dwyer v. Kaltayer*, 68 Tex. 554.

It is proper for the court to direct a verdict, when it would be its duty to set aside a different one, if rendered. *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 8 Sup. Ct. Rep. (U. S.) 266.

Where there are disputed facts, or facts from which others may or may not be inferred, the court should submit them all to the jury without instruction as to what inferences they should accept or reject; but, when no reasonable construction would entitle defendant to a verdict, the court may give binding instructions for plaintiff. *Maynard v. Lumberman's Nat. Bank* (Pa.), 11 Atl. Rep. 529.

Under Rev. St. Ind. 1881, § 546, relating to the verdict of a jury, the court may direct the jury to return a general verdict, and, in the absence of any showing to the contrary, it will be presumed that the authority was justly exercised. *Louisville etc. R. Co. v. Wood*, 113 Ind. 544.

Where instructions are asked which are correct as abstract propositions, but there is no evidence making them applicable to the case, and the uncontradicted evidence entitles plaintiffs to recover, it is not error to refuse these instructions and charge the jury to find for plaintiffs. *Gould v. Saunders* (Mich.), 37 N. W. Rep. 37.

A direction to find a verdict should not be given unless the evidence for the adverse party, considering it as undisputed, and giving to it the most favorable construction in his favor it will legitimately bear, including all reasonable inferences from it, is insufficient to justify a verdict in his favor. *Jackson v. Jacksonport*, 56 Wis. 310.

Offer to Direct Verdict.—In the course of a charge by the court to the jury, an offer was made to defendant's counsel to direct a verdict for the defendant, if he so desired, but he did not avail himself of the opportunity, and the jury subsequently returned a verdict for the defendant. *Held*, that the offer of the court was error. *Wright v. Towle* (Mich.), 34 N. W. Rep. 578.

the case of the party who offered it, it is the duty of the judge so to instruct the jury.¹

c. Where the Court Would be Bound to Set the Verdict Aside.—Some of the leading courts have held that the judge ought to order a nonsuit against the will of the plaintiff where he can see that the evidence would not warrant the jury in finding for the plaintiff,² and that if they did so find it would be his duty to set aside the verdict as against the evidence, even though there is some slight conflict in the evidence.³ It has been held that the same rule will apply where the verdict would be against the clear weight and effect of the evidence.⁴

1. Thompson's Charging the Jury, 44; Proffatt on Jury Trial, §§ 351-4.

If a plaintiff has no case *in law* he has no business in court; and if a jury find a verdict upon evidence that does not legally make out a case, they may find a verdict on no evidence at all. Nolan v. Shickle, 3 Mo. App. 300; State v. Thayer, 5 Mo. App. 420.

"When assuming that all the testimony adduced by the one or the other party is true, it does not support the issue, it is the duty of the judge to declare this clearly and directly." CAMPBELL, J., in Chandler v. Von Roeder, 24 How. (U. S.) 227.

Thus where, in an action on a contract to buy a note, there was no evidence of a contract to buy a note, but evidence to pay, which contract was void under the statute of frauds, the court erred in refusing a *nonsuit*. Hoeflinger v. Stafford, 38 Wis. 391.

2. Brown v. European etc. R. Co., 58 Me. 384; Cooper v. Waldron, 50 Me. 80; Hartfield v. Roper, 21 Wend. (N. Y.) 615; s. c., Thom. on Neg., 1121; Deyr v. N. Y. Cent. R. Co., 34 N. Y. 9; Ringgold v. Haven, 1 Cal. 108; Eusminger v. McIntire, 23 Cal. 593; Stuart v. Simpson, 1 Wend. (N. Y.) 376.

3. Corning v. Troy Iron Factory, 44 N. Y. 577.

4. Rudd v. Davis, 7 Hill (N. Y.) 529.

Power to Order Nonsuit as Against the Wish of the Plaintiff.—In England. 2 Tidd's Pr. 869; Dewae v. Purday, 4 N. & M. 633; Watkins v. Towers, 2 T. R. 275.

In the U. S. Federal Courts. Elmore v. Gryme, 1 Pet. (U. S.) 469; De Wolf v. Roband, 1 Pet. (U. S.) 476; Foote v. Silsby, 1 Blatchf. (U. S.) 445; Boucicault v. Fox, 5 Blatchf. (U. S.) 87; Crane v. Morris, 6 Pet. (U. S.) 598, 609; Castle v. Bul-
lard, 23 How. (U. S.) 172.

North Carolina. Dickey v. Johnson, 13 Ired. (N. Car.) 450.

Tennessee. Scruggs v. Brackin, 4 Yerg. (Tenn.) 528.

Alabama. Hunt v. Stewart, 7 Ala. 525.

Arkansas. Martin v. Webb, 5 Ark. 72; Ringo v. Field, 6 Ark. 43; Carr v. Crain, 7 Ark. 241.

Missouri. St. Louis etc. Co. v. Sou-
lard, 8 Mo. 665. See, however, Mor-
gan v. Durfee, 9 Cent. L. J. 12.

Kansas. Case v. Hannahs, 2 Kan. 490.

Indiana. Williams v. Port, 9 Ind. 551.

Vermont. French v. Smith, 4 Vt. 363.

Michigan. Cahill v. Kalamazoo Mut-
ual Ins. Co., 2 Dougl. (Mich.) 124.

Mississippi. Winston v. Miller, 12 Smed. & M. (Miss.) 550, it is held that the judge cannot, in any case, direct a nonsuit where the plaintiff in-
sists in going to the jury.

But in **New York**, Pratt v. Hull, 13 Johns. (N. Y.) 334; Betts v. Jackson, 6 Wend. (N. Y.) 173; Foot v. Sabin, 19 Johns. (N. Y.) 159; Jansen v. Acker, 23 Wend. (N. Y.) 480.

Pennsylvania. Munn v. Mayor, 40 Pa. St. 364; Myers v. Girard Ins. Co., 26 Pa. St. 192.

Ohio. Ellis v. Ohio etc., 4 Ohio St. 628; Slipper v. Fisher, 11 Ohio 299; Powell v. Jones, 12 Ohio 35.

Wisconsin. Woodward v. McReynolds, 1 Chand. (Wis.) 244; Cutler v. Hulburt, 29 Wis. 165; Hoeflinger v. Stafford, 38 Wis. 391.

Iowa. Eddy v. Wilson, 1 Greene (Iowa) 259.

Connecticut. Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468.

Maine. Perley v. Little, 3 Me. 97; Lyon v. Sibley, 32 Me. 577.

New Hampshire. Bailey v. Kimball,

d. Where There Is a Variance, etc.—Where there is a substantial variance in the pleadings and in the evidence, the judge should generally direct a nonsuit to be entered for the defendant.¹

e. At What Stage of Trial to be Given.—Where the evidence offered by the plaintiff has no tendency to support the issue, or is insufficient in law to entitle him to recover, the judge is at liberty to so instruct the jury at any time after the plaintiff had closed his case.² A nonsuit may well be ordered at the close of the defendant's testimony, although at the close of the plaintiff's testimony there was a *prima facie* case.³

4. Elements of the Charge—*a. Its Relation to the Evidence.*—The judge instructs hypothetically upon whatever state of facts there is evidence tending to prove.⁴ It is error for him to submit to the jury a fact, or a state of facts, which there is no evidence tending to prove, or to give instruction with reference to a state of facts not in evidence.⁵

26 N. H. 351; *Stickney v. Stickney*, 21 N. H. 61.

California. *Mateer v. Brown*, 1 Cal. 221; *Ensminger v. McIntire*, 23 Cal. 593.

Georgia. *Tison v. Yawn*, 15 Ga. 491; *Long v. Lewis*, 16 Ga. 154.

New Jersey. *Aycrigg v. New York etc. R. Co.*, 30 N. J. L. 460; *Cent. R. Co. v. Moore*, 24 N. J. L. 830.

South Carolina. *Turnbull v. Rivers*, 3 McCord (S. Car.) 131; *Clason v. Bird*, 2 Brev. (S. Car.) 370, it has been conceded that the judge, in proper cases, has power to nonsuit, and to this view the decisions of the courts holding the contrary are slowly progressing.

1. *Thompson's Charging the Jury*, 46; *Johnson v. Moss*, 45 Cal. 515.

This, perhaps, under the liberal allowance of amendments under the code, will seldom need to occur, for amendments are generally allowed at any stage of the case, in order that substantial justice may be done.

2. *Thompson's Charging the Jury*, 47;

There is no point in an objection that such instructions were given before the defendant had announced that he had closed his case. *Harris v. Woody*, 9 Mo. 113.

Nor, if the case is a proper one for such instructions, is the judge at liberty, after the plaintiff has closed his case, to refuse them on the ground that the defendant is not ready to close his case, and submit it to the jury.

3. *Unger v. Forty-second Street R. Co.*, 51 N. Y. 497; *Cooper v. Waldron*, 50 Me. 80-82.

But to award a nonsuit before the plaintiff has closed his case is an obvious error. *Walker v. Supple*, 54 Ga. 178.

4. "The instructions should be confined to the issues is a leading cardinal rule." *Proffat in Jury Trial*, § 313; *Nollen v. Wisner*, 11 Iowa 190; *King v. King*, 37 Ga. 205; *Miles v. Douglas*, 34 Conn. 393; *Hill v. Canfield*, 56 Pa. St. 454; *Hooker v. Johnson*, 6 Fla. 630.

"The charge ought not only to be correct, but to be so adapted to the case and so explicit as not to be misconstrued or misunderstood by the jury in the application of the law to the facts as they find them from the evidence." *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

Thompson's Charging the Jury, 87.

5. *Wakefield v. Smithwick*, 4 Jones L. (N. Car.) 327; *Gilchrist v. Rogers*, 6 W. & S. (Pa.) 488; *Herdic v. Bigler*, 47 Pa. St. 60; *Kelso v. Townsend*, 13 Tex. 140; *Bogle v. Kreitzer*, 46 Pa. St. 465; *Sartwell v. Wilcox*, 20 Pa. St. 117; *Manwell v. Briggs*, 17 Vt. 176; *Switland v. Holgate*, 8 Watts (Pa.) 385; *Sutton v. Madre*, 2 Jones L. (N. Car.) 320; *Cobb v. Fogalman*, 1 Ired. L. (N. Car.) 444; *Bond v. Hall*, 8 Jones L. (N. Car.) 14; *Webster College v. Tyler*, 35 Mo. 268; *Jeffersonville R. Co. v. Swift*, 26 Ind. 459; *Dickerson v. Johnson*, 24 Ark. 251; *Cothran v. State*, 39 Miss. 541; *Herndon v. Bryant*, 39 Miss. 336; *Oliver v. State*, 39 Miss. 526; *Galena etc. R. Co. v. Jacobs*, 20 Ill. 487; *Swank v. Nichols*, 24 Ind. 199.

But where there is any evidence, however slight, it is the duty of the judge to declare the law thereon.¹

b. Abstract Propositions of Law.—No instructions should be given which are not relevant to the facts which there is evidence tending to prove. In many cases the giving of such instruction has been held error;² on the other hand, it is held not error to refuse to give them.³ And if the instructions are not based upon facts which the evidence tends to prove, and are also, when examined by the appellate court, found to have a tendency to mislead, the judgment will be reversed because they were given, although they are correct as abstract propositions.⁴ When an instruction is so worded as to lead the jury to infer the existence of a state of facts not warranted by the evidence, it will afford good cause for reversing the judgment.⁵ Judgment will not be reversed

1. *Flournoy v. Andrews*, 5 Mo. 513; *Bradford v. Pearson*, 12 Mo. 71; *Camp v. Phillips*, 42 Ga. 289; *Abilene v. Hendricks*, 36 Kan. 106.

2. *Thompson's Charging the Jury*, 88, citing *Gist v. Loring*, 60 Mo. 487; *Huffman v. Ackley*, 34 Mo. 277; *Lellis v. St. Louis R. Co.*, 64 Mo. 464.

3. *Straus v. Minzesheimer*, 78 Ill. 492; *Clark v. Vorce*, 19 Wend. (N. Y.) 232; *Wendell v. Moulton*, 26 N. H. 41; *McKnight v. Rutcliff*, 44 Pa. St. 156; *Allan v. Wanamaker*, 31 N. J. L. 370; *Patton v. Gregory*, 21 Tex. 513; *Laber v. Cooper*, 7 Wall. (U. S.) 565; *Davis v. Fairclough*, 63 Mo. 61; *Hamilton v. Russell*, 1 Cranch (U. S.) 495; *Roach v. Hulings*, 16 Pet. (U. S.) 326; *Phett v. Poe*, 2 How. (U. S.) 458; *State v. Rash*, 12 Ired. (N. Car.) 382; *Hibler v. McCarter*, 31 Ala. 501; *Breese v. State*, 12 Ohio St. 146; *Montgomery v. Evans*, 8 Ga. 178; *State Bank v. Hubbard*, 8 Ark. 183; *Mayeys v. Farish*, 11 B. Mon. (Ky.) 41; *Edelin v. Saunders*, 8 Md. 118; *Snyder v. Witt*, 15 Pa. St. 59; *Croft v. State*, 6 Humph. (Tenn.) 317; *Cowles v. Bacon*, 21 Conn. 451; *Conlon v. San Francisco*, 36 Cal. 404; *Rice v. Rice*, 6 Ind. 100; *Shaw v. Brown*, 13 Iowa 508; *Gilbert v. Woodbury*, 22 Me. 246; *Harvey v. Skipwith*, 16 Gratt. (Va.) 405; *Ely v. Tallman*, 14 Wis. 28.

4. *Ocheltree v. Carl*, 23 Iowa 394; *Beaver v. Taylor*, 1 Wall. (U. S.) 644; *Coughlin v. People*, 18 Ill. 266; *State v. Bailey*, 57 Mo. 131; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Horner v. Wood*, 16 Barb. (N. Y.) 386; *Cummings v. Chandler*, 26 Me. 453; *Caw v. People*, 3 Neb. 367.

The fair test of the propriety of a charge cannot be whether in the abstract it is right. It must be taken in

view of the evidence of the facts charged on which the jury is to respond. A charge in the abstract, as a mere legal proposition might be perfectly inoperative and harmless, when, however, referred to a certain set of facts and circumstances in the proof, it might have a most important and conclusive influence on the jury in forming their verdict. *Liscomb, J.*, in *Thompson v. Shannon*, 9 Tex. 536.

5. *Cane v. People*, 3 Neb. 357.

Instances.—In *State v. Bailey*, 57 Mo. 131, it appeared that the accused and the deceased met at a certain place and commenced firing at each other at so nearly the same time that it was impossible to tell which fired first. This was either a case of murder or justifiable homicide in self defence, and it was therefore error for the judge to instruct the jury as to the law of manslaughter, although his instructions on that branch of the law were in the abstract correct.

So in *Kennedy v. North Mo. R. Co.*, 36 Mo. 351, where a farmer sustained an injury by reason of his wagon coming in contact with a railway train at a farm crossing, and it appeared from the evidence that the collision was the result of a mere casualty, it was error to instruct the jury that, if they believed from the evidence that the injury complained of was wilfully or recklessly done by the defendant, then they were not confined to the actual damages sustained by the plaintiff, and might give such exemplary damages as the circumstances of the case might warrant. This instruction was correct as an abstract proposition of law, but it was misleading because it intimated to the jury that they might give exemplary

for error in charging an abstract proposition,¹ unless misleading.

c. Should be Pointed and Definite.—The instructions of the judge to the jury should be pointed and definite.² The instruction should not be ambiguous, that is, capable of two interpretations, one correct and the other incorrect.³ Neither should inconsistent or contradictory instructions be given.⁴ Nor should

damages in a case in which there was no evidence tending to show those facts which constitute a basis of exemplary damages. *Thompson's Charging the Jury*, 92.

1. *Schneider v. Hosier*, 21 Ohio St. 113, 98.

2. *McKinney v. Snyder*, 78 Pa. St. 497; *Gas Co. v. Wheeling*, 8 W. Va. 323.

We suggest to the courts the necessity, when instructions are asked, to see that the law is properly laid down to the jury, and not content themselves with simply giving or refusing the instruction asked. The object of the courts should not be to get clear of laying down the law by refusing to instruct, especially when instructions are prayed for, which in part contain the law, and which obviously show a desire to have the jury properly instructed, although in the hurry, and for other reasons, the counsel have not properly attended to the framing and the phraseology of the instructions. Let the lower courts place the law fairly before the jury in a few plain, forcible, pointed and pithy instructions, and there will be much less appealing—much less dissatisfaction with their decisions. They should declare the law whenever called upon, in order to assist the juries in coming to a proper determination. *Talbot v. Mearns*, 21 Mo. 431.

We have often thought and said that instructions were designed *ex vi termini* to assist the jury upon the law, to find properly the facts and issues in controversy. Therefore a few plain, direct instructions, embracing the law of the case, will always aid a jury to come to the correct conclusions. The court had better give no instructions than such as mystify, confuse and involve the case in intricacy, thereby often misleading them instead of giving light to them. Improper instructions given to juries are a fruitful source of litigation. *Crole v. Thomas*, 17 Mo. 332; *State v. Floyd*, 15 Mo. 349.

Instructions should always be clear, accurate and concise statements of the law as applicable to the facts of the

case. It was never contemplated under the provisions of the practice act that the court should be required to give a vast number of instructions, amounting in the aggregate to a lengthy address. . . . *Adams v. Smith*, 58 Ill. 417; *Trish v. Newell*, 62 Ill. 296.

3. *Belt v. Goode*, 31 Mo. 128; *Henry v. Davis*, 7 W. Va. 715; *Central R. etc. v. Sanger*, 15 Gratt. (Va.) 231; *Siebert v. Leonard*, 21 Minn. 442; *Ill. Linen Co. v. Hough*, 91 Ill. 63; *Vanslyck v. Mills*, 34 Iowa 375.

Where one instruction states the defendant's liability more strongly than the law warrants, and another series states it correctly, and the two relate to vital points in the issue, they are calculated to confuse the jury, and the latter instructions will not cure the former. *Steinmeyer v. People*, 95 Ill. 383.

3. *Whitfield v. Westbrook*, 40 Miss. 311; *Ferguson v. Fox*, 1 Metc. (Ky.) 83; *Selin v. Snyder*, 11 Serg. & R. (Pa.) 319; *Clem v. State*, 31 Ind. 480; *Chicago etc. R. Co. v. Payne*, 49 Ill. 499; *Pond v. Wyman*, 15 Mo. 181; *Mackey v. People*, 2 Colo. 13; *Rice v. Olin*, 79 Pa. St. 391; *Pittsburg R. v. Krouse*, 30 Ohio St. 240.

A merely misleading charge is not reversible error. *Perkerson v. Snodgrass* (Ala.), 4 So. Rep. 752.

In an action for driving logs, where defendant alleged that he had been damaged by the injudicious use by plaintiff of a certain dam, the court properly refused to charge "that there is no evidence of any damage to the defendant by reason of the manner in which the dam was operated; and the jury will not allow any damages to the defendant by reason of any alleged improper use of the dam," as such charge would mislead the jury. *Beard v. Clarke* (Minn.), 39 N. W. Rep. 63.

In an action on a firm note given by one partner without authority from the other, for a purchase in the firm name, instructions that the burden of proving notice to plaintiffs that such latter party was not to be bound is on him; and if the witnesses are equally credible, and their evidence contradictory as to

they be couched in technical language;¹ nor on isolated parts of the testimony. Instructions should cover the whole case.²

d. How Taken and Construed.—Instructions should be taken and construed together with reference to one another.³

the notice, then he has not proved notice, and plaintiffs should recover; and that if the witnesses are equally credible and honest as to the notice, and their evidence on that point in direct conflict, then notice cannot be said to be proved, —are properly refused, as calculated to confuse and mislead the jury. *Alabama Fertilizer Co. v. Reynolds* (Ala.), 4 So. Rep. 639.

It is error to give to the jury conflicting instructions based upon different views of the law applicable to the case, without such instructions being harmonized by the judge. *Kelley v. Cable Co.*, 7 Mont. 70.

Any instructions calculated to mislead the jury, whether such tendency arises from ambiguity, prolixity, or any other cause, should be avoided; and if given in such form, the appellate court should reverse the judgment. *Gordon v. Richmond*, 83 Mo. 436.

1. *Chappell v. Allen*, 38 Mo. 213.

The judge ought to instruct the jury in plain English, and avoid, as far as possible, the use of technical terms. The use of such expressions as "*prima facie*" and "preponderance of evidence" has been criticised. Thompson's *Charging the Jury*, 99.

2. *First Nat. Bank v. Currie*, 44 Mo. 91.

If requests for instructions which do not cover the whole case, are presented to the judge, he may modify them so as to make them present the law applicable to the facts contended for by both parties, there being, of course, evidence of such facts. Neither is it error that the instructions given fail to present the view of the case taken by one of the parties, provided that, taken together, they fairly present the law of the case in a way that is not calculated to mislead. Instructions are to be considered in their combination and entirety, and not as though each instruction was intended to present the whole law of the case. *Hawkins v. Hudson*, 45 Ala. 482; *McKeon v. Citizens' R. Co.*, 43 Mo. 405; *People v. Doyell*, 48 Cal. 85; *Smith v. Carr*, 16 Conn. 455; Thompson's *Charging the Jury*, 100.

3. *Cowger v. Land*, 112 Ind. 263; *Conrad v. Kinzie*, 105 Ind. 281.

An instruction should be taken as a

whole, and in connection with the other instructions in the case; and if, when so taken, the law of the case is correctly stated, an inaccurate expression in the particular instruction will not be available error. Hence an instruction, to an action for damages caused by a railroad accident, that upon plaintiff's showing lack of negligence on his part, it devolved upon the railroad company to show how the accident happened, is not erroneous, if modified by the further instruction that the defendant would not be liable if the accident did not occur through its negligence. *Louisville etc. R. Co. v. Jones*, 108 Ind. 551.

Where certain instructions in the judge's charge to the jury, claimed by appellant to be erroneous, are so qualified by subsequent instructions that the charge, taken as a whole, lays down the true rule of law, objections to it will not be sustained. *Fort Worth etc. R. Co. v. Hogsett*, 67 Tex. 685.

Where the court gave an instruction at request of the defendant, and then gave a more complete instruction, applying the law involved to the particular facts of the case, the defendant has no ground of exception. *Baker v. State*, 69 Wis. 32.

The instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient. *Campbell v. Holland*, 22 Neb. 587.

In the trial of a case, a correct apprehension by the court of all the principles of law involved is not demanded; but it is sufficient if the instructions are correct, as applicable to the case presented, and that the court should not be wrong to the extent of misleading the jury. *Schutz v. Jordan*, 32 Fed. Rep. 55.

Instructions should be considered with reference to one another, and as an entirety; and if, when thus construed, they contain a full, fair and correct statement of the law applicable to the case, and are not calculated to mislead the jury, the judgment will not be reversed because of the mere inaccuracies or "loose expressions" therein when separately considered. *Kopelke v. Kopelke*, 112 Ind. 435.

5. Duty of Judge in Instructing Jury—*a. Duty to Give Instructions.*—It is the duty of the judge to see that every case so goes to the jury that they have clear and intelligent notions of the points they are to decide, and to this end he shall give necessary instructions whether so requested by counsel or not, and his failure to do so is held ground for a new trial when the verdict was not one which effectuated justice between the parties.¹

In the absence of a statute or constitutional provision, it will not be error, however, in a civil case to submit a cause to a jury without instruction, if no instructions are asked for.² And even when requested, the court is not bound to instruct upon an abstract proposition of law not applicable to the case.³ In criminal cases it has been held that it is the duty of the judge to instruct the jury whether requested or not.⁴ This rule is not universal,⁵

In an action by an employe for injuries caused by the fall of a building, defendant alleged that it would have withstood any ordinary storm, but that the one that overthrew it was most extraordinary. The court instructed the jury that the defendant would be liable, unless he showed that it was such an unusual storm as builders do not provide against,—“a phenomenal one.” *Held*, that all the judge said in relation to storms in his charge must be considered together, and that the charge in substance meant an “extraordinary storm such as builders do not provide against or contemplate, in planning their architecture,” and was correct. *Diamond State Iron Co. v. Giles* (Del.), 11 Atl. Rep. 189.

If a court instructs a jury to take into consideration *all* of the facts brought out in the evidence, it is not error for it to refuse to indicate particular points in the evidence, suggested by defendant's request for instructions. *State v. Laughlin*, 73 Iowa 351.

1. *Owen v. Owen*, 22 Iowa 270; *State v. Brainard*, 25 Iowa 572.

It is the duty of the court to instruct the jury as to the issues joined in the pleadings and to determine from the pleadings what allegations are admitted and what denied. *Potter v. C. R. I. etc. R. Co.*, 46 Iowa 399; *Dassler v. Wisley*, 32 Mo. 498.

“It is the practice for judges at *nisi prius* not only to state to the jury all the evidence that has been given, but to comment upon its bearing and weight, and to state the legal rules upon the subject, and their application to the particular case, and to advise them as regards the verdict they

should give. *Chitty*, cited in *Sackett on Instructions*, 1.

See *Morris v. Platt*, 32 Conn. 75; *Carpenter v. State*, 43 Ind. 371; *Nels v. State*, 2 Tex. 280.

While the trial court is not bound to instruct the jury of its own motion, yet, if it does so instruct them, it should not direct them unconditionally to find against a party upon a given hypothesis, when there may be another hypothesis equally supported by the evidence, but withheld from their consideration, upon which they might find in favor of such a party. *Swope v. Schafer* (Ky.), 4 S. W. Rep. 300.

The case should be submitted to the jury upon the theories of the parties. *Winchester v. King*, 46 Mich. 102.

2. *Drury v. White*, 10 Mo. 354; *Coates v. Sangston*, 5 Md. 121; *Haupt v. Pohlman*, 16 Abb. (N. Y.) Pr. 307.

In the trial of causes neither party is bound to ask instructions. If they are not asked, the giving of them or not is at the discretion of the court. If instructions are asked on the whole case, or on any particular matter arising out of it, which the court refuses, it is not bound afterwards to give instructions of its own as substitutes for those refused. If erroneous instructions are asked and refused, it is entirely at the option of the judge whether he will afterwards give any or not. *Clark v. Hammerle*, 27 Mo. 55.

3. See *ante*, 4*b.*, Abstract Propositions.

4. *State v. Matthews*, 20 Mo. 55; *State v. Stonum*, 62 Mo. 596.

5. *People v. Gray*, 5 Wend. (N. Y.) 289.

and in no instance will it be error unless excepted to at the proper time in absence of statutory provision.¹

1. *Krock v. Wolf*, 39 Ind. 88; *Murray v. State*, 26 Ind. 141.

Charging Juries.—It is, of course, the duty of the judge, when requested to lay down the law to the jury, touching every hypothesis of fact presented by the evidence. But it is often a question of much perplexity, what degree of probability must support the hypothetical state of facts in order to require the judge to instruct the jury with reference to it. Upon this point there seem to be two ideas. One is that if there is any evidence, however slight,—even a *scintilla*, as it is sometimes called, tending to show a certain state of facts, the judge is bound, if requested, to instruct the jury with reference to the law applicable to these facts. By necessary analogy, where this idea prevails, a verdict of the jury will not be set aside on appeal or error if there is a *scintilla* of evidence to support it; for it is an unavoidable conclusion that the judge is bound if requested to charge the jury upon any hypothetical state of facts presented by evidence of sufficient force to support a finding of the jury in favor of the existence of those facts. The other idea is that, in order to make it obligatory upon the judge to lay down the law to the jury with reference to a hypothetical state of facts, there must be evidence tending to show such facts sufficiently strong to require the judge to allow the verdict to stand if rendered in favor of the existence of such facts, on a motion for new trial, where he decides in the exercise of a sound discretion, and not within restricted limits which courts occupy on appeal or error. In other words, according to this doctrine, the judge is not bound to instruct the jury with reference to the state of facts, unless there is evidence making it in some degree probable that such facts exist. This doctrine is much more consistent with sense and conducive to justice than the *scintilla* doctrine. In a Texas case it was thus laid down by CHIEF JUSTICE ROBERTS, himself an able and experienced judge:

"When the evidence tends sufficiently to the establishment of a defence or mitigation of the offence charged, as to reasonably require a charge as applicable, is a question of sound judgment to be exercised by the district judge, in the first instance, and afterwards by

the supreme court on appeal. If its force is deemed to be very weak, trivial, light, and its application remote, the court is not required to give a charge upon it. If, on the other hand, it is not so pertinent and forcible as that it might be reasonably supposed that the jury could be influenced by it in arriving at their verdict, the court should charge so as to furnish them with the appropriate rule of law upon the subject." *Bishop v. State*, 43 Tex. 402.

This doctrine was lately reaffirmed and applied by the court of appeals of Texas. *Elan v. State*, 16 Tex. App. 34; 20 Cent. Law Jour. 123.

The duty of a judge, in instructing the jury on the issue between the parties, is a very important and delicate one. Care is to be taken not to trench on the provision of a jury in finding the facts, while the court does not allow them to be misled. The first duty is to make the jury comprehend what is the question or fact in dispute between the parties. The jury go wrong oftener from not understanding the true issue than from any wish to go wrong or do wrong in finding a verdict. And the judges often fail in conveying to the minds of a jury the exact fact in dispute, or the issue between the parties through a fear of exceeding the proper limits of a judge. In doing this, a judge need express no opinion as to what the truth is on the evidence; he can still leave this to the unbiased action of the minds of a jury. But he should never omit the first duty of a judge, that of making the jury see the exact and naked point in dispute, and leaving that dispute to be settled by the yea or nay of the jury. Unless a charge succeeds in doing this, it has done very little, if any, good. So also should the judge make the jury understand the application of the law to the evidence, and its bearings upon the case and upon the decision which they are about to give. It often happens that there are many points in a case about which there is no dispute. It is well to call the attention of the jury to these undisputed facts, with the remark that as to these there seems to be no dispute. The object of this is to fix the attention of the jury upon the really contested fact, and to prevent them from wasting time and becoming con-

b. Instructions Presumed to be Correct.—In the absence of evidence to the contrary, it is presumed that the presiding judge at a trial has given proper instructions.¹

c. The Judge Must Present All the Material Facts.—The judge is not bound to sum up the evidence,² but if he does so he must present all the material facts.³ He must not single out isolated parts of the testimony, and instruct the jury as to the law arising on the facts which such testimony tends to prove, and he must be careful not to give undue prominence to certain portions of it, and especially he ought not to review only those facts which have a tendency to establish one side of the case.⁴

fused on immaterial matters. Juries have been known to disagree or find a verdict contrary to the truth of a case, and that, too, on an issue about which the parties had no dispute. The judge had to call their attention to it as a fact in the case, which they must find; and it was a fact about which there had been no dispute and little said; jurors forgot that it had been proved or admitted. It is well, therefore, for the judge to point out the facts which are not disputed and call the attention of the jury to the really contested points in the case. The jury will then give their whole attention to these points, and will usually decide them right, unless a criminal prejudice shall have by stealth crept into the jury box, and warped the minds of the jurors. Nash's Pleading and Practice (Ohio) 978.

1. Commonwealth v. Ford, 146 Mass. 131.

2. Thompson's Charging the Jury, 109.

It cannot be traced or ascertained that any rule of common law exists that makes it imperative on a judge to repeat the evidence to the jury. He is placed on the bench to the end that he may preside over the order and solemnity of trials, maintain the authority of the laws, and administer them upon all applications which are solely confined to his jurisdiction. If, on the trial of a case, the witnesses are numerous, the evidence complicated, and the main question or principal issue obscured by various and conflicting testimony, he may, in his direction, sum up the whole to the jury, that they may apply it properly, and have their attention directed to the essential points in controversy. No judge would ever refuse to impart such assistance when it is requested by a jury; nor would he withhold it in any case, wherein the nature of the evidence or the conduct

of the cause led him to believe that his aid would enable them to discharge their constitutional functions with more correctness or facility. But it must of necessity depend on the circumstances of each case whether the judge believes that his aid would be of any efficacy; whether the case be not so plain and intelligible as to render his interference unnecessary, or the evidence so equally balanced as to make it unsafe. All these considerations the law has wisely confided to the sound discretion of the judge; and it affords a singular testimony in favor of free institutions that the reluctance of judicial interposition should be made a subject of complaint, when in other countries, where the same system of law prevails, the invasion of the right of juries has been an abundant source of public evil. The common law is not altered in this respect by the act of 1796, ch. 52, which professes only to prescribe the manner in which a judge shall charge the jury, when he thinks fit to deliver a charge—not to make it his duty to deliver one, if he deem it unnecessary: "It shall not be lawful for any judge, in delivering a charge to the petit jury, to give an opinion whether any fact is fully or sufficiently proved, such matter being the true office and proper province of the jury; but it is hereby declared to be the duty of the judge in such cases to state, in a full and correct manner, the facts given in evidence, and to declare and explain the law arising therefrom." No implication can arise from this law that he must charge the jury; but if he does charge them, he must do it according to the rule there laid down. State v. Morris, 3 Hawks (N. Car.) 390.

3. Penn. R. Co. v. Zebe, 33 Pa. St. 318.

4. Thompson's Charging the Jury, 111.

d. The Judge Must Not Assume a State of Facts as Proven.—The judge should always direct the attention of the jury to a hypothetical state of facts, which they may or may not find from the evidence to be true. He should never so frame his instructions as to assume a disputed state of facts as proven. The rule is of equal application in civil and criminal cases.¹

e. He Must Not Assume the Existence of Facts Not in Evidence.—The judge in the charge to the jury must not assume the existence of facts not in evidence, or which there is no evidence

"It is therefore a golden rule, that the judge, who undertakes to present the evidence to the jury, must array before them all the material evidence on either side." Thompson's Charging the Jury, 111.

Comments on the Evidence.—A reference in a charge by the court to a fact, which, upon the testimony, is undisputed, is not error. Wright v. Towle (Mich.), 34 N. W. Rep. 578.

It is not error for the court to express its opinion upon the weight and character of the evidence if in the end the question is submitted to the jury. Rowell v. Fuller's Estate, 59 Vt. 688.

The defendant company requested an instruction to the effect that it had a right to leave a defective car upon the side track in the usual and regular course of business, as known to and understood by its employees. The court refused the request, and, in doing so, said: "Is there any testimony in this case that shows that [the plaintiff] knew the cars upon the grade might pass out upon the main track by the wind?" etc. It was part of the contention on the part of the plaintiff that the force of the wind had started the car. Held, that the refusal of the request was proper, but that the reference to the action of the wind was damaging error. Hewitt v. Flint etc. R. Co., (Mich.) 34 N. W. Rep. 659.

It is proper for the judge to aid the jury by explaining and commenting upon the testimony, and to even give them his opinion upon questions of fact, provided only he submit those questions to their determination. United States v. Philadelphia & R. R. Co., 8 S. Court Rep. (U. S.) 77.

The court, in charging the jury, made an arithmetical calculation of the amount due one of the parties, but expressly charged: "I only give these suggestions, and I do not intend to indicate to you that you should take them, but they are only suggestions of

the way you may look at it; not the way you must look at it. That is exclusively for you." Held, no error. Curry v. Curry (Pa.), 11 Atl. Rep. 198.

It is not error for the court, when instructing a jury, to speak of the testimony of one party to the action as uncorroborated. Lillibridge v. Barber, 55 Conn. 366.

1. Seibert v. Leonard, 21 Minn. 442; Straus v. Minzesheimer, 78 Ill. 492; Boddie v. State, 52 Ala. 395; Wash. etc. R. Co. v. Gladmon, 15 Wall. (U. S.) 401; N. J. Life Ins. Co. v. Baker, 94 U. S. 611; Peck v. Ritchey, 66 Mo. 114; Gaither v. Martin, 3 Md. 162; State v. Kennedy, 7 Nev. 374; Kinney v. Williams, 1 Colo. 191; Wall v. Goodenough, 16 Ill. 415; Walters v. Chicago etc. R. Co., 41 Iowa 71; McDonald v. Beal, 55 Ga. 288.

In summing up in a criminal case, says JUDGE THOMPSON (Charging the Jury, 73), the judge will therefore direct the minds of the jury to the salient points of the testimony in such a manner as, if possible, to leave no definite impression upon their minds as to what his own opinion upon the weight of the testimony. The duty of the judge in this respect was well stated to the jury by the late CHIEF JUSTICE PACKER, in his summing up in the celebrated trial of Selfridge: "I hold the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere with my opinion on the testimony, in order to influence your minds to incline either way, I should certainly step out of the province of a judge into that of an advocate. All which I conceive necessary or proper for the one to do in this part of the cause is, to call your attention to the points of fact on which the case may turn, state the prominent testimony in the case which may tend to establish or disprove those points, give you some rules by which you are

tending to prove.¹ Neither must he assume that there is a doubt if there is none.² But he may assume the nonexistence of facts as to which there is no evidence.³ Even incidental expressions of opinion as to the facts during the progress of a case has been held ground for reversing the case;⁴ or where the opinion is made by a careless or playful remark;⁵ or where

to weigh testimony, if a contrariety should have occurred, and leave you to form a decision according to your own best judgment, without giving you to understand, if it can be avoided, what my own opinion of the subject is."

1. Wash. etc. Ins. Co. v. St. Mary's Seminary, 52 Mo. 480; Andreas v. Ketchum, 77 Ill. 377; Moffit v. Conklin, 35 Mo 457; Shellito v. Sampson, 61 Iowa 40; Manning v. Burlington, 64 Iowa 240; Newton Wagon Co. v. Dier, 10 Neb. 284.

2. Where there is no conflict in the testimony, and no room to doubt or hesitate as to a matter of fact in issue, the judge in his charge, ought not to assume that it is or may be doubtful. Such a course is calculated either to confound the jury by causing them to doubt the justice of their own clear convictions, or to mislead, by inducing them to suppose that they may find the fact either way when the evidence warrants but one conclusion, and to find contrarywise would be to find manifestly against the evidence. The rule which forbids the judge to charge upon the weight of evidence, does not require or authorize him to assume as doubtful that which is clear and indisputable, or to assume hypotheses at variance with certain facts. When the evidence to a fact is positive and not disputed or questioned, it is to be taken as an established fact, and the charge of the court should proceed upon that basis. It is only when there may be doubt, that the jury are required to weigh the evidence, and it is then only that the rule applies that the court shall not charge upon the weight of the evidence. It is not the meaning of the rule that the judge shall ignore the indisputable facts of the case, or distrust the evidence of his senses, or that he shall assume that the jury may doubt where there is no room for doubt, or find contrary to the evidence and manifest truth and justice of the case. WHEELER, J., in Wintz v. Morrison, 17 Tex. 372.

No instruction should be given which

assumes as a matter of fact that which is not conceded or established by uncontradicted proof.

Knickerbocker Ins. Co. v. Foley, 105 U. S. 350; Leavenworth Nat. Bank v. Hunt, 11 Wall. (U. S.) 391; Washington etc. R. Co. v. Gladmon, 15 Wall. (U. S.) 401; New Orleans Ins. Co. v. Piaggio, 16 Wall. 378; Orleans v. Platt, 99 U. S. 676.

3. People v. Welsh, 49 Cal. 185; Thompson's Charging the Jury, 5.

4. State v. Harkin, 7 Nev. 377; McMinn v. Whelan, 27 Cal. 319.

5. Fuhrman v. Huntsville, 54 Ala. 263.

Thus in a case in *Alabama*, the judge, in telling the jury that they might give exemplary damages, and explaining to them what such damages were, playfully remarked, "Such as would teach the old gentleman not to violate the sabbath, nor injure his health by riding in the night, nor interfere with rights of others." For this remark the judgment was reversed.

Remarks by Judge.—In an action for damages against a city, a charge by the court, who has been deprecating the excess of partisan zeal displayed, that "I may here remark that, as a citizen, if the jury award to this plaintiff a verdict, the court, like the counsel, will be called upon to pay its share of the verdict, and I shall never, gentlemen, be found turning my back upon a tax which is the result of substantial justice, —never,"—is not an abuse of the discretion which the court may exercise in influencing the jury. *Magee v. City of Troy*, 1 N. Y. S. Rep. 24.

Language in a charge as follows: "It is my duty to charge you the law as it is declared to be by our supreme court, without reference to my own personal opinion in regard to the matter," followed by a statement of the law as decided by the supreme court, is not error. *Dial v. Agnew* (S. Car.), 6 S. E. Rep. 295.

The court instructed the jury that he gave them, with some regret, the law as laid down by the supreme court,

an opinion is expressed by the manner and emphasis of the judge.¹

f. Should Not be Argumentative.—It is erroneous to give an instruction which is more in the nature of an argument than a statement of the law governing the case, giving undue prominence to facts relied on, and reciting facts having no tendency to support the theory presented.² Long instructions with arguments injected into them are likewise condemned.³

g. Right to Modify Instructions Given.—The court has power at any time during the trial to modify instructions already given, or give or revoke them entirely upon reflection if he concludes that they are erroneous.⁴ But where erroneous instructions are given for one party, the error is not cured by giving for the other party instructions explanatory or contradictory of those first given. The erroneous instruction should be expressly withdrawn from the jury.⁵ If the additional instruction is not inconsistent, it may cure an erroneous prior instruction.⁶ The giving of addi-

that, in a suit for breach of promise, the birth of a child might not be proved, to aggravate the damages. He further told them they might consider all the circumstances: the disgrace, the feelings of misery, apart from the child being born; and made many similar comments. *Held*, that a judge should not tell the jury that he regrets the state of the law, or practically take away all its effect by observations which inflame the jury into disregarding it. *McFadden v. Reynolds* (Pa.), 11 Atl. Rep. 638.

It is not improper for the judge to remark in the hearing of the jury, after allowing a witness to be recalled to impeach another, that, had he known the nature of the impeaching question he would not have permitted such recall; the re-examination of a witness being entirely discretionary with the court. The remark does not violate Code N. C., § 413, providing that no judge in giving a charge to a petit jury shall give an opinion whether a fact is sufficiently proven. *De Berry v. Carolina Cent. R. Co.* (N. Car.), 6 S. E. Rep. 723.

A maker of maps procured from the defendant an agreement to pay him \$74 for printing, in an atlas of Morgan county, Ill., a sketch of his residence. The defendant refused payment on the ground that the sketch was incorrect, and on the trial it became purely a question of fact whether this was so or not. After the evidence had been submitted to the jury, the attorney for the defendant asked the judge "whether or not his honor would know the view to

be the residence of the defendant with the defendant's name taken from the view," to which the judge replied, "I do not know that I would." The jury found for the defendant. For this error the judgment was reversed. *Andreas v. Ketcham*, 77 Ill. 377.

1. *Reiger v. Davis*, 67 N. Car. 185; *State v. Simmons*, 6 Jones L. (N. Car.) 309.

2. *Ludwig v. Sager*, 84 Ill. 99; *Thorp v. Growey*, 85 Ill. 612; *Sackett on Instructions*, 14; *State v. Orr*, 64 Mo. 339; *Morris v. Lachman* (Cal.), 8 Pac. Rep. 799.

3. *Thompson's Charging the Jury*, 81; *Pierce v. Rehfus*, 35 Mich. 53; *Thompson v. Force*, 65 Ill. 372.

"We may here, with great propriety, take occasion to remark that a practice seems to be growing up to draw out instructions to a very great length, and injecting into them an argument of the case. This is bad practice, and should not be encouraged by the courts." *Merritt v. Merritt*, 20 Ill. 80; *Dingman v. State*, 48 Wis. 485.

In the famous Tilton-Beecher trial, which lasted six months, the charge of the court was delivered in twenty minutes. It is regarded as a model charge.

4. *Sittig v. Birkestock*, 38 Md. 158; *Hall v. State*, 8 Ind. 444; *Jones v. Van Patten*, 3 Ind. 107.

5. *Thompson's Charging the Jury*, 123; *Jones v. Talbot*, 4 Mo. 289.

6. *Pond v. Wyman*, 15 Mo. 181; *Williams v. Van Meter*, 8 Mo. 339.

If the instructions given are consistent with each other, and, taken to-

tional instructions rests in the discretion of the court.¹ Such instructions should not be given in the absence of the parties or their attorneys.²

h. At What Stage of Trial Instructions to be Given.—In the regular and orderly progress of a trial, it is the duty of the judge to give instructions to, or “charge” the jury, after counsel have closed their argument and immediately prior to the retirement of the jury.³

But he is not precluded from giving instructions to the jury at such other times as he may deem advisable. He may call the jury in for further instructions at their own request, or by the agreement of counsel, or through his own desire.⁴ It is not error for him to refuse so to do. It is a matter solely within his discretion.⁵ The only limit to this privilege is that it must be done in the presence of the parties or counsel in civil cases, and in the presence of the prisoner in criminal prosecutions.⁶ These instructions are subject to exceptions for error, just the same as those given before the jury retired.⁷

i. Instructions Must be Given in Open Court.—There must be no private communication between the judge and jury; he must not go to the room where they are deliberating,⁸ even for the purpose of giving additional instruction,⁹ or to answer certain questions to them,¹⁰ or, in the absence of the counsel, at the request of the jury, to expound the charge to them;¹¹ or go to their room and suffer them to put certain questions to him, though he do not answer them;¹² or to visit them in their room merely for the

gether, constitute a correct exposition of the law applicable to the case, a reversal of the judgment cannot be asked because a single instruction taken by itself is defective. Whilst erroneous instructions cannot be cured by subsequent instructions that are correct, a defective instruction, or an instruction that is not true under all contingencies, and is, therefore, not applicable to all the facts before the jury, may be supplied by instructions to follow. *Neale v. McKinstry*, 7 Mo. 132; *Browne v. Clay Fire Co.*, 68 Mo. 133.

JUDGE THOMPSON, however, adds that these cases must be treated as exceptional, if, indeed, they can be sustained on principle. *Charging the Jury*, 124.

1. *State v. Pitts*, 11 Iowa 343; *Hogg v. State*, 7 Ind. 551; *Nelson v. Hodge*, 116 Mass. 367.

2. *Davis v. Fish*, 2 Greene (Iowa) 447; *O'Conner v. Guthrie*, 11 Iowa 80; *Campbell v. Beckett*, 8 Ohio St. 210; *Hoberg v. State*, 3 Minn. 262.

In has, however, been held that it is not error for a judge to give the jury

further instruction in the absence of parties. For in contemplation of law the parties and their counsel remain in court until a verdict is rendered, or the jury discharged. *Cooper v. Morris*, 48 N. J. L. 607.

3. Sackett on Instructions (1st ed.)

4. *State v. Pitts*, 11 Iowa 343; *Lee v. Quirk*, 20 Ill. 392; *O'Shields v. State*, 55 Ga. 696; *Thompson's Charging the Jury*, 131.

5. *Nelson v. Dodge*, 116 Mass. 367.

6. *Davis v. Fish*, 2 Greene (Iowa) 447; *O'Conner v. Guthrie*, 11 Iowa 80; *Campbell v. Beckett*, 8 Ohio St. 210; *Hoberg v. State*, 3 Minn. 262.

7. *Thompson's Charging the Jury*, 132; *Nelson v. Dodge*, 116 Mass. 367; *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563.

8. *Hoberg v. State*, 3 Minn. 262; *Crabtree v. Hagenbaugh*, 23 Ill. 349.

9. *Fish v. Smith*, 12 Ind. 563.

11. *Taylor v. Betsford*, 13 Johns. (N. Y.) 487.

10. *Kirk v. State*, 14 Ohio 511.

12. *Benson v. Clark*, 1 Cow. (N. Y.)

purpose of informing them that if they should desire any further information on matters of law they should ask him for it, even though he held no other communication;¹ or, at their request, to send a paper to them in the absence of counsel;² or to write a letter to them;³ or to send a written instruction to them as in answer to a request made by them in writing.⁴

j. Must Not Suggest Compromise Verdict.—The court must not suggest that they should render a verdict arrived at by compromises among themselves, if they could not otherwise agree, rather than disagree.⁵ The judge may, however, tell the jury that a verdict ought, in all cases submitted to them, to be returned by them.⁶

6. Specific Instructions—*a. Must be Asked for.*—It is not error for the judge to omit to charge the jury on a particular point unless asked to do so at the trial. A party cannot, in a court of error, avail himself of an omission which he made no effort to have supplied at the time.⁷ The rule is that for a mis-

1. *Hoberg v. State*, 3 Minn. 262.

2. *Benson v. Clark*, 1 Cow. (N. Y.)

258.

3. *Sargent v. Roberts*, 1 Pick. (Mass.) 337.

4. *O'Conner v. Guthrie*, 11 Iowa 80.

5. A jury returned and stated they had not agreed, but stood eleven to one and divided on \$200. The judge then said, "If that is the only difference it would be better for the county and the parties that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when the difference is so small." *Held*, error.

"It is no doubt true," says JUDGE COOLEY, "that juries often compromise in the way here suggested by splitting a difference and that they sometimes return verdicts with which the judgment of no one is satisfied. But this is an abuse. The law contemplates they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide or yield for the mere purpose of an agreement. The sentiment or motive which permits this tends to bring jury trial into discredit and convert it into a lottery. It was no doubt very desirable to the public that the jury should agree if they could do so without sacrificing what any one of them believed were the just rights of the parties; but not otherwise. *Goodsell v. Seeley*, 46 Mich. 623; *Cranston v. N. Y. etc. R. Co.*, 103 N. Y. 614.

A jury, after being out nearly two days, reported that they could not

agree, whereon the court told them that it seemed very difficult for juries to agree at the present term; that they ought to agree and decide cases; that he had no idea of discharging them, but would keep them together during the entire term if they did not sooner agree. The next evening the jury announced a verdict. *Held*, that such remarks on the part of the court were reversible error. *Chesapeake etc. R. Co. v. Barlow* (Tenn.), 8 S. W. Rep. 147.

After the argument was closed, and the issue given to the jury, the court, upon its own motion, read an address to the jury on the theory that they were unevenly divided in sentiment, in which it advised them to compromise their views, and yield something in deference to the opinions of others, especially when those differing were in the majority, and told them to do their duty, and leave the rest to him. *Held*, an unwarrantable interference with the province of the jury, and ground for a new trial. *Whitelaw's Exr. v. Whitelaw*, 83 Va. 40.

6. *Whitman v. Morey*, 63 N. H. 448; *Ahearn v. Mann*, 60 N. H. 473; *Allen v. Woodson*, 50 Ga. 53; *Pierce v. Reh-fuss*, 35 Mich. 53.

In *Allen v. Woodson*, 50 Ga. 53, the judge in his charge said: "This case has been troublesome, and has cost much time and trouble to investigate it, therefore there should be a verdict." *Held*, no error.

7. *Thompson's Charging the Jury*, 112; *Rozar v. Burns*, 13 Ga. 34; *Hatch v. Spearin*, 11 Me. 354; *Hall v. Weir*, 1

direction judgment will be reversed, though no instruction be asked; but not for the omission to instruct on a particular point where the judge was not requested to do so.¹ Where the court instructs the jury in a manner sufficiently clear and sound as to the rules applicable to the case, it is not bound to give other instructions asked for, whether they are correct or not.² Where instructions are asked, they should be precise and certain to a particular intent.³

b. Can be Written or Verbal.—In the absence of statute or rule of court requiring otherwise, a request by counsel for the court to charge in a particular way may be made verbally; though it is, no doubt, the preferable practice to require that such requests be made in writing.⁴ If the record fails to show whether it was written or verbal, when it is required to be in writing, it will be presumed to be in writing.⁵

c. When Presented to Court.—The proper time to submit requests for specific instructions is after the evidence is concluded and before the argument to the jury is commenced.⁶ But where

Allen (Mass.) 261; Burns v. Southerland, 7 Pa. St. 103; Taft v. Wildman, 15 Ohio 123; Farquhar v. Dallas, 20 Tex. 200; Davis v. Elliott, 15 Gray (Mass.) 90; State v. O'Neal, 7 Ired. L. (N. Car.) 251; Ward v. Herrin, 4 Jones L. (N. Car.) 322; Parsons v. Brown, 15 Barb. (N. Y.) 590; Chamberlain v. Porter, 9 Minn. 260; Jones v. State, 20 Ohio 34; Cato v. State, 9 Fla. 163; Coates v. Sangston, 5 Md. 121; Bain v. Doran, 54 Pa. St. 124; Moore v. Ross, 11 N. H. 547; Castle v. Bullard, 23 How. (U. S.) 189; Kent v. Tyson, 20 N. H. 121; Fisher v. Filbert, 6 Pa. St. 61; State v. Straw, 33 Me. 554; Tomlinson v. Wallace, 16 Wis. 225; Express Co. v. Kountze, 8 Wall. (U. S.) 342; Pennock v. Dialogue, 2 Pet. (U. S.) 1; Miller v. Bryan, 3 Iowa 58; Koehler v. Wilson, 40 Iowa 183; Eiland v. State, 52 Ala. 322; Congsees etc. Co. v. Edgar, 99 U. S. 645; Mutual Life Ins. Co. v. Snyder, 93 U. S. 393; Hall v. Weare, 92 U. S. 728.

1. Siegle v. Louderbaugh, 5 Pa. St. 490; Parsons v. Brown, 15 Barb. (N. Y.) 590; Herbert v. Huie, 1 Ala. 18; United States v. Fourteen Packages, 1 Gilp. (U. S.) 235; Seabury v. Field, 1 McAll. (U. S.) 67.

2. Iron etc. Co. v. Chessmen, 116 U. S. 529; Kelley v. Jackson, 6 Pet. (U. S.) 622; Winans v. N. Y. & E. P. R., 21 How. 88; Law v. Cross, 1 Black (U. S.) 533; Tweed's Case, 16 Wall. 504; Klein v. Russell, 19 Wall. (U. S.) 433; Burton v. Driggs, 20 Wall. (U. S.)

125; Woodruff v. Hough, 91 U. S. 596; Indianapolis etc. R. Co. v. Horst, 93 U. S. 291; Ohio etc. R. Co. v. McCarthy, 96 U. S. 258; Smith v. Field, 105 U. S. 52; Ayers v. Watson, 113 U. S. 594.

3. United States v. Bank of Metropolis, 15 Pet. (U. S.) 377.

A new trial will not be granted because the presiding justice did not formally leave to the jury a question not raised by counsel at the trial. The attention of the court should have been called to it before the jury retired. Barrett v. Delano (Me.), 14 Atl. Rep. 288.

The court having fully instructed the jury as to the law upon a particular question, it is not error to refuse an instruction upon the same question, although correctly propounding the law. Fisher v. Cook (Ill.), 17 N. E. Rep. 763; Abenheim v. Samuel, 1 N. Y. S. 868; Coates v. Harvey, 2 N. Y. S. 5; *In re Bull*, 2 N. Y. S. 52.

When certain points are covered by the general charge of a court, it is not error to refuse to repeat them in special instructions requested. Gulf etc. R. Co. v. Gascamp (Tex.), 7 S. W. Rep. 227; Shannon v. Town of Tama City (Iowa), 36 N. W. Rep. 776.

4. Thompson's Charging the Jury, 126.

5. Myatts v. Bell, Ala. 222.

6. Billings v. McCoy, 5 Neb. 187; Tinkham v. Thomas, 2 J. & Sp. (N. Y.) 236; Glasgow v. Hobbs, 52 Ind. 239;

the instruction is unobjectionable and such as will aid the jury in their rendering a proper verdict, it ought not to be refused, although it might have been requested out of time.¹

d. How Presented to Jury.—Except where regulated by statute, there is no prescribed way in which the judge shall present "requested instructions to the jury." They may be given orally or in writing.² Where instructions to a jury are asked in a mass, if one of them is wrong, the whole may be rejected.³

United States *v. Gibert*, 2 Sumn. (U. S.) 22.

The dispatch of business, the rights of litigants, jurors and witnesses, all require that the time of the court shall not be unnecessarily consumed in the trial of the causes; and to avoid such consequences, judges must be invested with power to adopt all reasonable rules for the practice of their courts. Ever since the adoption of the statute requiring all instructions to be in writing before they are given, it is believed that similar rules have been in force in all the circuit courts in the State. They have varied slightly in their requirements, but all are designed to meet the same ends. The rule which is believed to have most generally obtained requires all instructions to be furnished the court by the commencement of the closing argument. That seems to us is well calculated to meet the convenience of both parties and the court and to economize time, and can in no way hinder or prevent the attainment of a fair trial by both parties. So far as observation has extended, such a rule has operated well. It gives ample time after the close of the evidence, and the case is fully opened to the jury for both parties to prepare their instructions. And the court, being thus apprised of the legal propositions they have assumed has, after the instructions are thus presented, usually ample time for their examination, and to determine upon their correctness. It is essential that the court shall exercise such powers, through reasonable and proper rules, as shall enable him to despatch business at least so fast as the proper administration of justice may require. *Prindle v. People*, 42 Ill. 221.

The rule of the court, that any instruction asked for must be presented in writing before any argument is made to the jury, is reasonable, and a party cannot disregard it. *Manhattan Life Ins. Co. v. Francis*, 17 Wall. (U. S.) 672.

Where instructions are submitted by counsel after the jury has been directed to retire, and the court refuses to consider them because offered too late, the judgment of the trial court will not be reversed, unless it affirmatively appears that the court manifestly abused its large discretion. *Tully v. Despard* (W. Va.), 6 S. E. Rep. 927.

1. *Billings v. McCoy*, 5 Neb. 187.

In the hurry of trial the most careful lawyer may overlook some question on which it is proper the jury should be instructed. The object of the law is to administer justice, and the rules of courts for conducting trials should not be so construed as to prevent a fair submission of the case to the jury. *MAXWELL J.*, in *Billings v. McCoy*, 5 Neb. 187.

2. *Thompson's Charging the Jury*, 126.

Where counsel read from a decision of the supreme court, in his argument to the jury, and the judge, taking the book, said to the jury: "Gentlemen, without stopping to weary you by repeating the decision of the supreme court, which has just been read by counsel of the plaintiff, I charge that decision to be the law." This was *held* sufficient. *Dillon v. McRea*, 40 Ga. 107. See *Talmage v. Davenport*, 31 N. J. L. 561.

As a matter of practice, when counsel for either party reads written requests to charge in the presence and hearing of the jury, the court should either give or refuse to give such requests in the charge. If the request is a legal and pertinent charge which ought to be given to the jury, then the court should give it in the language of the request by reading the same to the jury, and not hold up the paper containing the requests to charge after the same had been read and handed to the court, and say: "Gentlemen, I give you all these in charge, as requested." *Leaptrot v. Robertson*, 44 Ga. 46-50.

3. *Springer v. United States*, 102 U.

7. Written Instruction—*a. Not Required at Common Law.*—

Where there is no statute requiring instructions to be in writing, it rests in the sound discretion of the judge whether he shall deliver his instructions verbally or in writing.¹

b. Required by Statute.—It is required now by quite a number of the statutory laws of the States that the instructions of the court be delivered to the jury in writing. And where such is the law, it is error for the court to make any oral change in the written instructions modifying or explaining them.² The charge,

S. 586; *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Beaver v. Taylor*, 93 U. S. 46; *Indianapolis etc. R. Co. v. Horst*, 93 U. S. 291; *United States v. Hough*, 103 U. S. 71; *Worthington v. Mason*, 101 U. S. 149.

1. *Thompson's Charging the Jury*, 137; *Proffatt, Jury Trial*, § 349; *Sackett on Instructions* (1st ed.)

Where the instruction is definite and contains sound views of the law applicable to the case and intelligible to the jury, it can make no essential difference whether it is communicated to them in writing or orally. It is true that in the trial of causes, and exposition of the law to the jury, the reduction of the instructions to writing is certainly more formal, less liable to hasty error, and may enable the court the better to mature their views, and more distinctly and formally to express them to the jury, as a general rule, but still the law may be sufficiently expounded to the jury through oral instructions. No doubt the court would not hesitate, where it was requested and deemed by counsel to be material, to embody their views in writing in advance of any oral communication to the jury. This matter, however, is left to the sound discretion of the court below, and is not the subject of review by this court. When verbal instructions are given to the jury, it is certainly the right of the party who desires to except thereto, to have them reduced to writing, so that they may be reviewed on appeal, as was done in the present instance; and when that is the case it is no good cause of complaint that the court, in its discretion, chose in the first instance to instruct the jury orally. *Smith v. Crichton*, 33 Md. 108.

2. *Head v. Langworthy*, 15 Iowa 235; *Hardin v. Helton*, 50 Ind. 320; *Horton v. Williams*, 21 Minn. 187; *State v. Jones*, 61 Mo. 232; *Miller v. Hampton*, 37 Ala. 342; *Widner v. State*, 28 Ind. 394; *Strattan v. Paul*, 10

Iowa 139; *Ray v. Wooters*, 19 Ill. 82; *Parris v. State*, 2 Greene (Iowa) 449; *Dixon v. State*, 13 Fla. 636.

It has been held that it is a violation of the statute for the court to instruct the jury orally as to the impropriety of certain modes of arriving at their verdict. *Ill. Cent. R. Co. v. Harnner* 85 Ill. 526.

The following is the statute law upon the subject in several of the States:

Illinois.—The court, in charging the jury, shall only instruct as to the law of the case. Hereafter no judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing.

And when instructions are asked which the court cannot give, he shall on the margin thereof write the word "Refused," and such as he approves he shall write on the margin thereof the word "Given;" and he shall in no case, after instructions are given, qualify, modify, or in any manner explain the same to the jury otherwise than in writing.

Iowa.—When the argument is concluded either party may request instructions to the jury on points of law, which shall be given or refused by the court. If the court refuses a written instruction as demanded, but gives the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, etc.

The court must read over all the instructions which it intends to give, and no others, to the jury, and must write the words "Given" or "Refused," as the case may be, on the margin of each instruction.

After argument, the court may also, of its own motion, charge the jury, which shall be exclusively in writing. The court shall not make any oral explanation of any instruction or charge.

Indiana.—"When the evidence is concluded and either party desires

and every modification of it, must be in writing.¹

These statutes are generally held to be mandatory, and any failure to comply with them is error for which a judgment will be reversed.² In criminal cases they must be strictly complied with.³ It has generally been held, however, that the requirement that they should be in writing may be waived.⁴

special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party, or his attorney, asking the same, and delivered to the court.

When either party asks special instructions to be given to the jury the court shall either give each instruction as requested or positively refuse to do so, or give the instruction with a modification in such manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused, so that either party may except to the instructions as asked for or modified, or to the modification.

When the argument of the cause is concluded, the court shall give general instructions to the jury, which shall be in writing and signed by the judge, if required by either party.

Michigan.—Hereafter, in all civil and criminal cases at law, circuit courts, in charging or instructing juries, shall charge or instruct them only as to the law of the case, and such charge or instruction shall be in writing, and may be given by the court upon its own motion.

Either party may present a written request for instructions on any point of law arising in the case. Whenever instructions are asked which the court cannot give, he shall write on the margin thereof "Refused;" and such instructions as the court approves he shall designate by writing on the margin thereof the word "Given."

And the court shall in no case orally qualify, modify or in any manner explain the same to the jury."

Ohio.—The court, after the argument is concluded, shall, before proceeding with other business, charge the jury; any charge shall be reduced to writing by the court if either party request it before the argument to the jury is commenced, and such charge or instruction, when so written, shall not be orally qualified, modified or in any manner explained to the jury by the court.

Wisconsin.—Upon the trial of every

action the judge presiding shall, before giving the same to the jury, reduce to writing, and give as written, his charge and instruction to the jury, and all further and particular instructions given them when they shall return after having once retired to deliberate, unless a written charge be waived by counsel at the commencement of the trial; and except that the charge or instructions may be delivered orally when taken down by the official phonographic reporter of the court, each instruction asked by counsel to be given to the jury shall be given without change or modification, the same as asked, or refused in full. If any judge shall violate any of the foregoing provisions, or make any comments to the jury upon the law or fact on the trial in any action, without the same being reduced to writing or taken down, the judgment rendered upon the verdict found shall be reversed upon appeal or writ of error upon fact appearing. See Sackett on Instructions, 1 (1st ed.)

1. *Townsend v. Doe*, 8 Blackf. (Ind.) 328; *Meredith v. Crawford*, 34 Ind. 379; *Kenworthy v. Williams*, 5 Ind. 375; *City Bank v. Kent*, 57 Cal. 285.

2. *Dixon v. State*, 13 Fla. 636; *Tolledo etc. R. Co. v. Daniels*, 21 Ind. 256; *Miller v. Hampton*, 37 Ala. 342.

3. *Widner v. State*, 28 Ind. 394; *Strattan v. Paul*, 10 Iowa 139.

In *Arkansas* a rule prescribed by the supreme court for the conduct of judges presiding at trials, requiring all instructions given by the court of its own motion to be given in writing, if so requested by either party, was *held* directory merely. Some discretion, it was said, was necessarily left to the judge as to the manner in which he would comply with it; when, therefore, instead of writing out the instruction asked, with his own hands he dictated it to counsel who asked it, and the latter took it down, it was *held* that this was a sufficient compliance with the rule. *Barkman v. State*, 13 Ark. 705.

4. *Head v. Langworthy*, 15 Iowa 235. And a party being present and not

c. Statute Must be Complied with.—Where the statute requires the charge to be in writing, it cannot be modified orally;¹ nor will it be sufficient to refer to a certain page in a law book.² But where all remarks made by the court while giving the instruction are to be in writing; it only includes the "charge" proper.³ The

objecting to a violation of the statute will be presumed to have waived the right. *Head v. Langworthy*, 15 Iowa 235.

See *Vanwey v. State*, 41 Tex. 639.

1. The action of the court in this case, in reducing a part of his charge to writing and in delivering another part without so doing, cannot be justified. The language of the statute is imperative, and a court, after the request has been made, has no discretion to reduce a part of the charge to writing and give the remainder orally. The purpose of the statute was to secure a carefully considered charge from the court, free from misleading words, which are sometimes found in unwritten charges, and to have it in such form that the jury can read it in their retirement, in case they have misapprehended during its reading by the court. *Householder v. Granby*, 40 Ohio St. 430. See *Hardy v. Turney*, 9 Ohio St. 400.

2. *Feriter v. State*, 33 Ind. 283; *State v. Cooper*, 45 Mo. 64; *People v. Sanford*, 43 Cal. 29; *Gile v. People*, 1 Colo. 60; *State v. Potter*, 15 Kan. 302.

The bill of exceptions shows that the presiding judge, after giving to the jury an instruction requested in writing by the defendant upon the general burden of proof, proceeded of his own motion, and without defendant's consent, to read from a printed book an instruction which was not reduced to writing, nor filed with the other instructions in the case, but was referred to in writing in these words only: "Follow this from Magazine American Law Register, July 1868, p. 559," and that to the instruction so given was excepted to.

This was a clear disregard of the statute. The instruction was not reduced to writing, filed and made a part of the record, as the statute required. If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the charge as the statute contemplated. If they were permitted to take the book with them without defendant's consent, that would of itself be ground of exception. *Hopt v. People*, 104 U. S. 635.

3. Thompson's Charging the Jury, 147.

The defendant having requested the court to reduce its charge to writing, and the respective counsel having presented written instructions, which they requested to have given to the jury, the judge addressed the jury orally as follows: "The only instructions I shall give you in this cause are in writing, which I shall read to you, being the three instructions reduced to writing and requested by the plaintiff's counsel, and two of the instructions reduced to writing by the defendant's counsel, one of which I have changed in writing, and shall read to you as it is written. Before reading the instructions to you I desire to say that the trial has been a long and tedious one, occupying one day longer in taking the evidence than any case which has been tried for seven years in the circuit. During the long and fatiguing trial the court may have become impatient at the delay of the counsel, and made remarks that may possibly have influenced some juror. I wish it specially understood that nothing I have said was intended to influence unduly the verdict of the jury, and I do not wish any juror to be influenced in the least by it. In submitting this case to you I will not comment at all on the evidence which has been introduced, leaving you to weigh it all in your own judgment, and bring in your verdict accordingly."

Thereupon addressing himself to the defendant's counsel, and not to the jury, but in the hearing of the jury, the judge said "orally": "Of the thirty-four instructions handed me by you I mark all, except the 26th and 34th, refused, because they assume a state of facts which, whether or not it existed, I cannot assume. The vital points of them are also contained in the three instructions submitted by the plaintiff, which, I shall presently read to the jury." He then read to the jury the written instructions presented by plaintiff's counsel and afterwards gave certain instructions asked by the defendant, altering one of them and refusing others. The defendant's counsel excepted to the instructions given for the plaintiff;

statute must be strictly complied with.¹

d. At What Stage of Trial Request Should be Made to Have Instructions in Writing.—An able judge and author is of the opinion that the request to charge in writing should be made at the commencement of the trial.² It has been held, however, that it will be in sufficient time if the request is made after the evidence is in and before the argument has begun.³

to the refusal of the court to give the instructions asked by the defendant; to the alteration made in the one given at his request, and also "to the remarks made by the judge to the jury." The judge then said, in the presence and hearing of the jury, "I have given no instructions whatever to the jury, except the five written instructions which I have read, and they are expressly so informed and charged and cannot misunderstand me."

The jury found for the plaintiff and the defendant appealed. It was held by the supreme court that the oral remarks by the judge were not within the prohibition of the statute, because they constituted no part of his charge to the jury. In giving the judgment of the court on this point, COLK, J., said: "As we understand the record, the charge of the court, that is, everything which the court said to the jury to guide them in their examination of the evidence, and which related to any questions of law involved in the case, was reduced to writing before it was given. We do not suppose that remarks of the character of those added orally by the judge, which really have nothing to do with the case—no bearing upon any question of law or fact involved—can be said to be a part of the 'charge to the jury,' within the meaning of our statute. It is very clear to our minds that what the court may say in regard to the principles of law applicable to the case on trial, and the evidence adduced, must be in writing if requested, because it constitutes the 'charge of the jury.' But we do not think the remarks made by the judge in this case, as set forth in the bill of exceptions, constitute any part of his charge to the jury." *Hasbrouck v. Milwaukee*, 21 Wis. 238. See *Thompson's Charging the Jury*, 149.

1. *Dixon v. State*, 13 Fla. 636; *Toledo etc. R. Co. v. Daniels*, 21 Ind. 256; *Townshend v. Doe*, 8 Blackf. (Ind.) 328; *Miller v. Hampton*, 37 Ala. 342; *Strattan v. Paul*, 10 Iowa 139.

2. *Thompson's Charging the Jury*, 153.

3. *Patterson v. Ball*, 19 Wis. 246.

In courts of record instructions are ordinarily presented to the court after the evidence is in, and before summing up the cause to the jury, and frequently just before the court charges the jury. Until the testimony is closed the judge could not well begin to reduce his charge to writing, for his charge is presumed to be based upon the evidence in the case. Up to this point of time counsel may not know that it is desirable to have the instructions reduced to writing. In plain and simple cases the request would not ordinarily be made. But where there is a conflict of testimony, or doubtful questions of law arise upon it, it is often very important that the exact instructions given should be preserved. There is frequently great difficulty in embodying in bills of exceptions oral charges. Opposing counsel understand the charge differently, and the judge is not able always to recollect exactly his own expressions. To avoid this difficulty and uncertainty the statute was enacted and should be construed so as to give the desired remedy. We have been referred to several decisions of the supreme court of Indiana made under a similar statute. They are to the effect that the statute must be so construed as to require the party who desires a written charge to notify the court, in a reasonable time before it may be called on to charge the jury, of his desire that such charge be in writing. The request in this case was made immediately after all the testimony was in, and must be regarded as in time. It was the earliest moment that it could be of any practical advantage to the judge to know of this request. The rule, therefore, requiring it to be made at or before the commencement of the trial is in conflict with the statute and void. *Patterson v. Ball*, 19 Wis. 246.

JUDGE THOMPSON, however, believes that it would be of great advantage if

8. Exceptions to Instructions—*a. When Must be Taken.*—For misdirection or nondirection, exceptions must be taken at the time the charge is given.¹

Objection to the charge being oral instead of written, must also be made at the time the instructions are given; if not, the error will be regarded as waived.²

the request was made at the commencement of the trial, so that as the trial progressed the judge could draw up those portions of his charge which are applicable to the evidence as successively presented. *Thompson's Charging the Jury*, 153.

1. *Thompson's Charging the Jury*, 155; *Winchell v. Hicks*, 18 N. Y. 558; *Dows v. Rush*, 28 Barb. (N. Y.) 157; *Clark v. New York*, 24 How. Pr. (N. Y.) 333; *Jenks v. Smith*, 1 N. Y. 90.

It is a general rule, says JUDGE THOMPSON (*Charging the Jury*, 156), that a party losing loses his right to complain in an appellate court of an interlocutory error committed by the court in the trial of the case, unless he makes his objection and reserves his exception at the time. The reason is that the court is entitled to an opportunity to correct any error inadvertently committed in the progress of the trial, and a party ought not to be permitted to put the other party to the expense of an appeal to correct an omission which he might have prevented by objecting at the proper time. If, therefore, no objection is made to the misdirection at the time it is given, it cannot be assigned for error in a revising court.

2. *State v. Sipult*, 17 Iowa 575; *Vanway v. State*, 41 Tex. 639.

Exceptions.—Where an instruction is correct, as far as it goes, the remedy for omissions therein is not an exception thereto, but a request for a further instruction, and, if such request is refused, an exception to such refusal. *Du Souchet v. Dutcher* (Ind.), 114 N. E. Rep. 459.

If the court's charge is not as full and specific as parties desire, they must call the court's attention thereto; otherwise they cannot assign his omissions as error. *Rutledge v. Hudson* (Ga.), 5 S. E. Rep. 93.

Where a general exception is taken to the refusal of the court to charge a series of propositions, such exception is bad if one of the series is objectionable. *Union Ins. Co. v. Smith*, 8 S. Ct. Rep. (U. S.) 534.

Where counsel do not avail them-

selves of an opportunity, given at the close of the charge, to look over the requests previously handed to the judge, and to see if there is anything they desire to be further charged, no exception will lie to the judge's refusal to charge them without a further request. *Sudlow v. Warshing*, 108 N. Y. 520.

Exceptions to conclusions of law should be taken at the time the decision is made; and where they are not so taken, the mere fact that the attorneys for the other party were present in court, and made no objection when exceptions were taken and noted, several days after the decision, does not amount to a waiver. *Hull v. Louth*, 109 Ind. 315.

Where the court gives a general charge to the jury, and the charge contains various propositions of law, and a general exception only is taken, such exception is not sufficient. *Black v. Lewiston* (Idaho), 13 Pac. Rep. 80.

When counsel want every detail of the law applicable to the facts of the case gone over by the court, they should call attention to such minute matters. Unless they do so, the court may instruct, in general terms, on broad and controlling principles and then stop. *Moore v. Brown* (Ga.), 6 S. E. Rep. 833.

A general exception to instructions given is insufficient. Each specific instruction which is claimed to be erroneous must be pointed out and excepted to. *Brooks v. Dutcher*, 22 Neb. 644.

Where a party desires a more specific charge upon any question, it is his duty to ask therefor; and an exception to a general charge, which appears upon the whole to be correct, where no specific error is assigned, will be overruled. *Poullain v. Poullain* (Ga.), 4 S. E. Rep. 92.

Exceptions to instructions given by the trial court to a jury in a cause, made after trial and verdict, are ineffectual, and are not available on a motion for a new trial or upon appeal. *Barker v. Todd*, 37 Minn. 370.

Failure to give a more specific charge is not error where no request for such

b. Must be Taken to the Instructions Separately, and Not en Masse.—It is well settled that if a series of propositions be embodied in instructions, and the instructions be excepted to as a whole, if any of the propositions be correct, the exception must be overruled.¹

9. Misdirection, When Error or Ground for New Trial.—Misdirection is no ground for a new trial where the jury has not been misled;² nor where the verdict is right;³ nor where substantial justice has been done;⁴ nor where a new trial would lead to the same results;⁵ nor because the judge gave wrong reasons for a correct decision;⁶ nor where erroneous instructions were not injurious to the party complaining;⁷ nor where they were given at his request;⁸ nor because the instructions were merely obnoxious to verbal criticism;⁹ nor because they were incomplete, unless more specific instructions were asked for.¹⁰

charge was made at the trial. *Neyland v. Bendy* (Tex.), 7 S. W. Rep. 497.

1. *Johnson v. Jones*, 1 Black (U. S.) 209; *Rogers v. The Marshall*, 1 Wall. (U. S.) 654; *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Hunt v. Maybee*, 7 N. Y. 273; *Decker v. Mathews*, 12 N. Y. 313.

2. *Thompson's Charging the Jury*, 158; *Smith v. Carr*, 16 Conn. 450; *Benham v. Carey*, 11 Wend. (N. Y.) 83; *Doe v. Paine*, 4 Hawks (N. Car.) 64; *Hoitt v. Holcomb*, 32 N. H. 186; *Ochiltree v. Carl*, 23 Iowa 394; *Chicago v. Hesing*, 83 Ill. 204; *Washington etc. Co. v. Merchant etc. Co.*, 5 Ohio St. 450; *State v. Donovan*, 10 Nev. 36; *Planters' Bank v. Richardson*, 15 Ga. 277; *Hart v. Girard*, 56 Pa. St. 23; *Mercer Academy v. Rusk*, 8 W. Va. 382; *United States v. Wright*, 1 McLean (U. S.) 509; *Cummings v. Chandler*, 26 Me. 453; *Cane v. People*, 3 Neb. 357; *Phila. R. Co. v. Larkin*, 47 Md. 156; *Burton v. Merrick*, 21 Ark. 357; *Carrington v. Pac. Mail etc. Co.*, 1 Cal. 475; *Mead v. Boxborough*, 11 Cush. (Mass.) 362; *Davis v. Brown*, 67 Mo. 313.

3. *Fore v. Williams*, 35 Miss. 533; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Copeland v. Copeland*, 28 Me. 543; *Wilkinson v. Griswold*, 12 Smedes & M. (Miss.) 669; *Ettling v. Bank*, 11 Wheat. (U. S.) 59; *Woodbury v. Larned*, 5 Minn. 339; *Wilkinson v. Payne*, 4 T. R. 468; *Vanuxen v. Rose*, 7 Ind. 222; *Duke of New Castle v. Broxtowe*, 4 Barn. & Ad. 273. See *West v. Anderson*, 9 Conn. 107.

4. *Princeton etc. Co. v. Gulick*, 16 N. J. L. 161; *Branch v. Doane*, 17 Conn. 403; *Arrington v. Cherry*, 10 Ga. 429;

Wood v. Wylds, 11 Ark. 754; *Prescott v. Johnson*, 8 Fla. 391; *Ducket v. Cridder*, 11 B. Mon. (Ky.) 195; *Harris v. Doe*, 4 Blackf. (Ind.) 370; *Depeyster v. Columbia*, 8 East 348; *Graham v. Bradley*, 5 Humph. (Tenn.) 476; *Mirick v. Hemphill*, 1 Hempst. (U. S.) 179; *Seare v. Prentice*, 8 East 348; *Hewitt v. Jones*, 72 Ill. 218.

5. *Graham v. Bradley*, 5 Humph. (Tenn.) 476; *Sheldon v. School District*, 24 Conn. 88; *Foster v. Chicago etc. R. Co.*, 84 Ill. 164; *Noyes v. Shepherd*, 30 Me. 173; *Brown v. Bowen*, 30 N. Y. 520; *Morton v. Lawson*, 1 B. Mon. (Ky.) 46.

6. *Ellis v. Jameson*, 17 Me. 235; *Carpenter v. Pierce*, 13 N. H. 408; *Thompson's Charging the Jury*, 165.

7. *Sinard v. Patterson*, 3 Blackf. (Ind.) 353; *Welborn v. Spears*, 32 Miss. 138; *Graham v. Houston*, 4 Dev. (N. Car.) L. 236; *Dever v. Aiken*, 41 Ga. 423; *Freeman v. Rankins*, 21 Me. 446; *Gardner v. Clark*, 17 Barb. (N. Y.) 538; *Hook v. Craghead*, 35 Mo. 380; *Price v. Evans*, 4 B. Mon. (Ky.) 388; *Holly v. Brown*, 14 Conn. 256; *McKay v. Leonard*, 17 Iowa 569; *Cross v. Hall*, 4 Md. 426; *Salmons v. Roundtree*, 24 Ala. 458; *People v. Wiley*, 3 Hill (N. Y.) 214.

8. *Flowers v. Helm*, 29 Mo. 324; *Foote v. Silsby*, 1 Blatchf. (U. S.) 445; *Silsby v. Foote*, 14 How. (U. S.) 218; *Thompson's Charging the Jury*, 163.

9. *Galpin v. Wilson*, 40 Iowa 90.

10. *Marshall v. Hann*, 17 N. J. L. 425; *Moore v. Ross*, 11 N. H. 547; *Pennock v. Dialogue*, 2 Pet. (U. S.) 15; *Calbreath v. Gracy*, 1 Wash. (U. S.) 198; *Walker v. Humbert*, 55 Pa. St. 407;

Durand v. Grimes, 18 Ga. 613; *Keohler v. Wilson*, 40 Iowa 183.

Collection of Cases.—In many of the following cases there will be found precedents of instruction, and in others discussion of various principles applied in the instruction of juries. The list of cases might be extended to an almost illimitable extent, and it is not claimed to be complete, but is believed to contain a case on almost every question likely to arise.

Alabama.—*Assault, etc.*—*Mooney v. State*, 33 Ala. 419.

Carrier of Goods—*Montgomery v. Moore*, 51 Ala. 304.

Drunkenness—*Beasley v. State*, 50 Ala. 145.

Factors—*Schiffer v. Feagan*, 51 Ala. 335.

Fraud, Representations—*Townsend v. Cowles*, 31 Ala. 428.

Malicious Prosecutions—*Ewing v. Sanford*, 19 Ala. 605.

Negligence Railroad Companies—*Gov. St. R. Co. v. Hanlon*, 53 Ala. 70.

Perjury—*Taylor v. State*, 48 Ala. 157.

Usury—*Gray v. Brown*, 22 Ala. 262.

Wills—*Cotton v. Ulmer*, 45 Ala. 378.

Arkansas.—*Municipal Corporation*—*Mayor v. Thompson*, 29 Ark. 569.

Carriers—*Little Rock etc. R. Co. v. Atkins*, 46 Ark. 431.

Principal and Agent—*Pike v. Douglass*, 28 Ark. 59.

California.—*Adverse Possession*—*Brumagim v. Bradshaw*, 39 Cal. 24.

Carriers of Passengers—*Boyce v. California Stage Co.*, 25 Cal. 460.

Carriers of Goods—*Bohannon v. Hammond*, 42 Cal. 227.

Contract Sunday—*Moore v. Murdock*, 26 Cal. 514.

Degree of Certainty, etc.—*People v. Padillia*, 42 Cal. 535.

Ejectment—*San Felipe v. Belshaw*, 49 Cal. 655.

Forcible Entry, etc.—*Jones v. Shay*, 50 Cal. 508; *Goodrich v. Van Landingham*, 46 Cal. 601.

Fraud, Proof—*Daniel v. Baca*, 2 Cal. 326.

Fraud Representations—*People v. Supervisors*, 27 Cal. 655.

Fraudulent Conveyance—*Cartright v. Phoenix*, 7 Cal. 281; *Tulley v. Harlow*, 35 Cal. 302.

Insanity—*People v. Coffman*, 24 Cal. 230.

Landlord and Tenant—*Skaggs v. Emerson*, 50 Cal. 3.

Malicious Prosecution—*Harkrader v. Moore*, 44 Cal. 144.

Negligence—*Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351.

Negligence Railroad Companies—*Needham v. Railroad*, 37 Cal. 409;

Flynn v. San Francisco, 40 Cal. 14; *Hearne v. Southern R. Co.*, 50 Cal. 482; *Baxter v. Roberts*, 44 Cal. 187.

Principal and Agent—*Miller v. Board etc.*, 44 Cal. 166.

Slander—*Lick v. Owen*, 47 Cal. 252.

Trespass—*McCarty v. Fremont*, 23 Cal. 196.

Warranty—*Polhemus v. Herman*, 45 Cal. 573; *Byrne v. Jansen*, 50 Cal. 624.

Colorado.—*Assault*—*May v. People*, 8 Colo. 224.

Drunkenness—*May v. People*, 8 Colo. 220.

Murder—*May v. People*, 8 Colo. 217.

Manslaughter—*Solander v. People*, 2 Colo. 54.

Connecticut.—*Adverse Possession*—*Russell v. Davidson*, 38 Conn. 562.

Conspiracy—*State v. Rowley*, 12 Conn. 101.

Factors—*Weed v. Adams*, 37 Conn. 378.

Larceny—*State v. Ellis*, 3 Conn. 186.

Measure of Damages—*Dibble v. Morris*, 26 Conn. 416; *Swift v. Dickerman*, 31 Conn. 285.

Negligence—*Beers v. Housatonic R. Co.*, 19 Conn. 566; *Isbell v. New York etc. R. Co.*, 27 Conn. 393.

Notice—*Farmers' Bank v. Payne*, 25 Conn. 444.

Perjury—*State v. Fassett*, 16 Conn. 457.

Warranty—*Chadsey v. Green*, 24 Conn. 562.

Georgia.—*Adverse Possession*—*Franklin v. Newsome*, 53 Ga. 580.

Assault, etc.—*King v. State*, 21 Ga. 220.

Carrier of Goods—*Wallace v. Matthews*, 39 Ga. 617.

Contract, Sunday—*Meriwether v. Smith*, 44 Ga. 541.

Circumstantial Evidence—*Houser v. State*, 58 Ga. 78.

Drunkenness—*Estes v. State*, 55 Ga. 31.

Estoppel—*Carroll v. Turner*, 54 Ga. 177.

Factors—*Tison v. Howard*, 57 Ga. 410.

Fraud, Representation—*Payne v. Smith*, 20 Ga. 654.

Insanity—*Anderson v. State*, 42 Ga. 11.

Landlord and Tenant—Morrill v. Barnes, 57 Ga. 404.

Negligence, Municipal Corporation—Mayor v. Dodds, 58 Ga. 238.

Payment—Stewart v. Parker, 55 Ga. 656.

Partnership—Barnett v. Blackman, 53 Ga. 98.

Principal and Agent—Southern Ex. Co. v. Palmer, 48 Ga. 85.

Self-defence—Thompson v. State, 55 Ga. 47.

Tender—Cothran v. Scanlon, 34 Ga. 555.

Trespass—Suggs v. Anderson, 12 Ga. 461.

Wills—Terry v. Buffington, 11 Ga. 337.

Illinois. — Adultery, Criminal—Searles v. People, 13 Ill. 597.

Adverse Possession—Ambrose v. Raley, 58 Ill. 506.

Aiders and Abettors—Smith v. People, 74 Ill. 144.

Account Stated—Strauber v. Mohler, 80 Ill. 21; Bayley v. Bensley, 87 Ill. 556.

Altering Written Instrument—Montag v. Linn, 23 Ill. 551.

Application of Payments—Bonnell v. Wilder, 67 Ill. 327.

Conspiracy—Smith v. People, 25 Ill. 21.

Carriers of Passengers—P. C. & A. L. R. Co. v. Thompson, 56 Ill. 138; P. P. & J. R. Co. v. Reynolds, 88 Ill. 418.

Carriers of Goods—Merchants etc. v. Smith, 76 Ill. 542; Milwaukee R. Co. v. Smith, 74 Ill. 197.

Carriers of Live Stock—Toledo R. Co. v. Thompson, 71 Ill. 434.

Contract, Capacity—McCarty v. Keamon, 86 Ill. 291.

Contract, Drunkenness—Bates v. Ball, 72 Ill. 108.

Contract, Marriage—Rockafeller v. Newcomb, 57 Ill. 186; Sprague v. Craig, 51 Ill. 288.

Contract, Subscription—Wilson v. Mc Clure, 50 Ill. 336.

Confessions—Jackson v. People, 18 Ill. 269.

Custom—Coffman v. Campbell, 87 Ill. 98.

Damages, Exemplary—Bates v. Davis, 76 Ill. 222.

Demand—Ingalls v. Bulkley, 13 Ill. 315.

Debt—City of Chicago v. Gage, 95 Ill. 593.

Deeds, Delivery—Gunnell v. Cocke-rill, 79 Ill. 79.

Drunkenness—Rafferty v. People, 66 Ill. 118.

Ejectment—Kilgour v. Gorkley, 83 Ill. 109.

Estoppel—Kinnear v. Mackey, 85 Ill. 96.

Factors—Phillips v. Moir, 69 Ill. 155.

Forcible Entry—Huftalin v. Misner, 70 Ill. 205.

Fraud Proof—Strauss v. Kranert, 56 Ill. 254.

Fraud, Intent—Bowen v. Schuler, 41 Ill. 192.

Fraudulent Conveyance—Nelson v. Smith, 28 Ill. 495.

Highways—Grube v. Nichols, 36 Ill. 96.

Intoxicating Liquor—Phillips v. Dickerson, 85 Ill. 11.

Landlord and Tenant—Strobie v. Dills, 62 Ill. 432.

Malicious Prosecution—Ames v. Snider, 69 Ill. 376; Brown v. Smith, 83 Ill. 291; Skidmore v. Bricker, 77 Ill. 165.

Malpractice—McNevin v. Lowe, 40 Ill. 209; Barnes v. Means, 82 Ill. 379.

Measure of Damages—C. B. & Q. R. Co. v. Payne Admrs., 59 Ill. 534; Graham v. Fulford, 93 Ill. 596; Illinois Cent. R. Co. v. Reed, 37 Ill. 484; Thorne v. McVeagh, 75 Ill. 81.

Murder, at Common Law—Jackson v. People, 18 Ill. 270.

Manslaughter—State v. Greschia, 53 Ill. 296.

Negligence—Chicago R. Co. v. Elmore, 67 Ill. 177; Keokuk etc. v. True, 88 Ill. 608; Hale v. Johnson, 80 Ill. 185.

Negligence, Municipal Corporation—People v. Mayor, 63 Ill. 207; City of Chicago v. McGiven, 78 Ill. 347.

Negligence Railroad Companies—C. B. & Q. R. Co. v. Dickson, 63 Ill. 151; Noble v. Cunningham, 74 Ill. 51; Toledo etc. R. Co. v. Lavery, 71 Ill. 522; P. P. & J. R. Co. v. Champ, 75 Ill. 577; Ind. & St. Louis R. Co. v. Stables, 62 Ill. 313; Chicago R. I. & P. R. Co. v. Austin, 69 Ill. 426; Chicago & Alton R. Co. v. Munroe, 85 Ill. 25.

Negotiable Instruments—Palmer v. Marshall, 60 Ill. 289; Holbrook v. Vibbard, 2 Scam. (Ill.) 465; Roberts v. Haskell, 20 Ill. 59; Dupey v. Schuyler, 45 Ill. 306.

Notice—City of Chicago v. Witt, 75 Ill. 211; Heaton v. Prather, 84 Ill. 330.

Payment—Ryan v. The Trustees, 14 Ill. 20; Glickauf v. Kaufmann, 73 Ill. 37.

Perjury—Johnson v. People, 94 Ill. 505.

- Partnership*—Smith *v.* Knight, 71 Ill. 148; McNair *v.* Platt, 46 Ill. 211.
- Principal and Agent*—Murphy *v.* Ottenheimer, 84 Ill. 39; McMillan *v.* Lee, 78 Ill. 443; Rea *v.* Durkee, 25 Ill. 504.
- Replevin*—Reynolds *v.* McCormick, 62 Ill. 412; Whisler *v.* Roberts, 19 Ill. 274.
- Reasonable Doubt*—May *v.* People, 60 Ill. 119.
- Slander*—Rearick *v.* Wilcox, 81 Ill. 77; Miller *v.* Johnson, 79 Ill. 58; Flinn *v.* Barlow, 16 Ill. 39; Wallace *v.* Dixon, 82 Ill. 202.
- Self-defence*—Steimeyer *v.* People, 95 Ill. 383.
- Tender*—Pulsifer *v.* Shephard, 36 Ill. 513; Jenks *v.* Burr, 56 Ill. 451.
- Trespass*—Paxton *v.* Boyer, 67 Ill. 132; Snyder *v.* Brosse, 51 Ill. 357; Linbloom *v.* Ramsey, 75 Ill. 246.
- Usury*—Reinback *v.* Crabtree, 77 Ill. 182; House *v.* Davis, 60 Ill. 362.
- Warranty*—Hawkins *v.* Berry, 5 Gilm. (Ill.) 36; Chicago etc. Co. *v.* Tilton, 87 Ill. 547; Maltman *v.* Williamson, 69 Ill. 423.
- Wills*—Dixie *v.* Carter, 42 Ill. 375; Ambre *v.* Weishaar, 76 Ill. 109; Yeo *v.* McCord, 74 Ill. 33.
- Indiana*.—*Adverse Possession*—Petterson *v.* McCullough, 50 Ind. 35.
- Adultery, Criminal*—State *v.* Gartrell, 14 Ind. 280.
- Alibi*—Howard *v.* State, 50 Ind. 190.
- Assault*—McCulley *v.* State, 62 Ind. 433.
- Altering Written Instrument*—Schnewind *v.* Hackett, 54 Ind. 248.
- Carrier of Goods*—Thayer *v.* St. Louis, 22 Ind. 26; Ind. R. Co. *v.* Allen, 31 Ind. 394.
- Circumstantial Evidence*—Jarrell *v.* State, 58 Ind. 293.
- Debt*—Pepper *v.* State, 22 Ind. 399.
- Embezzlement*—State *v.* Wingo, 89 Ind. 206; Keeley *v.* State, 14 Ind. 36; Hart *v.* State, 57 Ind. 102; Starch *v.* State, 63 Ind. 285.
- Ejectment*—Lotz *v.* Briggs, 50 Ind. 346.
- Fraud, Representation*—Reed *v.* Sidener, 32 Ind. 373.
- Fraudulent Conveyance*—Harrison *v.* Jaquess, 29 Ind. 208.
- Intoxicating Liquor*—Fountain *v.* Draper, 49 Ind. 441.
- Malicious Prosecution*—Smith *v.* Zeret, 59 Ind. 362.
- Measure of Damages*—Indianapolis *v.* Gaston, 5 Ind. 224; Yates *v.* Mullen, 24 Ind. 277; McAvoy *v.* Wright, 25 Ind. 22.
- Murder, at Common Law*—Galloway *v.* State, 29 Ind. 442; McDermott *v.* State, 89 Ind. 192.
- Second Degree*—State *v.* Achey, 64 Ind. 59.
- Malice*—Binns *v.* State, 66 Ind. 433.
- Negligence, Municipal Corporations*—Centerville *v.* Woods, 57 Ind. 192; Indianapolis *v.* Gaston, 58 Ind. 224.
- Negligence Generally*—Jeffersonville *v.* Lyon, 55 Ind. 477; Lafayette R. Co. *v.* Adams, 26 Ind. 76.
- Negligence, R. Companies*—St. Louis etc. R. Co. *v.* Valerious, 56 Ind. 511; Indianapolis etc. R. Co. *v.* Truitt, 24 Ind. 112; Bellefontaine R. Co. *v.* Hunter, 33 Ind. 353; Toledo etc. R. Co. *v.* Shuckman, 50 Ind. 42; Louisville etc. R. Co. *v.* Talvey, 104 Ind. 424.
- Negotiable Instruments*—Riley *v.* Shamacker, 50 Ind. 592.
- Payment*—White *v.* Whitney, 51 Ind. 124; Parsons *v.* Pendleton, 59 Ind. 36.
- Perjury*—Hitesman *v.* ———— 48 Ind. 473.
- Principal and Agent*—Howe *v.* Linder, 59 Ind. 307; Oinson *v.* Heritage, 45 Ind. 73.
- Replevin*—Noble *v.* Epperly, 6 Ind. 414; Lewis *v.* Masters, 8 Blackf. (Ind.) 244.
- Slander*—Indianapolis *v.* Horrell, 53 Ind. 527; Janch *v.* Janch, 50 Ind. 135.
- Tender*—Rose *v.* Duncan, 49 Ind. 269.
- Trespass*—Adams *v.* Waggoner, 33 Ind. 531; Cook *v.* Morea, 33 Ind. 497.
- Warranty*—Humphreys *v.* Comline, 8 Blackf. (Ind.) 508; Mann *v.* Everston, 32 Ind. 355.
- Wills*—Turner *v.* Cook, 36 Ind. 129.
- Iowa*.—*Alibi*—State *v.* Harden, 46 Iowa 623.
- Assault, etc.*—State *v.* Malcomb, 8 Iowa 413.
- Adverse Possession*—Spitler *v.* Schofield, 43 Iowa 571.
- Adultery, Criminal*—State *v.* Maroin, 12 Iowa 499.
- Aiders and Abettors*—State *v.* Malloy, 44 Iowa 113.
- Altering Written Instrument*—Dickerman *v.* Minor, 43 Iowa 508.
- Application of Payments*—Allen *v.* Brown, 39 Iowa 330.
- Conspiracy*—State *v.* Shelledy, 8 Iowa 484.
- Carriers of Passengers*—Sales *v.* Stage Co., 4 Iowa 547.
- Carriers of Goods*—Francis *v.* D. &

S. City R. Co., 25 Iowa 60; McCoy v. K. & D. M. R. Co., 44 Iowa 424.

Carriers of Live Stock—McDaniel v. C. & N. W. R. Co., 24 Iowa 412.

Contract, Capacity—Harris v. Wamsley, 41 Iowa 671.

Contract, Sunday—Peake v. Conlan, 43 Iowa 297.

Contract, Marriage—Royal v. Smith, 40 Iowa 615.

Custom—Hughes v. Stanley, 45 Iowa 522.

Circumstantial Evidence—State v. Hayden, 45 Iowa 11.

Deeds, Delivery—Steele v. Miller, 40 Iowa 402.

Ejectment—Morrison v. Wilkerson, 27 Iowa 374.

Factors—Howe v. Sutherland, 39 Iowa 484.

Fraudulent Conveyance—Chappel v. Clapp, 29 Iowa 191.

Highways—Fisher v. Beard, 32 Iowa 346.

Insanity—State v. Newherter, 46 Iowa 88.

Intoxicating Liquor—Worley v. Spurgeon, 48 Iowa 465.

Larceny—State v. Dean, 49 Iowa 74; State v. Wood, 46 Iowa 116.

Malicious Prosecution—Smith v. Howard, 28 Iowa 51.

Murder, at Common Law—State v. Shelledy, 8 Iowa 485.

Manslaughter—State v. Hardie, 47 Iowa 648.

Measure of Damages—Rafferty v. Buckman, 46 Iowa 195; Collins v. The City, 32 Iowa 324.

Negligence—Cooper v. Central R. Co., 44 Iowa 138; Muldowny v. Illinois Cent. R. Co., 39 Iowa 618; Walter v. Chicago etc. R. Co., 39 Iowa 36.

Negligence, Municipal Corporation—Rowell v. Williams, 29 Iowa 210; Van Pelt v. Davenport, 42 Iowa 311; German Theological School v. Dubuque, 64 Iowa 739.

Negligence, Railroad Companies—Parker v. Railroad Co., 34 Iowa 399; Davis v. Chicago R. Co., 40 Iowa 292; Kesee v. C. & N. W. R. Co., 30 Iowa 78; Farley v. The C. & R. I. R. Co., 42 Iowa 234; Walters v. C. R. I. & P. R. Co., 41 Iowa 71.

Negotiable Instruments—Kelley v. Ford, 4 Iowa 140; Stoddard v. Burton, 41 Iowa 582; Crosby v. Tanner, 40 Iowa 136.

Notice—Keenan v. Dubuque, 13 Iowa 375.

Payment, Guarantor—Hughes v. Bowen, 15 Iowa 446; Tucker v. Rank, 42 Iowa 80.

Partnership—First National Bank v. Carpenter, 41 Iowa 518; Boardman v. Adams, 5 Iowa 224.

Perjury—State p. Raymon, 20 Iowa 583.

Principal and Agent—Murray v. Brooks, 41 Iowa 45; Eadie v. Eshbaugh, 44 Iowa 519.

Replevin—Campbell v. Williams, 39 Iowa 646; Smith v. McLean, 24 Iowa 322; Crum v. Hill, 40 Iowa 506.

Self-defence—State v. Traunberg, 40 Iowa 555.

Tender—Eastman v. Rapids, 21 Iowa 570; Barnes v. Greene, 30 Iowa 114.

Trespass—Turner v. Hitchcock, 20 Iowa 310.

Warranty—McClung v. Kelley, 21 Iowa 508.

Wills—*In re Coffman*, 12 Iowa 491; Leighton v. Orr, 44 Iowa 679.

Kansas.—*Measure of Damages*—Kansas, Pac. R. Co. v. Cutter, 19 Kan. 83.

Murder, at Common Law—State v. Dickson, 6 Kan. 213.

Negligence—Sawyer v. Sauer, 10 Kan. 470; Union Pac. R. Co. v. Rollins, 5 Kan. 167.

Municipal Corp.—City of Emporia v. Schmidling, 33 Kan. 488.

Larceny—Ferrill v. Com., 1 Duv. (Kentucky) 154.

Malicious Prosecution—Wood v. Weir, 5 B. Mon. (Ky.) 544.

Murder, Manslaughter—Sparks v. Com., 3 Bush (Ky.) 113.

Negligence Generally—Robinson v. Webb, 11 Bush (Ky.) 464; Norfolk etc. R. Co. v. Armsby, 27 Gratt. (Va.) 455.

Negligence Railroad Companies, Carriers—Louisville etc. R. Co. v. Fox, 11 Bush (Ky.) 507.

Louisiana.—*Drunkness*—State v. Colman, 27 La. Ann. 691.

Malicious Prosecution—Hayes v. Hayman, 20 La. Ann. 336; York v. Chilton, 4 La. Ann. 377.

Maine.—*Burglary*—State v. Alexander, 56 Me. 131.

Conspiracy—State v. Ripley, 31 Me. 386.

Custom—Randall v. Smith, 63 Me. 105.

Debt—Inhabitants of Berwick v. Huntres, 53 Me. 89.

Fraudulent Conveyance—Furgeson v. Spear, 65 Me. 277.

Highways—Bartlett v. Bangor, 67 Me. 460.

Insanity—State v. Lawrence, 57 Me. 574.

- Landlord and Tenant*—Withers *v.* Larrabee, 48 Me. 570.
- Malicious Prosecution*—Humphries *v.* Parker, 52 Me. 506.
- Malpractice*—Simonds *v.* Henry, 39 Me. 155.
- Malice*—State *v.* Goodenow, 65 Me. 30.
- Measure of Damages*—Gilmore *v.* Matthews, 67 Me. 517; Pike *v.* Dilling, 48 Me. 539; Humphries *v.* Parker, 52 Me. 502.
- Negligence Generally*—Goddard *v.* Grand Trunk R. Co., 57 Me. 202.
- Negligence Railroad Companies*—Hervey *v.* Nourse, 54 Me. 256; Buzzell *v.* Laconia Co., 48 Me. 113.
- Negotiable Instruments*—Warren *v.* Gilman, 15 Me. 70.
- Payment*—Ware *v.* Adams, 24 Me. 177.
- Replevin*—Newman *v.* Jeune, 47 Me. 520; Adams *v.* Goddard, 48 Me. 212.
- Slander*—Orr *v.* Skofield, 56 Me. 483; Knowles *v.* Scribner, 57 Me. 495.
- Tender*—Pillsbury *v.* Willoughby, 61 Me. 274.
- Trespass*—Lord *v.* Wormwood, 29 Me. 282; Bradbury *v.* Gilford, 53 Me. 99.
- Warranty*—Hillman *v.* Wilcox, 30 Me. 170; Bishop *v.* Small, 63 Me. 12; Bryant *v.* Crosby, 40 Me. 9.
- Wills*—Barnes *v.* Barnes, 66 Me. 285.
- Maryland.**—*Malicious Prosecution*—McWilliams *v.* Hoben, 42 Md. 56.
- Negligence, Railroads*—Baltimore etc. R. Co. *v.* Strickler, 51 Md. 47-69.
- Principal and Agent*—Barmon *v.* Warfield, 42 Md. 22.
- Massachusetts.**—*Account Stated*—Hayes *v.* Kelley, 116 Mass. 300.
- Carrier of Goods*—Banan *v.* Eldridge, 100 Mass. 455; School District *v.* Boston R. Co., 102 Mass. 552.
- Carrier of Live Stock*—Smith *v.* New Haven R. Co., 12 Allen (Mass.) 531.
- Contract, Drunkenness*—Mitchell *v.* Kingham, 5 Pick. (Mass.) 431.
- Custom*—Page *v.* Cole, 120 Mass. 37.
- Conspiracy*—Com. *v.* Crowninshield, 10 Pick. (Mass.) 497.
- Debt*—Smith *v.* Crooker, 5 Mass. 538.
- Deeds, Delivery*—Concord Bank *v.* Bellis, 10 Cush. (Mass.) 276.
- Fraud*—Litchfield *v.* Hutchinson, 117 Mass. 195.
- Fraudulent Conveyance*—Allen *v.* Smith, 10 Mass. 308.
- Insanity*—Com. *v.* Rodgers, 7 Metc. (Mass.) 500; Cone *v.* McKie, 1 Gray (Mass.) 61.
- Landlord and Tenant*—Colburn *v.* Morrill, 117 Mass. 262.
- Larceny*—Com. *v.* Cullins, 1 Mass. 116.
- Murder—Manslaughter*—Com. *v.* Fox, 7 Gray (Mass.) 585; Com. *v.* McAfee, 108 Mass. 585.
- Malicious Prosecution*—Cardinal *v.* Smith, 109 Mass. 159.
- Negligence Generally*—Bryant *v.* Rich, 106 Mass. 180.
- Negligence, Railroad Companies*—Eames *v.* S. & L. R. Co., 98 Mass. 560; Ingersoll *v.* Stockbridge, 8 Allen (Mass.) 438; Allyn *v.* Railroad, 105 Mass. 77; Ackerson *v.* Dennison, 117 Mass. 407; Ladd *v.* New Bedford R. Co., 110 Mass. 412.
- Negligence, Carriers*—Christie *v.* Griggs, 11 Pick. (Mass.) 106.
- Negotiable Instruments*—Pettee *v.* Prout, 3 Gray (Mass.) 502.
- Notice*—Housatonic Bank *v.* Martin, 1 Metc. (Mass.) 294; Forbes *v.* How, 102 Mass. 427.
- Perjury*—Com. *v.* Grant, 116 Mass. 17.
- Principal and Agent*—Thayer *v.* White, 12 Metc. (Mass.) 343.
- Replevin*—Esson *v.* Tarbell, 9 Cush. (Mass.) 407.
- Reasonable Doubt*—Com. *v.* Webster, 5 Cush. (Mass.) 320.
- Trespass*—Barden *v.* Felch, 109 Mass. 154; Purrington *v.* Loring, 7 Mass. 388.
- Usury*—Bridge *v.* Hubbard, 15 Mass. 96.
- Warranty*—Vincint *v.* Leland, 100 Mass. 432; Bradford *v.* Manby, 13 Mass. 139; Brown *v.* Bigelow, 10 Allen (Mass.) 242.
- Wills*—Brooks *v.* Barrett, 7 Pick. (Mass.) 94.
- Michigan.**—*Altering Written Instrument*—Bradley *v.* Mann, 37 Mich. 1.
- Assault, etc.*—Roberts *v.* People, 19 Mich. 401.
- Conspiracy*—People *v.* Clark, 10 Mich. 317.
- Carrier of Goods*—McMillin *v.* Michigan R. Co., 16 Mich. 79.
- Carrier of Live Stock*—Great Western R. Co. *v.* Hawkins, 18 Mich. 427.
- Debt*—McCormick *v.* Bay City, 23 Mich. 447.
- Ejectment*—Gustin *v.* Barnham, 34 Mich. 511.
- Estoppel*—Sebright *v.* Moore, 33 Mich. 92.

- Fraud, Proof*—Watkins v. Wallace, 19 Mich. 57.
- Fraudulent Conveyance*—Hill v. Bowman, 35 Mich. 191.
- Landlord and Tenant*—Day v. Watson, 8 Mich. 535.
- Larceny*—People v. Crawford, 48 Mich. 500.
- Malicious Prosecution*—Livingston v. Burroughs, 33 Mich. 511.
- Measure of Damages*—Ripley v. Davis, 15 Mich. 75.
- Negligence, Municipal Corporation*—Detroit v. Beckman, 34 Mich. 125; Ashley v. Ft. Huron, 35 Mich. 296.
- Negotiable Instruments*—Outwaite v. Porter, 13 Mich. 533.
- Negligence, Railroad Companies*—Fort Wayne R. Co. v. Geldersleeve, 33 Mich. 137; Robinson v. The Grand Trunk R. Co., 32 Mich. 322.
- Principal and Agent*—Widner v. Lane, 14 Mich. 124.
- Replevin*—Eggleston v. Mundy, 4 Mich. 295.
- Slander*—Elliott v. Van Buren, 33 Mich. 49.
- Trespass*—Brushaber v. Stagemann, 22 Mich. 266; Van Auken v. Munroe, 38 Mich. 725; Aylesworth v. Herrington, 17 Mich. 417.
- Minnesota*.—*Assault, etc.*—State v. Garvey, 11 Minn. 154.
- Conspiracy*—State v. Pulle, 12 Minn. 164.
- Deb*—State v. Young, 23 Minn. 551.
- Embezzlement*—State v. Baumhager, 28 Minn. 229.
- Ejectment*—Williams v. Murphy, 21 Minn. 534.
- Fraud*—Cochran v. Stewart, 21 Minn. 435.
- Fraudulent Conveyance*—Hicks v. Stone, 13 Minn. 434.
- Highways*—Kennedy v. Le Vau, 23 Minn. 513.
- Landlord and Tenant*—Nelson v. Thompson, 23 Minn. 508.
- Negligence*—Derosia v. Winona, 18 Minn. 149; Hocum v. Weitherick, 22 Minn. 154.
- Negligence, Municipal Corporation*—Kobs v. Minnea, 22 Minn. 159; Alden v. City of Minneapolis, 24 Minn. 257.
- Negligence, Railroad Companies*—Locke v. St. Paul R. Co., 15 Minn. 350.
- Principal and Agent*—Hawkins v. Lange, 22 Minn. 557.
- Slander*—Shull v. Raymond, 23 Minn. 66; Burr v. Wilson, 22 Minn. 206.
- Mississippi*.—*Adverse Possession*—Wilson v. Williams, 52 Miss. 487.
- Ejectment*—Lum v. Reed, 53 Miss. 73.
- Factors*—Cotton v. Hiller, 52 Miss. 7.
- Principal and Agent*—Meyer v. Morgan, 51 Miss. 21.
- Self-defence*—State v. Stockton, 61 Miss. 382.
- Missouri*.—*Adverse Possession*—Bradley v. West, 60 Mo. 33.
- Adultery, Criminal*—State v. Crouner, 56 Mo. 149; Dameron v. State, 8 Mo. 494.
- Aiders and Abettors*—State v. Butterfield, 75 Mo. 301.
- Account Stated*—Powell v. P. R. R., 65 Mo. 658.
- Altering Written Instrument*—Evans v. Foreman, 60 Mo. 449.
- Burglary*—State v. Butterfield, 75 Mo. 301; State v. Hecox, 83 Mo. 538.
- Contract Rescinding*—Parker v. Marquis, 64 Mo. 38.
- Embezzlement*—State v. Ware, 62 Mo. 602.
- Ejectment*—Miller v. Hardin, 64 Mo. 545.
- Forcible Entry, etc.*—McCurtney v. Auer, 50 Mo. 395.
- Fraud, Proof*—Waddington v. Loker, 44 Mo. 132.
- Insanity*—State v. Huting, 21 Mo. 464.
- Landlord and Tenant*—Finney v. St Louis, 39 Mo. 117.
- Larceny*—State v. Conway, 18 Mo. 321.
- Murder, at Common Law*—State v. Gee, 85 Mo. 647; State v. Thomas, 78 Mo. 280.
- Malice*—State v. Jones, 78 Mo. 278.
- Accidental*—State v. Wisdom, 84 Mo. 190.
- Malicious Prosecution*—Holliday v. Sterling, 62 Mo. 321; Hill v. Palm, 38 Mo. 15.
- Measure of Damages*—Polk v. Allen, 19 Mo. 467; Whalen v. St. Louis, 60 Mo. 323; Davis v. Slagle, 27 Mo. 600.
- Negligence*—Jackson v. St. Louis R. Co., 87 Mo. 428; Neilon v. Kansas, 85 Mo. 607; Brown v. Hannibal R. Co., 50 Mo. 46.
- Negligence, Municipal Corporations*—Craig v. Sedalia, 63 Mo. 417.
- Negligence, Railroad Companies*—Porter v. Hannibal etc. R. Co., 60 Mo. 160; Brown v. Hannibal R. Co., 66 Mo. 588; Isabel v. Hannibal R. Co., 60 Mo. 475; Fletcher v. Atlantic R. Co., 64 Mo. 484.
- Payment*—Franklin v. Heinsman, 1 Mo. App. 336.
- Principal and Agent*—Summerville

v. Hannibal etc. R. Co., 62 Mo. 391;
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 Mo. 217; *Rothchild v. Am. Cent. Ins.*
 Co., 62 Mo. 356.

Self-defence—Wall *v.* State, 51 Mo.
 453.

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 565.

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 421.

Nebraska.—*Motive*—Clough *v.* State,
 7 Neb. 320.

Negligence, Municipal Corpora-
tion—Lincoln *v.* Walker, 18 Neb. 259.

Negligence, Carriers—Post *v.* Chi-
 cago & Co., 14 Neb. 112.

Nevada.—*Ejectment*—Phillipotts *v.*
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New Hampshire.—*Altering Written*
Instrument—Burnham *v.* Ayer, 35 N.
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 ciety *v.* Perry, 6 N. H. 164.

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tion—Winship *v.* Enfield, 42 N. H.
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Negligence, Carriers—Murch *v.*
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 163.

New Jersey.—*Conspiracy*—State *v.*
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New York.—*Burglary*—People *v.*
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v. Bush, 3 Parker's Cr. (N. Y.) 553.

Carriers of Baggage—Dexter *v.*
 Syracuse R. Co., 42 N. Y. 326.

Carriers of Goods—Coyle *v.* West-
 ern, etc., 47 Barb. (N. Y.) 152.

Contract Payment—Kellogg *v.* Rich-
 ards, 14 Wend. (N. Y.) 116; Boyd *v.*
 Hitchcock, 20 Johns. (N. Y.) 76.

Conspiracy—People *v.* Mather, 4
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 56 N. Y. 83; Simar *v.* Canaday, 53 N.
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 (N. Y.) 94; People *v.* Anderson, 14
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 39 N. Y. 459; Abrams *v.* People, 6
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 56 N. Y. 451.

Measure of Damages—Tilley *v.*
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Negligence, Municipal Corpora-
tion—Wendell *v.* Troy, 39 Barb. (N.
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Negligence, Railroad Companies—
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 Y. 641; Wright *v.* N. Y. Cen. R. Co.,
 25 N. Y. 562; O'Mara *v.* Hudson R.
 Co., 38 N. Y. 445.

Negotiable Instruments—Stalker *v.*
 McDonald, 6 Hill (N. Y.) 93.

Notice—Fulton Bank *v.* New York,
 4 Paige (N. Y.) 127; Bank of U. S. *v.*
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Perjury—People *v.* Warner, 5 Wend.
 (N. Y.) 271.

Principal and Agent—Barkley *v.*
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Replevin—Stillman *v.* Squire, 1
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 1 Hill (N. Y.) 176.

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Tender—Wood *v.* Hitchcock, 20
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 4 Denio (N. Y.) 295.

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Warranty—Hawkins *v.* Pemberton,
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v. Osmer, 65 Barb. (N. Y.) 556.

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North Carolina.—*Alibi*—State v. Jaynes, 78 N. Car. 504.

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Ohio.—*Assault, etc.*—Sharp v. State, 19 Ohio St. 379.

Burglary—Ducher v. State, 18 Ohio 308; Mulrooney v. State, 26 Ohio St. 327.

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Malpractice—Geiselman v. Scott, 25 Ohio St. 86.

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Negotiable Instruments—Carlisle v. Wishart, 11 Ohio 172; Johnson v. Way, 27 Ohio St. 374.

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Perjury—Montgomery v. State, 10 Ohio St. 220.

Replevin—Phillips, 14 Ohio St. 240.

Slander—Jones v. Graves, 26 Ohio St. 2; Fowler v. Chichester, 26 Ohio St. 9.

Trespass—Wright v. Lathrop, 2 Ohio 33.

Oregon.—*Ejectment*—Whyte v. Smith, 4 Sawyer (Oreg.) 17.

Landlord and Tenant—Ladd v. Smith, 6 Oreg. 316.

Payment, Guarantor—O. & C. R. Co. v. Potter, 5 Oreg. 228.

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Carriers of Goods—Morrison v. Davis, 20 Pa. St. 171; Penn. R. Co. v. Benz, 68 Pa. St. 272.

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Negligence, Railroad Companies—Penn. R. Co. v. Heilman, 49 Pa. St. 60; Penn. R. Co. v. Beale, 73 Pa. St. 504.

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Texas.—*Aiders and Abettors*—Cotton v. State, 32 Tex. 627; Pierce v. State, 17 Tex. App. 239; Jackson v. State, 20 Tex. App. 192.

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Circumstantial Evidence—Law v. State, 33 Tex. 37.

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Malice—Kemp v. State, 13 Tex. App. 562.

Negligence—Houston R. v. Randall, 50 Tex. 257.

Negligence, Carriers—International R. Co. v. Ormond, 64 Tex. 488; Houston, etc. R. v. Gorbett, 49 Tex. 576.

Principal and Agent—Folkes v. Baker, 27 Tex. 135.

Rape—Pefferling v. State, 40 Tex. 486.

Vermont.—*Adverse Possession*—Soule v. Barlow, 49 Vt. 329.

INSTRUMENT.—See note 1.

Contract, Subscription—State v. Cross, 9 Vt. 289.

Negligence, Railroad Companies—Noyes v. Smith, 28 Vt. 59.

Negligence, Municipal Corporations—Hunt v. Paronall, 9 Vt. 411.

Payment, Guarantor—White v. White, 30 Vt. 338.

Principal and Agent—Swain v. Tyler, 26 Vt. 9.

Rape—State v. Niles, 47 Vt. 82.

Replevin—Barnes v. Barnes, 6 Vt. 388.

Tender—Preston v. Grant, 34 Vt. 201.

Trespass—Harrison v. Harrison, 43 Vt. 417; Abbott v. Kimball, 19 Vt. 551; Austin v. Bailey, 37 Vt. 219.

West Virginia.—Drunkennes—Bales v. State, 3 W. Va. 685.

Larceny—State v. Heaton, 23 W. Va. 776.

Malicious Prosecution—Vinal v. Core, 18 W. Va. 1-74.

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Embezzlement—State v. Leicham, 41 Wis. 582.

Estoppel—Knox v. Clifford, 38 Wis. 651.

Forcible Entry, etc.—Steinlein v. Halstead, 42 Wis. 422.

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Measure of Damages—Costello v. Landwehr, 28 Wis. 522; McWilliams v. Biagg, 3 Wis. 424; Terney v. State Bank, 20 Wis. 152.

Negligence, Municipal Corporations—Prideaux v. Mineral Point, 43 Wis. 513; Guffin v. Town of Willow, 43 Wis. 509.

Negligence, Generally—Hoyt v. Hudson, 27 Wis. 656; Hammond v. Town of, etc., 40 Wis. 35.

Negligence, Railroad Companies—Wedgewood v. Chicago R. Co., 41 Wis. 478; Bass v. Chicago R. Co., 36 Wis. 450; Jones v. The Sheboygan & R. Co., 42 Wis. 306.

Negotiable Instruments—Cook v. Helms, 5 Wis. 107; Stevens v. Campbell, 13 Wis. 375.

Notice—Pringle v. Dunn, 37 Wis. 449.

Payment—Weed, etc. v. Oberreich, 38 Wis. 325; Griffiths v. Kellogg, 39 Wis. 290.

Principal and Agent—Saveland v. Green, 40 Wis. 431.

Slander—Wilson v. Noonan, 35 Wis. 321; Blaeser v. Milwaukee, 37 Wis. 31.

Tender—Hunter v. Warner, 1 Wis. 141.

Trespass—Bonesteel v. Bonesteel, 28 Wis. 245.

Warranty—Hahn v. Doolittle, 18 Wis. 197; Conger v. Chamberlain, 14 Wis. 258; Merriam v. Field, 39 Wis. 578.

Authorities.—Thornton on Instructions (Ind.); Thompson on Trials; Thompson on Charging the Jury; Sackett on Instructions; Proffatt on Jury Trials.

1. "Abbott, in his law dictionary, defines the word instrument as 'something reduced to writing as a means of evidence,' and Webster describes it as a writing expressive of 'some act, contract, process or proceeding, as a deed, contract, writ, etc.'" State v. Kelsey, 15 Vroom (N. J.) 34.

A will is an instrument in writing within the meaning of a power to appoint by an "instrument in writing." Sugden on Powers, p. 214; Smith v. Adkins, L. R., 14 Eq. Cas. 402.

A judgment is not a written instrument within the meaning of the *Indiana* statute, which provides as follows: "When any pleading is founded on a written instrument, or on account, the original, or a copy thereof, must be filed with the pleading. . . . Such copy of a written instrument, when not copied in the pleadings, shall be taken as part of the record." Said the court: "Deeds, mortgages, bonds, written contracts, promissory notes, bills of exchange, etc., are written instruments. Judgments are in writing, but are not usually called written instruments. The legislature, in framing and enacting the section, evidently had in view only instruments of which 'the original, or a copy,' might be filed, as the party might elect." Lytle v. Lytle, 37 Ind. 281. See also Wilson v. Vance, 55 Ind. 584; Morrison v. Tishel, 64 Ind. 177.

A writ of attachment is not an instrument within the meaning of section 1107 of the *California* Code of Civil Proc., which provides as follows:

INSUFFICIENCY—INSUFFICIENT.—See note 1.

"Every grant of an estate in real property is conclusive against the grantor, also every one subsequently claiming under him, except a purchaser or incumbrance, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded." *Hoag v. Howard*, 55 Cal. 564.

A sheriff's certificate of sale under § 700 of the Cal. Code of Civil Proc. is an instrument within the meaning of § 1107 of the said code. (See preceding paragraph.) Said the court: "The question recurs, was the sheriff's certificate of sale, issued to the respondent and recorded, good as against an unrecorded deed? Appellant contends that a sheriff's certificate is not an instrument whereby a title or lien is acquired within the purview of section 1107, Civil Code. An instrument is a writing which contains some agreement, and is said to be so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes conveyances, leases, mortgages, bills, bonds, promissory notes, wills, etc. *Bouv. Law Dict.* In *Hoag v. Howard*, 55 Cal. 564 [see above] it was held that a writ of attachment was not an instrument within the sense of that term as used in section 1107, Civil Code, and therefore a deed executed prior to a levy of the attachment upon the property conveyed, though not recorded until after the levy, would prevail over the attachment. A writ of attachment, an execution, or other writ, is not the record or memorial of any agreement, but simply the mandate of the law commanding something to be done, or not to be done, and is quite independent of the will of the party against whom it runs, and is in no sense an embodiment of the agreement, will, or wishes, and we fully concur in the view taken by the court in that case of the writ of attachment. The court in the same case defined the word 'instrument,' as used in the Civil Code, to mean 'some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty.' The sheriff, under a proper writ, is clothed by law with the power to sell and convey the property of a judgment debtor.

This can only be done in the cases and in the manner and subject to the limitations provided by law, but when this is accomplished the process is as effective in passing the title as a conveyance by the debtor himself. When real estate is thus sold by a sheriff, 'the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto; and, when the real estate is less than a leasehold of two years' unexpired term, the sale is absolute,' etc. *Code Civil Proc.*, § 700. The sheriff is required to give the purchaser a certificate of sale, containing a specification of the facts enumerated in the statute, and a duplicate of this certificate must be filed in the office of the county recorder. The certificate is a memorial signed by the sheriff, in which whatever has taken place at the sale is set forth. It is the evidence of a sale, whereby subject to the right of redemption, and of possession in the judgment debtor for the time allowed therefor, the entire equitable title is conditionally vested in the purchaser, subject to be defeated by a redemption; but if not so redeemed the certificate is evidence of his right to a deed which shall vest in him the dry, legal title which remained in the judgment debtor. The transfer is not perfect until the execution and delivery of the sheriff's deed, but by the doctrine of relation, the deed, when thus executed, is to be deemed and taken as though executed at the date when the lien of which it is the sequence originated. The sheriff's certificate to the purchaser is the evidence of the equitable interest which the purchaser has in the land, and is an instrument whereby an interest or title is created, within the meaning of section 1107, *supra*. Page *v. Rogers*, 31 Cal. 310." *Torman v. Wallace*, 19 Pac. Rep. (Cal.) 680.

1. **Insufficiency in Pleading.**—"In common law pleadings the word [insufficiency] was sometimes used. A pleading was said to be defective, uncertain, or bad, but it was not generally called insufficient. In chancery, however, the word was extensively used in connection with answers which were called insufficient when they did not distinctly and fully respond to the allegations or interrogatories in the bill. But it was always applied to those answers which did not explicitly respond, either by ad-

INSULTING.—See note 1.

mitting or denying specifically the matters charged or enquired of by the complaint, and was not deemed applicable to the statement of new matter. (1 Hoff. Ch. [N. Y.] 272; 1 Paige [N. Y.] 556.)" *Salinger v. Lusk*, 7 How. Pr. (N. Y.) 430. The word is used in the same sense in section 153 of the *New York Code*, which provides that the plaintiff may demur to the answer for "insufficiency." *Salinger v. Lusk*, 7 How. Pr. (N. Y.) 430.

Insufficient Evidence.—By section 804 of the Rev. Sts. of the U. S., which relates to the administration of justice in the *District of Columbia*, it is provided as follows: "The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages." By section 805, it is provided that "when such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision." It has been held that the phrase "insufficient evidence," as thus used, includes evidence that is insufficient in fact as well as that which is insufficient in law, and that, therefore, an appeal lies on a motion to set aside a verdict as being against the weight of the evidence. Says the court: "We see no reason for supposing that the language in section 804, 'for insufficient evidence,' is to be limited to evidence insufficient in point of law. The words themselves do not import any distinction. It is admitted that according to established rules of procedure in such cases, it is customary and proper for courts of justice, sitting in the trial of causes by jury, to set aside verdicts and grant new trials in both classes of cases; that is, where the verdict rests upon evidence which is either insufficient in law or insufficient in fact. Strictly speaking, evidence is said to be insufficient in law only in those cases where there is a total absence of such proof, either in its quantity or kind, as in the particular case some rule of law requires as essential to the establishment of the fact. Such, for instance, would be the case where a fact was attested by one witness only, when the law required two; or when the alleged evidence was proven to be verbal, when the law required it to be in

writing. In such cases, a verdict might be said to be against law, because founded on insufficient evidence. Insufficiency in point of fact may exist in cases where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality in law to sustain to it, and yet it may be met by countervailing proof so potent as to leave no reasonable doubt of the opposing conclusion." *Metropolitan R. R. Co. v. Moore*, 15 Wash. L. Rep. (U. S. S. C.) 405. For a similar construction of the phrase as used in the *New York Code*, see *Algeo v. Duncan*, 39 N. Y. 313; *McDonald v. Walter*, 40 N. Y. 551.

Under section 16, ch. 132, of the Rev. Sts. of *Wisconsin*, which provides that a verdict may be set aside "for insufficient evidence," it has been held that where the plaintiff, if entitled to recover at all, is clearly entitled to a larger amount than that allowed by the jury, the verdict may be set aside as being found on "insufficient evidence," within the meaning of the section. Say the court: "In the case of *Moore v. Wood*, 19 How. Pr. 405, the court held that a party could not move on the minutes to set aside a verdict in his own favor, on the ground that the damages found by the jury were too small. 'By insufficient evidence,' the court say, 'is intended a case where the verdict is contrary to the evidence, not where the jury have found a verdict upon evidence, but have ignorantly or perversely found too small damages.' [But] it seems to us, if a jury ignorantly or perversely finds for a plaintiff five dollars damages, when the evidence shows that he should recover a thousand dollars damages, that such a verdict is clearly contrary to evidence, and found upon insufficient evidence. See *McDonald v. Walter*, 40 N. Y. 551." *Emmons v. Sheldon*, 26 Wis. 648.

1. Insulting Language.—The *Alabama Criminal Code*, section 4031, provides for the punishment of "any person who enters into or goes sufficiently near to the dwelling house of another and, in the presence or hearing of the family of the occupant thereof, or any member of his family, or any person who in the presence or hearing, of any female, uses abusive, insulting or obscene language." In *Benson v. State*,

INSURABLE INTEREST.—See INSURANCE.

INSURANCE—(See also ACCIDENT INSURANCE, vol. 1, p. 87; BENEFICIAL ASSOCIATION, vol. 2, p. 171; FIRE INSURANCE, vol. 7, p. 1007; GUARANTY INSURANCE, vol. 9, p. 65; LIFE INSURANCE; MARINE INSURANCE; MUTUAL INSURANCE).

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68 Ala. 513, the defendant went into the dwelling house of his niece, and speaking to her said, "If you don't give up my pistol I'll knock your brains out, by God," and speaking to a man there with her said, "Do you take it up." It was held that the language was insulting. Said the court: "If the same language had been used to a male it would doubtless have been construed as insulting, and would have tended to provoke a breach of the peace. Indeed the defendant himself seems to have considered it insulting, for he turned immediately to a gentleman present and enquired if he 'took it up.' Why make this enquiry if there was no insult to be resented, or taken up? We would be loth to hold that language which would insult a man would not be insulting to a female, because, by reason of her sex and gentler nature, she would not resent it with blows."

Insulting Words Towards a Female.—By the *Texas Penal Code*, article 593.

manslaughter is defined as "voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law." *Inter alia*, the use of "insulting words . . . by the person killed towards a female relative of the party guilty of the homicide" is specified as an "adequate cause." In *Simmons v. State*, 23 Tex. App., in which Simmons, the defendant was charged with murder by stabbing, there was evidence showing that just before the defendant stabbed the deceased the latter applied to the former the words "damned son of a bitch." It was held that the use of these words did not make the homicide manslaughter. Said the court: "We do not think this language comes within the meaning of the statute upon this subject; the term used is rather a sudden expression of anger and contempt, and, when used, no one understands it to be directed at the mother of the person to whom used."

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I. DEFINITIONS.—Insurance, in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a specified peril.¹

The party who agrees to indemnify or insure is called the insurer or underwriter. The person to whom indemnity is promised is called the insured or assured.

II. THE CONTRACT—1. **Need Not be in Writing.**—The written contract between the parties expressing the terms of the insurance is called the policy. But in the absence of positive law or a charter provision to the contrary, there is nothing requiring the contract to be in writing.² It is, however, the universal practice

1. "Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss." May on Insurance, 1.

"Insurance is a contract by which the one party, in consideration of a price paid to him, adequate to the risk, becomes security to the other, that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them." *Lucena v. Crawford*, 2 Bos. & Pul. New Rep. 300.

"A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks." 1 Phillips on Insurance, § 1.

"A contract by which a person, in consideration of a gross sum, or of a periodical payment, undertakes to pay a larger sum on the happening of a particular event." Smith's Common Law, 299.

A contract by which, for a consideration, one promises to make a certain payment on the destruction or injury of something in which the other party has an interest, whatever the terms of payment of the consideration or the mode of estimating or securing payment of the sum to become due in case of loss. *State v. Farmers' etc. Assoc.*, 18 Neb. 276.

A corporation organized to provide for its members during life, and their families after death, provided, in its constitution and by-laws, for the payment at death of a certain sum in consideration of a membership fee and certain future assessments. The member was obliged to be examined by a physician before becoming a member. The officers and agents of the corporation received good salaries. *Held*, that it was not a corporation for benevolent purposes within the meaning of Rev.

St. Tex. tit. 20, but an insurance company. *Farmer v. State*, 69 Tex. 561.

It is called fire, life, accident, marine, or other insurance, according to the character of the subject matter or the peril insured against.

2. May on Insurance, § 14; *Taylor v. Merchant's F. Ins. Co.*, 9 How. (U.S.) 390; *Commercial Mut. Ins. Co. v. Union etc. Ins. Co.*, 19 How. (U.S.) 318; *Relief Fire Ins. Co. v. Shaw*, 4 Otto (U.S.) 574; *Mobile Marine etc. Ins. Co. v. McMillan*, 31 Ala. 711; *Home Ins. Co. v. Adler*, 77 Ala. 242; *First Baptist Church v. Brooklyn etc. Ins. Co.*, 19 N. Y. 305; *Wood v. Rutland etc. Ins. Co.*, 31 Vt. 552, 562; *Blanchard v. Waite*, 28 Me. 51; *Warren v. Ocean Ins. Co.*, 16 Me. 439; *Campbell v. American F. Ins. Co. (Wis.)*, 40 N. W. Rep. 661; *North Western Iron Co. v. Etna Ins. Co.*, 26 Wis. 78; *Taylor v. Germania Ins. Co.*, 2 Dill. (U.S.) 282; *Ide v. Phoenix Ins. Co.*, 2 Biss. (U.S.) 333; *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Henning v. U. S. Ins. Co.*, 47 Mo. 425; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Northrup v. Miss. Ins. Co.*, 47 Mo. 435; *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166; *People's Ins. Co. v. Paddon*, 8 Ill. App. 447; *Palm v. Medina Co. etc. F. Ins. Co.*, 20 Ohio 529; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Franklin F. Ins. Co. v. Taylor*, 52 Miss. 441. These cases have mostly been where a loss occurred before the issuance of the policy.

Where There Is No Stamp Act.—*West Mass. Ins. Co. v. Duffy*, 2 Kan. 347; *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171; *American Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Sanborn v. Firemen's Ins. Co.*, 16 Gray

to reduce the contract to a generally accepted form, and where a statute or the charter requires it to be in writing, or requires a formality which implies it, it is necessary.¹

It being within the power of an insurer to obligate himself as such by a mere verbal agreement, so a verbal agreement enlarging or otherwise modifying an existing policy is valid and binding.² And this, though it be provided that "the use of general terms or anything less than a distinct, specific agreement, clearly expressed or endorsed on this policy shall not be construed as a waiver of any printed or written condition or restriction herein contained."³

2. Form.—The form of the policy is immaterial as a matter of law,⁴ unless some form be prescribed by statute;⁵ but, as a matter of practice, is of much importance. One form alone in each of the several classes of insurance is now substantially concurred in by all insurance companies, the different provisions of which forms have received judicial construction in a great number of cases, so that to now adopt a new form would be to open wide the flood-gates of litigation.

3. Parties.—The business of insurance is carried on by companies chartered for such purpose; but unless a statute or public policy forbids, an individual, otherwise capable of contracting, or a partnership, as well as a corporation, may enter into the undertaking.⁶

4. Consummation.—When the policy is issued by the company and accepted by the insured, its terms fix the rights and determine the obligations between the parties.⁷ But, unless it is otherwise agreed or provided, it is not essential to the liability of the insurer that a policy should have been issued. It is merely the evidence of the contract into which the parties have entered.⁸

(Mass.) 448; *Kennebeck Co. v. Augusta Ins. Co.*, 6 Gray (Mass.) 204; *Franklin Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231; *Hamilton v. Lycoming Ins. Co.*, 5 Barr. (Pa.) 339.

There may be a parol contract of insurance to protect the insured between the time of taking the risk and issuing the policy. *Patterson v. Benjamin Franklin Ins. Co.*, 81 Pa. St. 454.

1. *Cockerell v. Cincinnati etc. Ins. Co.*, 16 Ohio 148; *Henning v. U. S. Ins. Co.*, 47 Mo. 425; *Train v. Holland etc. Ins. Co.*, 62 N. Y. 598; *Simonton v. Liverpool etc. Ins. Co.*, 51 Ga. 76; *Croghan v. Underwriters' Agency*, 53 Ga. 109.

2. *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Wood v. Cutland etc. Ins. Co.*, 31 Vt. 552.

3. *Day v. Mechanics & Traders' Ins. Co.*, 88 Mo. 325.

4. *Pullen v. Glover*, 12 East 124; *Roebuck v. Hammertown, Cowp.* 737.

5. See *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460; *New Era Life Ass'n v. Musser*, 120 Pa. St. 384; *Susquehanna Mut. F. Ins. Co. v. Hallock* (Pa.), 14 Atl. Rep. 167; *Dunbar v. Phoenix Ins. Co.* (Wis.), 40 N. W. Rep. 386.

6. *Angell on Ins.*, 43; *Park on Ins.*, 5; *Wood on Fire Ins.*, 2; *May on Ins.*, 34.

In *Holbrook v. St. Paul F. etc. Ins. Co.*, 25 Minn. 229, it was held that the policy was not invalidated by reason of having been taken out as if the insured was a corporation instead of a partnership.

7. *McGurk v. Metropolitan Life Ins. Co.* (Conn.), 16 Atl. Rep. 263. But this court holds that the applicant in making the application is not bound by the terms of a stipulation in the policy when he does not know that the policy will contain it.

8. *Fuller v. Madison Mut. Ins. Co.*,

If all the terms of the contract have been agreed upon, and nothing remains to be done but execute them, such liability attaches with all the efficacy of a formal policy.¹

But whether the parties have come to an understanding and agreement so that nothing remains to be done but to execute it, may be a serious question. And here it must be borne in mind that all of the terms of the contract must have been agreed upon. If it be incomplete in any material particular, it is of no binding force.² So all the conditions upon which it is made to depend

36 Wis. 599; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448; *Relief Fire Ins. Co. v. Shaw*, 4 Otto (U. S.) 574; *Fitton v. Fire Ins. Ass'n*, 20 Fed. Rep. 766; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Home Ins. Co. v. Adler*, 77 Ala. 242.

1. *Akin v. Liverpool etc. Ins. Co.* (U. S. C. Ct. Ark.), 6 Ins. L. J. 341; *Hallock v. Commercial Ins. Co.*, 2 Dutch. (N. J.) 268; s. c., 3 Dutch. (N. J.) 645; *Kohne v. Ins. Co. of N. A.*, 1 Wash. (U. S.) 93; *Goodall v. New Eng. etc. F. Ins. Co.*, 5 Post. (N. H.) 169; *Mead v. Davidson*, 4 Ad. & Ell. 303; *Excelsior F. Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; *Lightboy v. N. A. Ins. Co.*, 23 Wend. (N. Y.) 18; *Davenport v. Peoria Fire Ins. Co.*, 17 Iowa 276; *Home Ins. Co. v. Adler*, 77 Ala. 242; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Gausser v. Fireman's Ins. Co.*, 38 Minn. 74. See also *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151; *Keim v. Home Mut. Ins. Co.*, 42 Mo. 38; *Franklin F. Ins. Co. v. Colt*, 20 Wall. (U. S.) 560.

A valid parol agreement with an insurance company, made in October, that a policy for twelve months should be issued in the early part of November, would, by its terms, cover a loss occurring November 19th. *Home Ins. Co. v. Adler*, 77 Ala. 516.

Plaintiff testified to an agreement with defendant's agent to write a policy for \$500 for six months, to take effect at a certain time, for a certain premium to be paid. Defendant's agent testified to the same facts, except as to the time the policy was to take effect; but insisted that he suggested to plaintiff that the company might be unwilling to take risk when reported. The agent never wrote the policy, nor did the company refuse to carry the risk until after loss and the plaintiff had demanded the policy. *Held*, that though no premium was paid, there was a valid contract.

Campbell v. American F. Ins. Co. (Wis.), 40 N. W. Rep. 661.

Where a parol agreement is made for insurance, to begin at once, and the policy to be subsequently issued, the conditions of the policy ordinarily employed govern. *Smith v. State Ins. Co.*, 64 Iowa 716; *Salisbury v. Hekla F. Ins. Co.*, 32 Minn. 458.

2. *Piedmont etc. Life Ins. Co. v. Ewing*, 92 U. S. 377; *Earnes v. Home Ins. Co.*, 94 U. S. 621; *Strohn v. Hartford F. Ins. Co.*, 37 Wis. 625; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Clark v. Brand*, 62 Ga. 23; *Delaware State F. & M. Ins. Co. v. Shaw*, 54 Md. 546; *O'Reilly v. London Ass'n Corp.*, 101 N. Y. 575.

A applied to an insurance agent, who was the agent of several companies for insurance, paid part of the premium, and, after the property was burned, paid the rest, demanded a policy, and, failing to get it, sued one of the companies which the agent represented. There was no evidence of a contract with any particular company, and it was *held* that the action could not be maintained. *New Orleans Ins. Ass'n v. Boniel*, 20 Fla. 815. To the same effect, *Sheldon v. Hekla F. Ins. Co.*, 65 Wis. 436. Otherwise where the company or companies are designated. *Filton v. Fire Ins. Ass'n*, 20 Fed. Rep. 766; and if there are more than one, and the amount in each has not been agreed upon, the amounts will be presumed to be equal. *Filton v. Phoenix Ass'n Co.*, 25 Fed. Rep. 880.

S's agent applied to a mutual company for insurance, and said he would pay the premium and fees when he received the policy; whereupon a policy was drawn without S's signature, and S was enrolled as a member on the books of the company. On the next day the property was destroyed by fire. S's agent at once tendered the premium and demanded the policy.

must have been complied with.¹ Thus, if it be stipulated that the agreement shall not take effect until the premium is paid,² or the policy delivered,³ it will have no effect until this stipulation is complied with. Indeed, whether or not there is a completed contract of insurance is mainly to be tested by the principles applicable to the making of contracts in general. Thus, if an offer be made, and be accepted with qualifying terms or conditions which are not approved by the party making the offer, applying the familiar rule that, to constitute a contract there must be an exact meeting of minds, readily determines that no contract has been consummated.⁴

Where the contract is made by correspondence through the mails, consummation occurs when an unqualified acceptance of

which the company refused. *Held*, that the contract was not completed, S's liability to contribute for losses not being fixed, and he could not maintain a suit for the amount named in the policy. *Schaffer v. Lehigh Co. etc. Ins. Co.*, 89 Pa. St. 296.

A applied to an insurance agent for a policy on his life. His application was made out, he was examined, and he gave the agent his note for the amount of the first premium. Before it was paid, or the application forwarded to the company, A was killed. Upon this state of facts it was *held* that the company was not liable. *Covenant Mut. Ben. Ass'n v. Conway*, 10 Ill. App. 348.

An oral agreement by an insurance agent to take a certain sum upon mill property is not a completed contract of insurance, if there was to be an apportionment between real and personal property, and none had been made when the property was destroyed. *Kimball v. Lion Ins. Co.*, 17 Fed. Rep. 625.

Showing that the agent's clerk called his attention to a renewal which was sought, and asked him to renew, and that he made no reply and did nothing indicating that he intended to comply with the request, does not establish a renewal. *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6.

Withdrawal of Application.—An application for insurance may be withdrawn at any time before the policy is issued. *Globe etc. L. Ins. Co. v. Snell*, 19 Hun (N. Y.) 560.

1. *Flint v. Ohio Ins. Co.*, 8 Ohio 501; *Rogers v. Charter Oak L. Ins. Co.*, 41 Conn. 97.

2. *Flint v. Ohio Ins. Co.*, 8 Ohio 501; *Markey v. Mut. Ben. Ins. Co.*, 126

Mass. 158; *Hubbell v. Pac. etc. Ins. Co.*, 100 N. Y. 41.

But delivery of a policy to an agent authorized to deliver it to the insured and receive the premium, and his delivery of the policy to the insured, and acceptance of a note for the premium, and procuring a discount of the same for his own account, without paying the premium to the principal, constitutes a valid insurance, in spite of a provision in the policy that such agent shall be deemed the agent of the insured, and that the insurer shall not be liable until he actually receives the premium. *Carson v. Jersey City F. Ins. Co.*, 43 N. J. L. 300; s. c., 39 Am. Rep. 594.

3. *McCully v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782; *Kohen v. Mut. Reserve Fund L. Ass'n*, 28 Fed. Rep. 705.

4. *Mut. Life Ins. Co. v. Young*, 23 Wall. (U. S.) 106; *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357.

Where a proposal was made for insurance, nothing being said as to the premium, and the company wrote to its agent accepting the same with a statement that a policy would be issued on the payment of a premium named, which letter the agent did not make known to the party applying, on account of his failing health, it was *held* that no contract had been consummated. *Wemyss v. Med. Ins. & Gen. Life Ins. So.*, 11 Ct. of Sess. Cas. (Scotch), 2d O. series, 151, 345; s. c., 20 Scotch Jur. 534. See also *Piedmont etc. L. Ins. Co. v. Ewing*, 92 U. S. 377; *Neville v. Merchants' etc. Ins. Co.*, 19 Ohio 452; *Wallingford v. Home Mut. F. & M. Ins. Co.*, 30 Mo. 46.

the offer is mailed,¹ the offer being deemed to continue a reasonable length of time after its receipt for acceptance, unless sooner withdrawn. What is such reasonable time will be determined from all the circumstances of the case, but unless it is otherwise indicated it will not usually be considered as extending beyond the next mail, where ample time intervenes for acceptance.²

Payment of the premium and delivery of the policy are presumed by the law to be concurrent. Therefore, where the premium has not been paid, nor the policy delivered, the contract is *prima facie* incomplete.³ And where the one has been paid and the other delivered, it is *prima facie* complete.⁴ But this presumption may be rebutted, and it be shown that it was intended as a complete contract when the premium has not been paid, nor the policy delivered, or that it was deemed to be incomplete when the premium has been paid and the policy delivered.⁵

Sometimes it is provided that the agent may write policies subject to the right of the company to reject the risk in case it shall be unsatisfactory, from the rate of the premium or otherwise. In such event the company cannot reject it merely because a fire has intervened,⁶ or because the agent has neglected to forward the

1. *Tayloe v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; *Eames v. Home Ins. Co.*, 94 U. S. 621; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Western v. Genesee Mut. Ins. Co.*, 2 Kern. (N. Y.) 258; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Barr. (Pa.) 339; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Palm v. Medina Co. etc. F. Ins. Co.*, 20 Ohio 529.

Contra, *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278, where it is held that the contract does not take effect until the letter of acceptance is received, or until knowledge of the acceptance has in some way come to the insurers. See *CONTRACTS*, 2 Am. & Eng. Ency. of Law, 856 *et seq.* Upon this principle it has been decided that a policy issued under an agreement that the agent shall pay the first quarter's premium and take the applicant's note therefor, takes effect when mailed from the home office to the local agent. *Yonge v. Equitable L. Ass'n Soc.*, 30 Fed. Rep. 902.

2. *Thayer v. Middlesex Mut. F. Ins. Co.*, 10 Pick. (Mass.) 326; *Insurance Co. v. Johnson*, 23 Pa. St. 72.

3. *Markey v. Mut. Ben. Ins. Co.*, 126 Mass. 158; *Schaffer v. Lehigh Co. etc. Ins. Co.*, 89 Pa. St. 296.

4. *Davis v. Mass. etc. L. Ins. Co.*, 13 Blatchf. (U. S.) 462; *May v. Western Assurance Co.*, 27 Fed. Rep. 260.

The delivery of the policy and receipt of the premium estops the insurers from

denying that a contract has been made. *Re State of Pennsylvania Ins. Co.*, 22 Fed. Rep. 109.

5. *Myers v. Liverpool etc. Ins. Co.*, 121 Mass. 338; *Markey v. Mut. Ben. L. Ins. Co.*, 103 Mass. 78; *Faunce v. State Mut. L. Assur. Co.*, 101 Mass. 279; *Godard v. Monitor Ins. Co.*, 108 Mass. 57; *Dinning v. Phoenix Ins. Co.*, 68 Ill. 415; *Heiman v. Phoenix etc. L. Ins. Co.*, 17 Minn. 153; *Cooper v. Pacific etc. L. Ins. Co.*, 7 Nev. 116; *Berthoud v. Atl. F. Ins. Co.*, 13 La. 539; *Decamp v. N. J. Mut. L. Ins. Co.*, 3 Ins. L. J. 89; *Collins v. Ins. Co.*, 7 Phila. (Pa.) 201; *St. Louis etc. L. Ins. Co. v. Kennedy*, 6 Bush. (Ky.) 450; *Bidwell v. St. Louis Floating Dock and Ins. Co.*, 40 Mo. 42.

6. *Ætna Ins. Co. v. Webster*, 6 Wall. (U. S.) 129; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371.

But in *Pickett v. German F. Ins. Co.*, 39 Kan. 697, it was held that where a written application for insurance was made out on one of the regular blanks of an insurance company, which provides that no liability shall attach until the application has been approved by the home office, and the application, with the premium, is delivered to the company's agent, and before such approval the property is destroyed, the company is not liable.

application in due time.¹ Nor can it refuse to issue a policy or respond in damages merely because a loss has occurred between the time of making the application and its receipt, where the agent is authorized to receive and forward such application for the acceptance or rejection of the company, and it is provided that if issued, the policy shall take effect from the date of the application.²

Where *interim* receipts are issued by the agent, the parties are bound by the terms of the policy ordinarily issued by the company.³ But it has been held, where the insurance was for only a month, and the company refused to issue a policy for so short a time, that the insured was not bound by a stipulation in the ordinary policy of the company of which he had no notice.⁴ So it has been held that where the description in the policy does not correspond with the description in the receipt, the insured may recover according to the terms of the latter.⁵

It is sometimes a question whether or not delivery of the policy has been made. But of this the manual possession of the policy is not decisive. It depends rather upon the intention of the parties as manifested by their acts or agreements, for whatever the parties have agreed to as regards delivery, or whatever their conduct shows to have been considered as a delivery by them, controls.⁶

1. Fish v. Cottenet, 5 Hand. (Ohio) 538.

2. Palm v. Medina Co. etc. F. Ins. Co., 20 Ohio 529. And see Walker v. Farmers' Ins. Co., 51 Iowa 679.

But compare N. Y. etc. Ins. Co. v. Johnson, 23 Pa. St. 72. And see Medina Co. etc. F. Ins. Co. v. Bollmeyer, 5 Ohio St. 107; Bennett v. City Ins. Co., 115 Mass. 241; Myers v. Keystone Mut. L. Ins. Co., 27 Pa. St. 268.

An application for fire insurance was made to a mutual company August 7th, the application being subject to the approval of the directors, and was delivered to one of the directors August 9th. On the 19th of August the directors had a meeting for the transaction of special business, and no action was at that time taken on the application. August 30th the house was burned. September 25th, at the first regular meeting of the executive committee, the application was rejected, and the committee's action was approved by the directors. Held, that there was no such negligence on the part of the company as would entitle the plaintiff to recover. Harp v. Grangers' etc. F. Ins. Co., 49 Md. 307. To the same effect, in case of a life policy, see Ala. Gold L. Ins. Co. v. Mayes, 61 Ala. 163.

A company is not bound by contract by its agent retaining the premium note after a rejection of the risk, and while endeavoring to induce it to change its action. Otterbein v. Iowa State Ins. Co., 57 Iowa 274.

3. Home Ins. Co. v. Favorite, 46 Ill. 263; Grant v. Reliance Ins. Co., 44 U. C. (Q. B.) 229; Hawke v. Niagara Dist. Mut. F. Ins. Co., 23 U. C. (Ch.) 139; Gauthier v. Waterloo Ins. Co., U. C. (Q. B.) 490.

4. Lafleur v. Citizens' Ins. Co. (Q. B.), 22 L. C. Jur. 247; Woody v. Old Dominion Ins. Co., 9 Ins. L. J. 276.

5. Wyld v. Liverpool etc. Ins. Co., 23 U. C. (Ch.) 442.

6. New Eng. F. & M. Ins. Co. v. Robinson, 25 Ind. 537; Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96; Southern L. Ins. Co. v. Kempton, 56 Ga. 339; Whitaker v. Farmers' Union Ins. Co., 29 Barb. (N. Y.) 312; Hallock v. Commercial Ins. Co., 2 Dutch. (N. J.) 268; Home Ins. Co. v. Curtis, 32 Mich. 402; Ala. Gold L. Ins. Co. v. Herron, (Miss.) 10 Ins. L. J. 68; McLachlin v. Aetna Ins. Co., 4 Allen (N. B.) 173; Gloucester Man. Co. v. Howard Ins. Co., 5 Gray (Mass.) 497; Real Estate etc. F. Ins. Co. v. Roessle, 1 Gray (Mass.) 336.

The charter or by-laws of the company may determine when and by what means the contract shall be consummated. At all events, it has been frequently, though not unanimously,¹ held especially as it concerns mutual companies, that the contract cannot be made except in conformity with the terms of the charter and by-laws.²

It is commonly provided in the policy that it shall be countersigned by the agent. And where this is the case, it is usually considered to be invalid without it,³ even where it is in favor of the agent.⁴ It has been held, however, that other evidence of the completion of the contract may be supplied in the place of this,⁵ and that such a provision, either in the policy or charter, does not prevent the company from agreeing, without the signature of the agent, to issue a policy.⁶

5. Construction.—The construction of policies of insurance does not differ in principle from that of other contracts. The object is always to ascertain the true intention of the parties.⁷ But in determining this, stipulations are construed strictly against the party in whose favor they are made,⁸ and if possible, so as to

Where a proposal for insurance stipulates that the company's agent who forwards it shall act for both parties, delivery of the policy to him consummates the contract. *Ala. Gold L. Ins. Co. v. Herron*, 56 Miss. 643.

Evidence that the amount of the premium on a policy was paid to the company by the agent who took the risk, although he received from the assured only a part thereof, and retained the policy in his hands until the time of the loss, warrants a finding that it was duly issued and delivered. *Wheeler v. Watertown F. Ins. Co.*, 131 Mass. 1. But where an agent made out a policy and placed it in the hands of a third party until it could be ascertained whether the company would accept the risk, and the company refused it, it was held that there was no delivery, although the agent had provisionally received the premium. *Brown v. American Cent. Ins. Co.*, 70 Iowa 390.

1. *Bragdon v. Appleton Mut. Ins. Co.*, 42 Me. 259; *New Eng. F. & M. Ins. Co. v. Schettler*, 38 Ill. 167; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214.

2. *Belleville Mut. Ins. Co. v. Van Winkle*, 1 Beas. (N. J.) 333; *Mound City Mut. Fire Ins. Co. v. Curran*, 42 Mo. 374; *Barrett v. Union etc. F. Ins. Co.*, 7 Cush. (Mass.) 175; *Real Estate etc. F. Ins. Co. v. Roessle*, 1 Gray (Mass.) 336; *Buffum v. Fayette etc. F. Ins. Co.*, 3 Allen (Mass.) 360; *Spitzer*

v. St. Mark's Ins. Co., 6 Duer (N. Y.) 6; *Montreal Ins. Co. v. McGilvray*, L. C. (Q. B.) 488; *Flint v. Ohio Ins. Co.*, 8 Ohio 501.

3. *Hardie v. St. Louis etc. L. Ins. Co.*, 26 La. Ann. 242; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *McCull v. Phoenix etc. L. Ins. Co.*, 18 W. Va. 782.

4. *Badger v. American etc. L. Ins. Co.*, 103 Mass. 244; compare *Norton v. Phoenix etc. L. Ins. Co.*, 36 Conn. 503.

5. *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Myers v. Keystone Mut. L. Ins. Co.*, 27 Pa. St. 268; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *United L. F. & M. Ins. Co. v. Ins. Co.*, 42 Ind. 588.

6. *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371.

7. Where the terms are explicit, of course the courts cannot depart from them. *Fuchs v. Germantown Farmer Mut. Ins. Co.*, 60 Wis. 286; *Werner v. Metropolitan L. Ins. Co.*, 11 Daly (N. Y.) 176. And in such cases it is the duty of the court to interpret the contract. *Home Mut. Ins. Co. v. Roe*, 7 Wis. 33.

8. *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (U. S.) 434; *Dow v. Hope Ins. Co.*, 1 Hall (N. Y.) 174; *Hoffman v. Ætna F. Ins. Co.*, 32 N. Y. 405; *Western Ins. Co. v. Cropper*, 32 Pa. St. 35. For instance, the policy provided that in case of loss the company should pay to the mortgagee "such proportion

prevent a forfeiture.¹

Where possible, such a construction should be adopted as will give to all parts of the contract equal effect.²

the sum insured as the damages by fire to the premises mortgaged or charged shall bear to the value immediately before the fire." *Held*, that the words "premises mortgaged" should be construed to mean so much of the mortgaged premises as was insured at the time of the fire; in this case the value of the building insured, and not merely the proportion of the sum insured, which the value of the building bore to the value of the whole lot mortgaged, with the building thereon. *Teutonia F. Ins. Co. v. Mund*, 102 Pa. St. 89.

A clause against the keeping of certain articles cannot be extended to such articles in a building other than the one mentioned. *Sperry v. North America Ins. Co.*, 22 Fed. Rep. 516; *Allemania F. Ins. Co. v. Pitts, Ex. Soc.* (Pa.) 11 Atl. Rep. 572.

1. *Ripley v. Aetna Ins. Co.*, 29 Barb. (N. Y.) 552; *Westfall v. Hudson River F. Ins. Co.*, 2 Duer (N. Y.) 490; *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray (Mass.) 221; *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 5 Gray (Mass.) 497; *Albion Lead Works v. Williamsburgh etc. Ins. Co.*, 2 Fed. Rep. 479; *Sayles v. N. W. Ins. Co.*, 2 Curt. (U. S.) 612. And see also *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553.

Where it is provided that the application shall be a part of the contract, and also that it shall be void if the insured is not the owner in fee, and the application shows that he is not, the contract is binding. *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa 238.

2. *Merchants' Ins. Co. v. Edmond*, 17 Gratt. (Va.) 138; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; s. c., 36 Am. Rep. 617.

Words and figures on the margin of a policy which relate to the mode of paying premiums and their amounts, are a part of the policy. *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151.

The insurance clause on a general stock of merchandise was in the written portion of the policy. The prohibitory clause was in the printed portion. The jury were instructed that the latter was repugnant to the former, and could not be interpreted so as to prevent a recovery, if they found that "turpentine

and benzine" were part of all kinds of merchandise usually kept in a country store. This was *held* to be error. *Lancaster F. Ins. Co. v. Lenheim*, 89 Pa. St. 497.

A policy covering both real and personal property is not a divisible contract, part of which may remain in force though the rest be invalid, where it is not perfectly clear that the insurer would have assumed both risks separately. *Aetna Ins. Co. v. Resh*, 44 Mich. 55. Nor is it a divisible contract where the premium is a gross sum. *Garver v. Hawkeye Ins. Co.*, 69 Iowa 202.

Where the constitution of a society requires each member to procure a certificate from the subordinate medical examiner, after examination, and provides that, if the medical examination is approved by the supreme medical examiner, the applicant shall be entitled to the relief fund, otherwise not; and the certificate requires the insured to comply with all the requirements of the society. The representations by the insured in his medical examination are made the basis of the contract, though the certificate does not refer to them. *Momrich v. Supreme Lodge K. & L. of H.*, 3 N. Y. S. Nat. Rep. 552.

The prospectus is no part of the contract, and statements therein are not made so by a statement on the back of the policy that the prospectus may be had *gratis* upon application to the agent of the company. *Knickerbocker Life Ins. Co. v. Heidel*, 8 Lea (Tenn.) 488. Nor are representations of the officers of the company, without a new consideration subsequent to the making of the contract, a part thereof, or binding on the company. *Knickerbocker L. Ins. Co. v. Heidel*, 8 Lea (Tenn.) 488. Nor is an endorsement on the back of a fire policy to the effect that, in case of a proposed alteration, the insured shall make application and the insurer shall examine the property and certify whether the alteration will increase the risk, the same not being referred to in the policy. *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236. Nor a letter from the insured to the insurers respecting the risk. *Mace v. Provident Life Ins. Ass'n* (N. Car.), 7 S. E. Rep. 674.

It is often necessary to consider surrounding circumstances to arrive at the real meaning of the parties.¹

The written and printed portions of a policy are given equal effect where they are not in conflict; but where they conflict, the written portion controls.²

In case of a special clause conflicting with a general one, the former governs.³

Where a portion of the description is false, that portion will be disregarded if enough remains to identify the property.⁴

It is ordinarily provided that the application shall form a part of the contract. Such provisions are given their stipulated effect and the application and policy are to be construed together.⁵

A policy containing a stipulation which has been violated will

Where the insured by a life policy purposely allows it to lapse for the purpose of substituting another beneficiary by taking out a new policy, the second policy will not be construed to be a mere continuation of the first, even though this be by collusion with the company. *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671.

1. In *Fuller v. Metropolitan L. Ins. Co.*, 37 Fed. Rep. 163, the defendant issued a life policy, reciting that it was on the "reserve dividend plan," and that if the premiums were paid for ten years, the company would pay to the assignee of the policy its equitable proportion of the "reserve dividend fund." *Held*, that the meaning of the parties must be ascertained by recourse to contemporaneous insurance literature; and, it appearing that the only reserve dividend plan known was the one by W. P. Stewart, and that defendant company had engaged him as actuary, secured the right to use his plan, and used his "key" in explaining to policyholders the meaning of the plan the liability must be ascertained by that plan.

2. *Chadsey v. Guion*, 97 N. Y. 333; *Kratzenstein v. Western Assurance Co.*, 53 N. Y. Supr. Ct. 505. Thus, in *Grandin v. Rochester German Ins. Co.*, 107 Pa. St. 26, where the insured took out a policy on property, "his own, or held by him in trust for others," in which it was provided that it should be void if the insured was not "the sole, absolute and unconditional owner of the property insured," it was *held* that this provision was not applicable, but that the insured was entitled to recover for any of the property in which he had any interest.

So where the provisions of the policy

and mortgage clause are inconsistent the latter will control. *German Ins. Co. v. Churchill*, 26 Ill. App. 206.

3. *Mitchell Furniture Co. v. Imperial F. Ins. Co.*, 17 Mo. App. 627; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212; s. c., 55 Am. Rep. 192.

4. *Hatch v. New Zealand Ins. Co.*, 67 Cal. 122.

5. *Phoenix Ins. Co. v. Benton*, 89 Ind. 132; *Chrisman v. State Ins. Co. (Oreg.)*, 18 Pac. Rep. 466.

Where a policy declares that the representations made in the application are warranted to be true, and that the policy shall be void if they are untrue, the falsity of these representations will defeat the insurance. *Gluting v. Metropolitan L. Ins. Co. (N. J.)*, 13 Atl. Rep. 4; *State Ins. Co. v. Jordan (Neb.)*, 3 N. W. Rep. 839.

Pennsylvania and Wisconsin Acts.—But under act *Pennsylvania*, May 11, 1881, declaring the application inadmissible in evidence, when referred to in the policy, unless a copy be attached, the application cannot be received where a copy is not attached to the policy. *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460. The act does not, as to policies issued since its passage, impair the obligation of contracts. *New Era Life Ass'n v. Musser*, 120 Pa. St. 384. A statement written at the end of a policy, entitled "Copy of Application," not containing any signature, does not satisfy the act. *Susquehanna Mut. F. Ins. Co. v. Hallock (Pa.)*, 14 Atl. Rep. 167. The same decision was reached in *Dunbar v. Phoenix Ins. Co. (Wis.)*, 40 N. W. Rep. 386, in construing similar statute of *Wisconsin*. The *Pennsylvania* act does not, however, prevent the intro-

not be construed to be forfeited unless it also contains a stipulation that such shall be the effect.¹

Cases involving the construction of particular clauses are cited in the notes.²

duction of the application to show fraud. *Carrigan v. Mass. Ben. Ass'n*, 26 Fed. Rep. 230.

1. *Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673; *Mut. F. Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. St. 467; *Dwelling House Ins. Co. v. Hardie*, 37 Kan. 674.

Where the contract of insurance on a steamboat stipulates for its continuance for one year, "unless it is terminated or made void by conditions hereinafter expressed," and contains a "permission to navigate the Ohio and Mississippi rivers below Cairo," but contains no condition expressly avoiding the policy for navigating the boat outside of the permitted waters, and the boat made a trip outside of these permitted waters and returned in safety where she was afterwards destroyed by fire, in no way caused or contributed to by such departure. *Held*, that the only effect of such deviation was to relieve the insurer from any loss happening outside of the permitted waters, and that said policy was not avoided thereby, and that after a temporary departure and return in safety to the permitted waters the insurers are liable for a subsequent loss covered by the policy, not caused or contributed to by such deviation. *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317.

2. **Kerosene Permit.**—A policy containing a clause that kerosene shall not be stored on the premises, except to use for lights, and to be drawn and the lamps filled by daylight only, to which is attached two riders granting permission to keep five barrels of kerosene and to use it for lights on the premises, provided the lamps are trimmed and filled by daylight, is avoided by drawing kerosene by lamplight, when an explosion is caused. *Gunther v. Liverpool etc. Ins. Co.*, 34 Fed. Rep. 501.

Explosion.—The clause "occasioned by explosion of any kind, by means of invasion," is not limited to explosions occasioned by invasion. *Smiley v. Citizens' F. etc. Ins. Co.*, 14 W. Va. 33.

Combustion is to be distinguished from explosion. *Smiley v. Citizens' F. etc. Ins. Co.*, 14 W. Va. 33.

Wearing apparel is covered when in

ordinary use elsewhere than on the premises described. *Longueville v. Western Assurance Co.*, 51 Iowa 553.

Benzine.—The policy forbade the insured to "keep or have" on the premises "petroleum, naphtha, benzine, benzole, gasoline, benzine-varnish," etc., or to "keep, have or use camphene, spirit-gas, or any burning fluid or chemical oils," etc. *Held*, that this did not prohibit the temporary taking of benzine on the premises for the cleaning of machinery, and the use of the same therefor. *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15.

Gasoline included under "petroleum" and "kerosene." *Kings Co. F. Ins. Co. v. Swigert*, 11 Ill. App. 590.

Location.—A policy insured two barns and personal property "contained therein." Also a horse "in barn or in fields." *Held*, that the horse was so contained, though in another barn than either of those mentioned. *Trade Ins. Co. v. Barraciff*, 45 N. J. L. 543.

Livestock "on the property described, in the places herein set forth and not elsewhere," is descriptive only, and the insurers are liable under such description for a mare at the time in a certain barn, but removed to another 300 feet away, where burned. *De Graff v. Queen Ins. Co.*, 38 Minn. 501. Similar holding in *Holbrook v. St. Paul F. Ins. Co.*, 25 Minn. 229.

The policy was against fire and lightning, and was on barn and contents. Horses were mentioned among other things. The policy provided that the company should not be liable for the loss of property while removed from the barn. *Held*, that horses killed in field were not included, three judges dissenting. *Haws v. St. Paul F. & M. Ins. Co. (Pa.)*, 15 Atl. Rep. 915.

A policy on "frame stable building, occupied by insured as a hack, livery and boarding stable," and on "his carriages, sleighs, hacks, horses, harnesses, blankets, robes, and whips contained therein," does not cover a hack in a shop for repairs an eighth of a mile away. *Bradbury v. Fire Ins. Ass'n*, 80 Me. 396.

Held in Trust.—A policy on a stock

III. WARRANTIES—1. Definition.—A warranty, in the law of insurance, is a statement or stipulation inserted or referred to in,

of musical instruments, "his own or held by him in trust or on commission," also provided that goods held on storage must be separately and specifically insured. The insured received a piano to be forwarded. *Held*, that the piano was covered. *Lucas v. Liverpool etc. Ins. Co.*, 23 W. Va. 258; s. c., 48 Am. Rep. 383.

Held on Storage.—An exception of goods held on storage does not apply to furniture not in use and stored away. *Continental Ins. Co. v. Pruite*, 65 Tex. 125.

Fences, etc.—An exception of "fences and other yard fixtures, side-walks, store furniture and fixtures," does not apply to a wooden awning in front, supported on pillars sunk in the ground, with rafters extending into the brick wall; but does apply to shelving and an office enclosed with a railing in the interior of the building. *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571.

When Loss Covered.—A policy on a "hop-house while drying hops," from August 15th to October 15th, 1875, does not cover a loss happening within the specified time but not while drying hops. *Langworthy v. Oswego etc. Ins. Co.*, 85 N. Y. 632.

Fixtures in a factory are not covered by "store fixtures." *Thurston v. Union Ins. Co.*, 17 Fed. Rep. 127.

"Premises" does not apply to personal property. *Carr v. Roger Williams Ins. Co.*, 60 N. H. 513.

Transfer Fraudulent as to Creditors.—Consent was given to an assignment of a policy, on representation that the assignor had sold his interest in the property to the assignee, the local agent of the company. In fact the transfer was fraudulent as to creditors. *Held*, that the company, under a provision in the policy for forfeiture in case of misrepresentation of interest in the property, was not liable for loss happening after the transfer, notwithstanding its agent was a party to the fraud. *Phoenix Ins. Co. v. Willis (Tex.)*, 6 S. W. Rep. 825.

Watchman.—One condition of a policy on premises, a part of which was a mill, required the insured, during all the time the mill was idle, to employ a watchman to be in and upon the premises insured, day and night. A watchman was employed, but at the time of the fire was about 65 feet away from

the premises insured, though engaged in watching the same, and was upon higher ground, from which he had a better view of the insured premises than if he had been in the mill. *Held*, that the condition had been complied with. *Sierra M., S. & M. Co. v. Hartford Fire Ins. Co. (Cal.)*, 18 Pac. Rep. 267.

Further cases construing particular provisions of fire policies, with the subject of such provisions, are:

Ownership—*Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468.

Carpenters' risk—*Alkan v. N. H. Ins. Co.*, 53 Wis. 136.

Term of renewal—*Scott v. Home Ins. Co.*, 53 Wis. 238.

Location—*N. Y. etc. Despatch Ex. Co. v. Traders' etc. Ins. Co.*, 132 Mass. 377; s. c., 42 Am. Rep. 440.

Participating policy does not create a trust relation between the holder and the company. *Taylor v. Charter Oak Life Ins. Co.*, 9 Daly (N. Y.) 489.

Amount.—Where one-third of the amount of the policy is payable if death occurs after three and within six months; two-thirds if after six months and within a year, and the whole if after a year, the whole amount is payable if the insured dies within three months. *Metropolitan L. Ins. Co. v. Drach*, 101 Pa. St. 278.

Paid-up Policy.—A life policy endorsed "non-forfeitable" and containing a provision entitling the insured, in case of forfeiture, to a new policy for as many tenths of the original insurance as there have been premiums paid, does not obligate the company to insert a similar provision in the new policy, but they may make it forfeitable. *People v. Knickerbocker L. Ins. Co.*, 103 N. Y. 480.

Further cases construing particular provisions of life policies, with the subject of such provisions, are:

Substitution of beneficiary—*Eiseman v. Judah*, 1 Flip. (U. S.) 627; *Packard v. Com. Mut. L. Ins. Co.*, 9 Mo. App. 469; *Pilcher v. N. Y. L. Ins. Co.*, 3 La. An. 322; *Pingrey v. Nat. L. Ins. Co.*, 144 Mass. 374; *Nally v. Nally*, 7 Ga. 669.

Time of demand of policy—*Mich. Mut. Life Ins. Co. v. Bowes*, 4 Mich. 19.

Beneficiary—*Tennes v. Northwestern Mut. L. Ins. Co.*, 26 Minn. 271; *Hu-*

and made a part of, the policy, upon the truth or performance of which, on the part of the insured, the validity of the contract depends.¹

A statement or stipulation incorporated into a policy or referred to therein and made a part thereof may not be a warranty, but it usually is. This is the chief characteristic of a warranty, and if there be nothing to indicate the contrary, such it will be construed to be.²

2. Form.—No particular form or set of words is essential to constitute a warranty. However, if it clearly appears from the instrument that a statement or stipulation inserted was not intended to operate as a warranty, it will not be given that effect.³

3. Effect of Warranty.—The effect of a warranty is to make void the policy if the statements made are not literally true, or if the stipulations adopted are not fully observed,⁴ without regard to

v. Hull, 62 How. Pr. (N. Y.) 100; *Batty's Estate*, 12 Phila. (Pa.) 29; *McDermott v. Centennial Mut. L. Ass'n*, 24 Mo. App. 73.

1. "An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends." *Arnould Ins.* 577. See also *May on Ins.* 179.

It was *held* a warranty where the insured made statements regarding his age in the application, and it was provided in the policy that it should be void if statements were in any respect untrue. *Linz v. Mass. Ins. Co.*, 8 Mo. App. 363.

A policy of fire insurance stated that the property insured was contained in their frame storehouse, with slate roof, situate "detached at least one hundred feet" on the east side of Lake Champlain. *Held*, that the words quoted were not mere description of the building, but related to the character of the risk and amounted to a warranty that no other building of such size and character as to constitute an exposure and increase the risk stood within the distance specified. *Burleigh v. Gebhard F. Ins. Co.*, 90 N. Y. 220.

2. *Kentucky etc. Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634.

The statement of an applicant that he is married when he is single is a warranty. *Jeffries v. Union Mut. L. Ins. Co.*, 1 *McCrary* (U. S.) 114.

3. *Fitch v. American etc. L. Ins. Co.*, 59 N. Y. 587; *Kingsley v. New Eng. Mut. F. Ins. Co.*, 8 *Cush.* (Mass.) 393; *Howard etc. Ins. Co. v. Cormick*, 24 *Ill.* 455.

4. *Hartford L. etc. Ins. Co. v. Gray*, 91 *Ill.* 159; *Bennett v. Agricultural Ins. Co.*, 50 *Conn.* 420; *Bloomington Grove Mut. F. Ins. Co. v. McAnerney*, 102 *Pa. St.* 335; *Ala. Gold L. Ins. Co. v. Garner*, 77 *Ala.* 210; *Conn. Mut. L. Ins. Co. v. Pyle*, 44 *Ohio St.* 19.

The applicant warranted that the building insured was a dwelling occupied by himself. In fact it was an unfinished building and never had been occupied. *Held*, a breach of the warranty. *Pottsville Mut. F. Ins. Co. v. Fromm*, 100 *Pa. St.* 347.

In *Brooks v. Standard F. Ins. Co.*, 11 *Mo. App.* 349, the insured warranted that he would keep a watchman on the premises nights. This was not complied with by requiring one to sleep there.

Where the building insured was described as "two stories high" and the main part was so, but a small rear addition was only one story high, it was *held* that this was not a breach of the warranty. *Wilkins v. Germania F. Ins. Co.*, 57 *Iowa* 529. Similar holding where building described as a boarding house was partly occupied as a bar and billiard room. *Martin v. State Ins. Co.*, 44 *N. J. L.* 485; *s. c.*, 43 *Am. Rep.* 397.

A denial by the applicant in his application that he had any of the specified diseases, though he had had one or two temporary attacks of one of them, does not avoid the policy. *Northwestern Mut. L. Ins. Co. v. Heimann*, 93 *Ind.* 24; *Conn. Mut. L. Ins. Co. v. Union Trust Co.*, 112 *U. S.* 250; *Dreier v. Continental L. Ins. Co.*, 24 *Fed. Rep.* 670.

their actual materiality,¹ the wilfulness of the falsity or non-observance,² or the cause of the loss. By them the parties have seen fit to settle conclusively the materiality of the matters involved,³ so that their absolute observance is essential to recovery on the policy.⁴

One may have dyspepsia in its milder form and say that his health is sound without misrepresentation. *Morrison v. Wis. Odd Fellows Mut. L. Ins. Co.*, 59 Wis. 162.

A warranty that a person is in good health means to ordinary observation and in outward appearance. *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274. Or freedom from any conscious derangement of important organic functions. *Goucher v. Northwestern Traveling Men's Ass'n*, 20 Fed. Rep. 594; *Schwarzbach v. Ohio Val. Prot. Union*, 25 W. Va. 622.

"Severe illness" means such as has a permanent detrimental effect on the system. *Goucher v. Northwestern Traveling Men's Ass'n*, 29 Fed. Rep. 596.

Where the statements made are warranted to be true "so far as the applicant knows," there is no absolute covenant that all answers or statements are true, but only so far as known. *Redman v. Hartford F. Ins. Co.*, 47 Wis. 89; *Wilkins v. Germania F. Ins. Co.*, 57 Iowa 529.

The case of *Hansen v. American Ins. Co.*, 57 Iowa 741, holds that it is no excuse for false representations that the agent knows the facts.

1. *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Columbian Ins. Co. v. Cooper*, 50 Pa. St. 331; *Sayles v. N. W. Ins. Co.*, 2 Curtis (U. S.) 612; *Thomas v. Fame Ins. Co.*, 108 Ill. 91; *Duckett v. Williams*, 2 C. & M. 348; *Anderson v. Fitzgerald*, 24 Eng. L. & Eq. 1; 4 H. of L. Cas. 484.

2. *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Glade v. Germania F. Ins. Co.*, 56 Iowa 400; *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, 98 Pa. St. 41.

3. *Ala. Gold L. Ins. Co. v. Garner*, 77 Ala. 210.

4. *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416; *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341; *Dowd v. American F. Ins. Co.*, 41 Hun (N. Y.) 139; *Ripley v. Aetna F. Ins. Co.*, 30 N. Y. 136; *Mayer v. Eq. Reserve Fund L. Ass'n*,

2 N. Y. S. Nat. Rep. 79; *State Ins. Co. v. Jordan* (Neb.), 38 N. W. Rep. 839; *Hoffman v. Supreme Council Am. L. of H.*, 35 Fed. Rep. 252; *Mullin v. Vermont Mut. F. Ins. Co.*, 54 Vt. 223; *Cuthbertson v. N. Car. Home Ins. Co.*, 96 N. Car. 480; *Scottish Union etc. Ins. Co. v. Petty*, 21 Fla. 399; *Mount Leonard Milling Co. v. Liverpool etc. Ins. Co.*, 25 Mo. App. 259; *Roberts v. State Ins. Co.*, 26 Mo. App. 92; *Garver v. Hawkeye Ins. Co.*, 69 Iowa 202.

A breach of a warranty is not established, however, by showing the records of several unsatisfied judgments against a former owner, rendered while he owned the premises, where it appears that two had been collected by execution before the date of the application, and that the debtor held receipts in full in the other cases; nor that there was pending at the time an action by a judgment creditor of a former owner to subject the property to his judgment on the ground that the conveyance by the debtor to an intermediate grantee, and by that grantee to the applicant, was for the purpose of delaying the plaintiff in the collection of his judgment, which judgment had not been obtained at the time of the conveyance, there being no allegation that the former owner retained any interest in the land, or that full ownership did not pass by the conveyance to the applicant. *Lang v. Hawkeye Ins. Co.* (Iowa), 39 N. W. Rep. 86.

But a breach of warranty was established where it was shown that the insured gave birth to a child in November, 1887, and was sick with typhoid fever in January, 1888, from which she got up in March following, and that application was made the first of that month, and that on May 12th, 1888, her physician found her weak with a cough, and sick with consumption, of which she died July 21st, 1888, and she stated in the application that she was at that date in good health, and had usually had good health. *Maine Ben. Ass'n v. Parks* (Me.), 16 Atl. Rep. 339.

So in *Edington v. Aetna L. Ins. Co.*, 77 N. Y. 564, the applicant warranted that he usually enjoyed good health,

4. Warranties, Affirmative and Promissory.—Warranties are affirmative or promissory. An affirmative warranty is one which affirms the existence of certain facts at the time of the insurance. A promissory warranty is one which requires the performance or omission of certain things, or the existence of certain facts after the taking out of the insurance.¹

5. A Part of Policy.—It has been stated that to be a warranty the statement or stipulation must be made in some way a part of the policy, but whether or not this is the case may sometimes be a question. If they are incorporated into the instrument itself, or are therein expressly referred to and made a part thereof, there can be no doubt of their character;² but where this has not been done, the question may be less certain. Upon this feature of warranties the following decisions of interest have been made: It is a warranty where the matter is written on the margin of the policy,³ or in several papers, each referring to the others as a part of the contract;⁴ where certain rules and regulations are referred to as the "accompanying articles,"⁵ or are printed upon the same sheet without any reference thereto.⁶ It is not a warranty where by-laws are printed upon the back of the policy with no reference thereto in the body of the same;⁷ or where another paper is referred to with no indication that it was the intention to make it a part of the policy,⁸ or a war-

and had not had any severe disease for seven years. He died within three years thereafter of nervous apoplexy. The defendant was not allowed to show that his disease was of long standing, but this was *held* to be error. And in *Goucher v. Northwestern Travelling Men's Ass'n*, 20 Fed. Rep. 596, "severe illness" was construed to mean such as has permanent detrimental effect on the physical system, and "good health," freedom from any conscious derangement of important organic functions. So where the applicant stated that he was a laborer, when he had not labored for years, the policy was void. *United Brethren Mut. Aid Soc. v. White*, 100 Pa. St. 12.

1. *Stout v. City F. Ins. Co.*, 12 Iowa 371; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio (N. Y.) 78.

In the application plaintiff said in answer to the question, "Is smoking or drinking of spirituous liquors allowed on the premises?" "No." The statements in the application were made warranties. During the life of the policy the insured smoked on the premises, but the fire did not have that source. *Held*, that the question and answer referred merely to the rule on the subject at the time of the applica-

tion, and not to the question whether that rule might be kept or broken in the future. *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399.

The applicant was asked if there was a watchman in the mill at night, and if the mill was ever left alone. He replied, "No regular watchman, but one or two hands sleep in the mill." *Held*, a continuing warranty. *Blumer v. Phoenix Ins. Co.*, 48 Wis. 535; s. c., 33 Am. Rep. 830.

2. *Cushman v. U. S. L. Ins. Co.*, 70 N. Y. 72.

3. *Patch v. Phoenix Mut. Life Ins. Co. (Vt.)*, 2 Ins. L. J. 36; *Bean v. Stupart*, Doug. 11.

4. *Babbitt v. Liverpool etc. Ins. Co.*, 66 N. Car. 70.

5. *Hill v. Equitable Mut. Fire Ins. Co.*, 6 Ins. L. J. 312.

6. *Roberts v. Chenango Co. Mut. Ins. Co.*, 3 Hill (N. Y.) 501; *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comst. (N. Y.) 210; *Kensington Bank v. Yerkes*, 86 Pa. St. 227.

7. *Kingsley v. New Eng. Mut. F. Ins. Co.*, 8 Cush. (Mass.) 393.

8. *Houghton v. Mfg. Mut. F. Ins. Co.*, 8 Met. (Mass.) 114; *Snyder v. Farmers' Ins. & Loan Co.*, 16 Wend. (N. Y.) 481; *Le Roy v. Market F. Ins.*

ranty;¹ or where another paper to which no reference is made in the policy is attached thereto,² or folded therein.³

Statements contained in the application are not warranties unless made a part of the policy.⁴

In case of doubt as to whether a statement or stipulation is a warranty, or merely a representation, the latter construction will be given. To be given the former, it must be clear that it was so intended.⁵

Co., 39 N. Y. 90; *Delonguemere v. Tradesmen's Ins. Co.*, 2 Hall (N. Y.) 589; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235; *Aetna Ins. Co. v. Grube*, 6 Minn. 82. And see *Edington v. Mut. L. Ins. Co.*, 67 N. Y. 185.

1. *Aetna Ins. Co. v. Grube*, 6 Minn. 82; *Redman v. Hartford F. Ins. Co.*, 47 Wis. 89; *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.) 139; *Fitch v. American etc. Ins. Co.*, 59 N. Y. 557.

2. *Bize v. Fetcher*, Doug. 13, N. B. see *Sillem v. Thornton*, 3 E. & B. 868.

3. *Pawson v. Barnevelt*, Doug. 13, N.

4. *Dunny v. Conway S. & M. Ins. Co.*, 13 Gray (Mass.) 492; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84.

5. *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Blood v. Howard F. Ins. Co.*, 12 Cush. (Mass.) 472; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 426; *Sayles v. N. W. Ins. Co.*, 2 Curt. (U. S.) 610; *Conover v. Mass. Mut. L. Ins. Co.*, 3 Dill. (U. S.) 217; *Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673; *Towne v. Fitchburg etc. Ins. Co.*, 7 Allen (Mass.) 51; *Clinnton v. Hope Ins. Co.*, 45 N. Y. 454; *Trench v. Chenango Co. Mut. Ins. Co.*, 7 Hill (N. Y.) 122; *Westfall v. Hudson River F. Ins. Co.*, 2 Duer (N. Y.) 490; *Wheelton v. Hardesty*, 8 El. & B. 232; *Stokes v. Cox*, 1 H. & N. Exch. 320; *Miller v. Mut. Ben. L. Ins. Co.*, 31 Iowa 216; *Watertown Fire Ins. Co. v. Simons*, 96 Pa. St. 520; *Ala. Gold L. Ins. Co. v. Johnston*, 80 Ala. 467; *American Popular Life Ins. Co. v. Day*, 39 N. J. L. 89; *Anders v. Supreme Lodge Knights of Honor (N. J.)*, 17 Atl. Rep. 119. And see *Lindsey v. Union Mut. Ins. Co.*, 3 R. I. 157; *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Howard F. & M. Ins. Co. v. Cormick*,

24 Ill. 455; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133. In a *Kentucky* case illustrating this subject, *MARSHALL, C. J.*, said: "Whatever might be the doctrine in case of marine policies, in making which the insurer is in general wholly dependent upon the statements of the insured, with regard to the property and the risk, it has been seriously doubted, and, so far as we know, has not been established by judicial decisions, whether the principle of construing every matter of mere description contained in the body of the policy into a warranty, should be applied with the same strictness to fire policies, where the misdescription is not generally the mistake of the underwriter's own surveyor. These warranties being conditions precedent, which must be performed or be true, however immaterial, there is an obvious propriety that they should be contained in the policy, which is to be kept by the insured, not only that he may be enabled to make the proper averments when he comes to declare, but that he may be fully apprised of the effect intended to be given to his statements. Since if they are considered merely as representations, it is sufficient that they were made without fraud, and are substantially true in every point material to the risk. Under these considerations we are of opinion that it is at least safe to conclude that the reference in this policy to the application and survey as a part thereof, being a part of the clause which vacates the policy if the premises should, at the time of any fire, be occupied for purposes more hazardous than at the date of the instrument, should be understood as merely identifying the description and condition of the property at that time, for the standard of comparison in case of fire; that no other force or effect was intended to be given the writings referred to, than as being a description of the nature or purposes of the occupation of the building at the time; and that as the clause points

As stated, a statement or stipulation in the policy may not be a warranty, as where, from the words employed, it appears that it was not intended that it should have such effect.¹ Thus, where the application is made a part of the policy, but the statements there made are called representations, they will be so treated.²

If a statute provides that the conditions of insurance shall be stated in the body of the policy, and they are there stated in substance, with a reference to them on another page, where they are printed in full, it is sufficient; but where they are only referred to with the stipulation that they shall constitute a part of the contract, and it is declared that the policy is made with reference thereto, it is not sufficient to constitute them a part of the contract.³

An application is not essential to the validity of a policy by reason of one being referred to.⁴

When a policy is accepted by the insured, it is binding upon both parties according to the terms therein contained.

The omission of the applicant to answer certain questions in the application is not a warranty that there is no answer to make,

expressly to the sort of variance against which it intends to guard, viz., a more hazardous occupation, and declares expressly the consequence of such variance, these declarations should be regarded as expressing the entire scope and object of the reference beyond which it cannot be carried without violating the apparent intention of the parties. The entire clause, including the reference to the application and the survey, was intended to secure the insurers from loss by a change in the occupancy of the premises which should increase the risk, and not to bind the other party to the truth of immaterial statements not affecting the risk, nor to preclude him from changes either in the plan or occupation of the premises, unless the hazard should be thereby increased. And the written application and survey were referred to as fixing the standard of comparison, and not for the purpose of creating or evidencing any covenant or warranty on the part of the insured, as to the condition or occupation of the premises at the time the insurance was made. The only covenant or warranty on this subject is contained in that part of the policy which describes the building as a mansion house, situated, etc., and states that it was then occupied as a dwelling-house. The facts alleged in these pleas, that one room was occupied as a kitchen, cannot be taken as a

breach of this warranty." *Kentucky etc. Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634.

1. *Moulor v. American L. Ins. Co.*, 111 U. S. 335; *Conover v. Mass. Mut. L. Ins. Co.*, 3 Dill. (U. S.) 217; *Miller v. Mut. Ben. L. Ins. Co.*, 31 Iowa 216; *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; *Schwarzbach v. Ohio Val. Prot. Union*, 25 W. Va. 622; *Lebanon Mut. Ins. Co. v. Losch*, 109 Pa. St. 100.

A circumstance can be included by implication only when it is manifestly material to the risk. *Appleton Iron Co. v. British Am. Ins. Co.*, 46 Wis. 23; *O'Neill v. Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122; *Swick v. Home L. Ins. Co.*, 2 Dill. (U. S.) 160.

A paper was pasted to a policy containing a requirement that the insured should keep a record of sales "warranted to be kept in an iron safe at night." *Held*, a representation, and not a warranty. *Goddard v. East Tex. F. Ins. Co.*, 67 Tex. 69.

2. *Houghton v. Mfrs. Mut. F. Ins. Co.*, 8 Met. (Mass.) 114. See also *Boardman v. N. H. Mut. Fire Ins. Co.*, 20 N. H. 557; *Virginia F. & M. Ins. Co. v. Kloeber*, 31 Gratt. (Va.) 749.

3. *Mullany v. Nat. etc. Ins. Co.*, 118 Mass. 393; *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 420.

4. *Newman v. Springfield F. & M.*

nor is a partial answer a warranty beyond what is stated.¹ The issuance of a policy on such an application is a waiver of a failure to answer, or to answer fully.²

If the questions in the application be indefinite, and an answer is truly made in some proper sense, it is sufficient.³

6. Warranty of Correct and Temperate Habits.—It is usually warranted by the applicant for life insurance that he is of correct and temperate habits. This refers to the *habits* of the insured as to the use of intoxicating liquors, and not to occasional *practices*; and if his usual and general habits were to abstain, or to use in moderation, an occasional indulgence to excess would not be a breach.⁴

But it is not necessary to the existence of intemperate habits that the excessive use of intoxicating liquor should be continuous and daily.⁵

IV. REPRESENTATIONS—1. Definition and Explanation.—A representation, in the law of insurance, is an incidental statement or

Ins. Co., 17 Minn. 123; Blake v. Exch. Mut. Ins. Co., 12 Gray (Mass.) 265; Commonwealth v. Hide etc. Ins. Co., 112 Mass. 136.

1. Dilleber v. Home L. Ins. Co., 69 N. Y. 256; Phoenix L. Ins. Co. v. Raddin, 120 U. S. 183.

2. Liberty Hall Ass'n v. Housatonic Mut. F. Ins. Co., 7 Gray (Mass.) 261; Bardwell v. Conway Mut. Fire Ins. Co., 122 Mass. 90; Lorillard F. Ins. Co. v. McCulloch, 21 Ohio St. 176; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345; Newman v. Springfield F. & M. Ins. Co., 17 Minn. 123.

An application for life insurance contained the following questions: "(28) Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already insured in this company, state the number of the policy?" The answer was as follows: "\$10,000, Equitable Life Assurance Society." *Held*, that the answer only purported to be to the third question, and that being answered truly, and the policy having been issued without requiring the other three questions to be answered, it was no defence that the insured had made other applications and been refused, even though his omission to state this was intentional. Phoenix L. Ins. Co. v. Raddin, 120 U. S. 183.

3. Wilson v. Hampden F. Ins. Co., 4 R. I. 159; Wilson v. Conway Ins.

Co., 4 R. I. 141; Cumberland Val. Mut. Prot. Co. v. Schell, 29 Pa. St. 31; Western Ins. Co. v. Cropper, 32 Pa. St. 351; Campbell v. Merchants' etc. F. Ins. Co., 37 N. H. 35; Aetna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 242; Bartlett v. Union Mut. F. Ins. Co., 46 Me. 500.

In Niagara F. Ins. Co. v. Miller, 120 Pa. St. 504, the warranty was as follows: "The assured . . . hereby warrants that any application, survey, plan, statement, or description connected with procuring this insurance . . . is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this company information material to the risk." At the time of such warranty the property, though never removed from the applicant's possession, was the subject of a levy, which the applicant failed to state. But it was *held* that, as there was nothing in the policy to warn the assured that the company regarded a levy as an increase of risk, he was under no obligation to report it.

If true answers are given, it cannot be objected in an action on the policy that the answers were not full enough. Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92.

4. Union Mut. L. Ins. Co. v. Reif, 36 Ohio St. 596; Knickerbocker L. Ins. Co. v. Foley, 105 U. S. 350.

5. Union Mut. L. Ins. Co. v. Reif, 36 Ohio St. 596.

representation made by the insured with regard to some feature of the risk upon the faith of which the contract is entered into.¹ It is not a part of the contract,² and need not be literally, though it must be substantially, true.³ It differs further from a war-

1. *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Nicol v. American Ins. Co.*, 3 Woodb. & M. (U. S.) 529; *Northwestern etc. Aid Ass'n v. Cain*, 21 Ill. App. 471.

"Misrepresentation is the statement of something as fact, which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter, or which he states positively as true without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk." *SHAW, C. J.*, in *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416.

If the applicant makes answers not called for by the questions, they are representations. *Buell v. Conn. Mut. L. Ins. Co.*, 2 Flip. (U. S.) 9.

2. "There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract constitute warranties, and what representations. One general rule is, that a warranty must be embraced in the policy itself. If by any words of reference the stipulation in another instrument, such as the proposal or application, can be construed as a warranty, they must be such as make it in legal effect a part of the policy." *SHAW, C. J.*, in *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416.

3. *Horn v. Amicable Mut. L. Ins. Co.*, 64 Barb. (N. Y.) 81; *Lueders v. Hartford etc. Ins. Co.*, 4 McCrary (U. S.) 149.

Whether there has been a substantial compliance is a question for the jury. *Ætna L. Ins. Co. v. Faunce*, 2 Ins. L. J. 657.

Cases illustrating the application of this rule are: *Naughton v. Agl. Ins. Co.*, 4 U. C. (Q. B.) 121; *Moulton v. American Life Ins. Co.*, 101 U. S. 708; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *World Mut. Life Ins. Co. v. Schultz*, 73 Ill. 586; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106; *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; *Gerhauser v. North British Ins. Co.*, 6 Nev. 15; *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Hough-*

ton v. Mfrs. Mut. F. Ins. Co., 8 Met. (Mass.) 114; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416; *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571; *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa 238; *Mut. Benefit Life Ins. Co. v. Wise*, 34 Md. 583; *Md. Fire Ins. Co. v. Whitford*, 31 Md. 219; *Swift v. Mass. Mut. L. Ins. Co.*, 63 N. Y. 186; *Jackson v. St. Paul F. & M. Ins. Co.*, 33 Hun (N. Y.) 60; *Le Roy v. Park Ins. Co.*, 39 N. Y. 56; *Power v. City Fire Ins. Co.*, 8 Phila. (Pa.) 566; *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. St. 521.

Where ashes are stated to be kept in brick, it is a substantial compliance if they are kept in some other mode equally safe. *Underhill v. Agawam Mut. Ins. Co.*, 6 Cush. (Mass.) 440.

It is substantially true if the applicant for a life policy states that he has made no other application on which a policy was not issued, when he has made another, not acted upon. *Langdon v. Union Mut. L. Ins. Co.*, 14 Fed. Rep. 272.

So if he represents that the property is his when the title is in another but he is in possession under an agreement for a conveyance. *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 273, and the purchase price has been paid. *Lewis v. New Eng. F. Ins. Co.*, 29 Fed. Rep. 496.

So if he states that he is in sound health, though he has dyspepsia in a mild form. *Morrison v. Wis. Odd Fellows Mut. L. Ins. Co.* 59 Wis. 162.

But it is a false statement where the applicant for life insurance states that former applications have been accepted or successful when a medical examiner has declined to pass him. *Edington v. Ætna L. Ins. Co.*, 100 N. Y. 536. So in *Story v. United Life & Accident Ins. Association*, 4 N. Y. S. Nat. Rep. 373, the insured stated in his application that his health was then and usually good. He showed the medical examiner a pimple on his tongue, stating that it was not serious. The physician made only a cursory examination and discovered no indications of disease. For two or three years there had been symptoms of cancer, and the insured consulted two physicians before

ranty in that to avoid the policy in case of its falsity it must be of facts material to the risk,¹ and

applying for the policy. Shortly after it was issued he procured medical treatment, underwent an operation and died. *Held*, in an action on the policy, that the policy was void.

1. *Mosley v. Vermont Mut. F. Ins. Co.*, 55 Vt. 142; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416. *SHAW, C. J.*, in this case, said: "If any statement of fact, however unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy; if it be construed a representation, and is untrue, it does not avoid the contract if not wilful, or if not material. To illustrate this, the application in answer to an interrogatory is this: 'Ashes are taken up and removed in iron hods,' whereas it should turn out in evidence that ashes were taken up and removed in copper hods, perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is gone; but if a representation, it would not, we presume, affect the policy, because not wilful or designed to deceive, but more especially because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract, or in fixing its terms."

If the defendant defends on the ground of misrepresentations, the same must be alleged and proved, together with their materiality. *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Price v. Phoenix L. Ins. Co.*, 17 Minn. 497; *N. Y. Life Ins. Co. v. Graham*, 2 Duv. (Ky.) 506; *Miller v. Mut. Ben. L. Ins. Co.*, 31 Iowa 216. The materiality of the facts is a question for the jury. *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523; *Garcelon v. Hampden F. Ins. Co.*, 50 Me. 580; *Mut. Ins. Co. v. Deale*, 18 Md. 26; *Franklin Ins. Co. v. Coates*, 14 Md. 285; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481; *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (U. S.) 434; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Washington L. Ins. Co. v. Haney*, 10 Kan. 525; *Mut. Ben. L. Ins. Co. v. Miller*, 39 Ind. 475; *Morrison v.*

Muspratt, 4 Bing. 60; *Huguenin v. Riley*, 6 Taunt. 186.

The test has been said to be the influence of the representation upon the insurer in accepting the risk and fixing the premium. *Ryan v. Springfield etc. Ins. Co.*, 46 Wis. 671; *Merriam v. Middlesex Mut. F. Ins. Co.*, 21 Pick. (Mass.) 162; *Valton v. Nat. Fund L. Ass'n Co.*, 20 N. Y. 32; *Higbie v. Guardian Mut. L. Ins. Co.*, 53 N. Y. 603; *Louisiana Mut. Ins. Co. v. New Orleans Ins. Co.*, 13 La. Ann. 246; *Canada Ins. Co. v. Northern Ins. Co.*, 2 Ont. App. 373; *Mulville v. Adams*, 19 Fed. Rep. 887; *Hardman v. Fireman's Ins. Co.*, 2 Fed. Rep. 594.

But the parties may settle for themselves what shall be deemed material as by a provision to that effect in the policy, or that the policy shall be void in case any of the answers in the application are false, or even by the putting and answering in writing of specific questions. *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Locke v. N. A. F. Ins. Co.*, 1 Mass. 68; *Draper v. Charter Oak Ins. Co.*, 2 Allen (Mass.) 573; *Towne v. Fitchburg etc. Ins. Co.*, 7 Allen (Mass.) 53; *Strong v. Mfg. Ins. Co.*, 10 Pick. (Mass.) 45; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 421; *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 376; *Le Roy v. Market F. Ins. Co.*, 39 N. Y. 90; *Fitch v. American etc. L. Ins. Co.*, 59 N. Y. 557; *Graham v. Fireman's Ins. Co.*, 9 Daly (N. Y.) 341; *Miller v. Mut. Ben. L. Ins. Co.*, 3 Iowa 216; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; *N. A. Fire Ins. Co. v. Throop*, 22 Mich. 146; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622; *Jeffries v. Economical L. Ins. Co.*, 22 Wall. (U. S.) 47; *Æetna L. Ins. Co. v. France*, 91 U. S. 512; *Moulou v. American etc. L. Ins. Co.*, 101 U. S. 708; *Conover v. Massachusetts Mut. L. Ins. Co.*, 3 Dill. (U. S.) 217; *Co-operative L. Ass'n v. Leflore*, 53 Miss. 1; *Gerhauser v. North British Ins. Co.*, Nev. 15; *Byers v. Farmers' Ins. Co.*, 3 Ohio St. 606.

A statement by the applicant that he has not been attended by a physician for nine years is material to the risk and it appearing that he had been at

must be either wilfully false or grossly negligent in character.¹

2. Affirmative and Promissory.—Representations are affirmative and promissory. Affirmative representations are those which affirm the existence of certain facts pertaining to the risk at the time the contract is entered into. Promissory representations are those with regard to the existence of certain facts after the making of the contract. As stated, the falsity of a material affirmative representation, whether written or oral, vitiates the policy; but the falsity of an oral promissory representation, even though material, does not have such effect, unless it be made with a fraudulent purpose, when it does. But where the promissory representation is carried into the contract, it is available as a defence if it be material and false.²

3. False in Part.—A representation, to vitiate the policy, need

tended by several physicians within a few months preceding, and that he died within three months afterwards, the policy is void, whether the statement is a warranty or representation. *Munrich v. Supreme Lodge K. & L. of H.*, 3 N. Y. S. Nat. Rep. 552.

In *Bvers v. Farmers' Ins. Co.*, 35 Ohio St. 606, the question in the application was: "Is the property incumbered? If so, state to what amount, and the value of the premises." Ans. "Yes; mortgage, \$2,000—\$10,000." The fact was, this mortgage, which was made by the insured, was \$3,200 principal, and \$240 accrued interest. *Held*, that this was a false representation, material to the risk, which avoided the policy.

Applicant stated that he was a widower when he was married. *Held*, material and policy void. *United Brethren Mut. Aid Society v. White*, 100 Pa. St. 12.

Age of house and amount of incumbrance *held* not material in *Eddy v. Hawkeye Ins. Co.*, 70 Iowa 472.

The applicant stated that he was insured in another company. when he was not; that he was born in 1817, when, in fact, he was born in 1816; that his father died of old age, aged ninety-three years, when, in fact, he died of apoplexy at eighty-two; and that his mother died of old age, aged seventy-two years, when, in fact, she died of paralysis at sixty-five. *Held*, immaterial, and, if made in good faith, not to avoid the policy. *Germania Ins. Co. v. Rudwig*, 80 Ky. 223.

The *Kentucky* act, February 4th, 1874, makes all statements in an application for insurance "representations

and not warranties," and provides that "no misrepresentation, unless material or fraudulent, shall prevent a recovery on the policy." This has been construed to prevent the insured from losing his indemnity either upon representation or warranty, not fraudulent or material. *Germania Ins. Co. v. Rudwig*, 80 Ky. 223; overruling *Farmers & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.) 312.

If a representation is material, it matters not that it is not fraudulent. If false it will avoid the policy. *Aicher v. Metropolitan L. Ins. Co.*, 13 Phila. (Pa.) 139.

1. *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Buell v. Conn. Mut. L. Ins. Co.*, 2 Flip. (U. S.) 9; *Schwartzbach v. Ohio Val. Prot. Union*, 25 W. Va. 622; *Wood v. Firemen's F. Ins. Co.*, 126 Mass. 316.

But see *Hartwell v. Ala. Gold L. Ins. Co.*, 33 La. Ann. 1353; s. c., 39 Am. Rep. 294; *Armour v. Transatlantic F. Ins. Co.*, 90 N. Y. 450; *Aicher v. Metropolitan L. Ins. Co.*, 13 Phila. (Pa.) 139.

If the insured, at the time of applying for the insurance, was in apprehension of an incendiary fire, and represented that he had no such apprehensions, he cannot recover. *Whittle v. Farmville Ins. etc. Co.*, 3 Hughes (U. S.) 421.

Where the provision was that if the representations by the insured should prove false or fraudulent the policy should be void, it was *held* that, to have this effect, the representations need not be both false and fraudulent. *Tex. Mut. L. Ins. Co. v. Davidge*, 51 Tex. 244.

2. *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.) 540.

not be false *in toto*. If untrue in a material part it will have the effect where the contract is entire and indivisible.¹

4. Change of Facts Represented.—The representation is deemed to be made at the time the contract is consummated, so that if the facts represented are, without notice, so changed between the time the representation is actually made and the moment of the consummation of the contract as to make the representation untrue and prejudicial to the insurers, the policy is avoided.² But when the contract is consummated, no subsequent change of the facts represented will avail to defeat the insurance, though the policy be not delivered nor the premium paid.³ Thus, should it be stated in the application that a building on which insurance is sought is occupied in a certain way, it would constitute no warranty that it should continue to be so occupied, in the absence of stipulations of that import;⁴ nor would a representation of the occupation and habits of an applicant for life insurance constitute a warranty of their continuance.⁵

5. Oral Representations.—Where the application for insurance is made in writing, oral representations cannot be shown; for in that case it is presumed that all such were incorporated into the

1. See *Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91; *Lovejoy v. Augusta Mut. F. Ins. Co.*, 45 Me. 472; *Plath v. Minnesota etc. Ins. Co.*, 23 Minn. 479; *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159; *Moore v. Virginia etc. Ins. Co.*, 28 Gratt. (Va.) 508; *Gottsmann v. Pennsylvania Ins. Co.*, 56 Pa. St. 210; *Bowman v. Franklin F. Ins. Co.*, 40 Md. 620; *Friesmouth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 587; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497.

Thus where a policy includes real and also personal property situated therein, the risk being distributed, a misrepresentation as to the realty, avoiding the insurance thereon, avoids the whole policy, the contract being entire. *Schumitsch v. American Ins. Co.*, 48 Wis. 26.

Contra, *Schuster v. Dutchess Co. Ins. Co.*, 102 N. Y. 260.

And the contrary was also held in *Woodward v. Republic F. Ins. Co.*, 32 Hun (N. Y.) 365, where the real and personal property was separately valued.

2. *Whitley v. Piedmont etc. Ins. Co.*, 71 N. Car. 480; *Trail v. Baring*, 4 Giff. 485; s. c., 10 L. T., N. S. 215; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622; *Calvert v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.) 308; *Piedmont etc. L. Ins. Co. v. Ewing*, 92 U. S. 380.

This rule does not necessitate a new statement when a new company as-

sumes the risks of the old and issues a new policy. *Cahen v. Continental L. Ins. Co.*, 69 N. Y. 308; *Cheever v. Union etc. Ins. Co.*, 4 Am. L. Rec. 15; s. c., 5 Big. Life & Acc. Ins. Rep. 45. Or where a lapsed policy is reinstated. *Day v. Mut. Ben. L. Ins. Co.*, 1 Mo. Arthur (D. C.) 41. Or when it is provided that the policy shall not take effect until the premium is paid, and this is not done until some time after the contract is made. *Fourdrinier v. Hartford Fire Ins. Co.*, 15 Upp. Cal. (C. P.) 403.

3. *Ellis v. Albany etc. F. Ins. Co.*, 50 N. Y. 402; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276; *Southern L. Ins. Co. v. Kempton*, 56 Ga. 33; *Franklin Fire Ins. Co. v. Colt*, 20 Wa. (U. S.) 560.

4. *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; *Hough v. City Fire Ins. Co.*, 27 Conn. 10; *Billings v. Tolland Co. Mut. Ins. Co.*, 20 Conn. 139; *Frisbie v. Fayette Ins. Co.*, 27 P. St. 325; *Blood v. Harvard F. Ins. Co.*, 12 Cush. (Mass.) 472; *Forbush v. Western Mass. Ins. Co.*, 4 Gray (Mass.) 338; *O'Neil v. Buffalo F. Ins. Co.*, 1 Comst. (N. Y.) 122; *Herrick v. Union Mut. F. Ins. Co.*, 48 Me. 558.

5. *Horton v. Equitable Life Assn. Soc.*, 2 Big. L. & A. Ins. Rep.; *Belham v. United G. & L. Ass. Co.*, 1 Exch. 744; *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518.

writing.¹ However, it is otherwise where parol statements are referred to in the application or policy without incorporating them into the contract.²

6. Fraud or False Swearing.—A frequent provision is that any fraud or false swearing by the insured shall forfeit the insurance. This means intentional fraud and false swearing,³ regarding a material matter.⁴

The question of intention is for the jury.⁵

No legal inference of intentional fraud is to be derived from the mere fact that the insured overstates a value,⁶ even though the policy provides that an overvaluation shall avoid it,⁷ though, of course, if it be done with a fraudulent purpose it will vitiate the policy.⁸ Nor again does the fact that the risk had been but recently rejected, show fraud in procuring the insurance.⁹ But whether or not there is a provision avoiding the policy for fraud perpetrated upon the insurers for the purpose of obtaining the insurance or insurance money, such will be its effect.¹⁰

1. *Lamotte v. Hudson etc. Ins. Co.*, 17 N. Y. 199; *Pindar v. Resolute F. Ins. Co.*, 47 N. Y. 114; *Rawls v. American L. Ins. Co.*, 27 N. Y. 282; *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276; *Boggs v. Am. Ins. Co.*, 30 Mo. 63; *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568; *Schmidt v. Peoria etc. Ins. Co.*, 41 Ill. 295; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609; *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.) 540; *Dolliver v. St. Joseph F. etc. Ins. Co.*, 131 Mass. 39; *Union etc. L. Ins. Co. v. Mowry*, 96 U. S. 544; *Candee v. Citizens' Ins. Co.*, 4 Fed. Rep. 143.

2. *Clark v. Mfrs. Ins. Co.*, 2 Woodb. & M. (U. S.) 472.

3. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Farmers' Mut. F. Ins. Co. v. Gargett*, 42 Mich. 289; *Dogge v. Northwestern Nat. Ins. Co.*, 49 Wis. 501; *Watertown F. Ins. Co. v. Grehan*, 74 Ga. 642; *Carson v. Jersey City Fire Ins. Co.*, 43 N. J. L. 300; s. c., 39 Am. Rep. 584; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474.

Under it the policy becomes void by a demand under oath for the whole amount of the loss, where a part is payable to a mortgagee. *Lewis v. Council Bluffs Ins. Co.*, 63 Iowa 193. But in *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa 600, it was held that where one has insurance in two companies, but there is doubt about recovery from either, he may claim the full amount of the loss from each without violating a provision of one of the policies that any attempt at fraud should forfeit it.

4. *Oshkosh Packing etc. Co. v. Mercantile Ins. Co.*, 31 Fed. Rep. 200.

5. *Dolan v. Aetna Ins. Co.*, 22 Hun (N. Y.) 396.

6. *Dolan v. Aetna Ins. Co.*, 22 Hun (N. Y.) 396; *Merchants & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Helbing v. Svea Ins. Co.*, 54 Cal. 156; s. c., 35 Am. Rep. 72; *Miller v. Alliance Ins. Co.*, 19 Blatchf. (U. S.) 308; *Lynchburg F. Ins. Co. v. West*, 76 Va. 575; *Behrens v. Germania F. Ins. Co.*, 64 Iowa 19; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284.

7. *Miller v. Alliance Ins. Co.*, 19 Blatchf. (U. S.) 308. But see *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; *Nassauer v. Susquehanna Mut. F. Ins. Co.*, 109 Pa. St. 507. And see, where valuation a warranty, *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420.

8. *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Biss. (U. S.) 31.

9. *Body v. Hartford F. Ins. Co.*, 63 Wis. 157.

10. *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238.

A policy is forfeited where one takes out a policy on another's life and murders him to obtain the insurance money. *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519.

The fraudulent conversion or withholding of part of the goods insured does not, however, avoid the policy. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284.

However, it was held in *Wright v. Mut. Ben. L. Assoc.*, 43 Hun (N. Y.) 61, that where a policy stipulates that no question as to the validity of an ap-

V. CONCEALMENT—1. Definition, etc.—A concealment is the intentional withholding by the insured from the insurers of facts material and prejudicial to the risk which ought in good faith to be made known, and its effect is to vitiate the policy. It is the opposite of a representation. It is, not stating facts which ought to be stated, and of which the insured has knowledge. The element of knowledge on the part of the insured is important, for concealment cannot be intentional without it.¹

2. Facts Within Knowledge of Insurers.—But where the facts undisclosed are within the knowledge of the insurers, or ought to be, or where they better the risk, it is not a concealment to fail to mention them, although the insured may know of them, unless it is otherwise provided in the policy.² But where it is stipulated that the insured warrants that his statement is a just, full and true statement of all facts material to the risk,³ or where a particular enquiry is made respecting the facts in question,⁴ and any material fact remains undisclosed, whether from accident, inadvertence or ignorance, it has the effect of avoiding the policy.⁵

plication or certificate of membership can be raised after two years or after the death of the member, the company is precluded, in a suit on the policy after the death of the member, from setting up that at the time of the application there were fraudulent representations concerning the health of the insured.

1. *Hall v. People's Mut. Ins. Co.*, 6 Gray (Mass.) 185; *Mut. Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123; *Swift v. Mass. Mut. L. Ins. Co.*, 63 N. Y. 186; *Merchants' etc. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Hand. (Ohio) 408; *Spratt v. Ross*, 16 Ct. of Sess. Cas. (Scotch) 1145; s. c., 3 Big. L. & A. Ins. Rep. 421; *Boggs v. American Ins. Co.*, 30 Mo. 63.

It has, however, been held that an innocent failure to communicate facts about which the applicant is not asked will not avoid the policy. *Washington etc. Manuf. Co. v. Weymouth etc. Ins. Co.*, 135 Mass. 503; *Buck v. Phoenix Ins. Co.*, 76 Me. 586.

2. *Lightbody v. North Am. Ins. Co.*, 23 Wend. (N. Y.) 18; *Boggs v. Am. Ins. Co.*, 30 Mo. 63; *Haley v. Dorchester Mut. F. Ins. Co.*, 12 Gray (Mass.) 545; *Merchants' etc. Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Hand. (Ohio) 408; *Benson v. Ottawa Agr. Ins. Co.*, 42 U. C. (Q. B.) 282; *Goodwin v. Lancashire Ins. Co.*, 18 C. L. J. 1; *Leach v. Republic F. Ins. Co.*, 58 N. H. 245.

3. *Hardy v. Union Mut. F. Ins. Co.*, 4 Allen (Mass.) 217; *Abbott v. Shaw-*

mut Mut. F. Ins. Co., 3 Allen (Mass.) 214; *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen (Mass.) 332; *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 1 N. Y. 376; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. (N. Y.) 285; *Baker v. Home Life Ins. Co.*, 4 Hun (N. Y.) 402; s. c., 64 N. Y. 648; *Barteau v. Phoenix Mut. Ins. Co.*, 6 N. Y. 595; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Beck v. Hibernian Ins. Co.*, 44 Md. 95; *Teutonia L. Ins. Co. v. Beck*, 74 Ill. 165; *Jeffries v. Economical Life Ins. Co.*, 22 Wal. (U. S.) 44.

4. *Horn v. Amicable Mut. L. Ins. Co.*, 64 Barb. (N. Y.) 81; *N. A. Fire Ins. Co. v. Throop*, 22 Mich. 147; *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545.

A general answer to a general question is sufficient, if in good faith. *Bebe v. Hartford Mut. Fire Ins. Co.*, 2 Conn. 51.

5. *Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415.

But in *Campbell v. American Fire Ins. Co. (Wis.)*, 40 N. W. Rep. 661, an action for breach of contract to insure, it appearing that defendant's agent had never questioned plaintiff as to what the building contained besides the property to be insured, it was held that defendant could not show that plaintiff did not disclose that it contained other property, in the absence of allegation of fraudulent concealment.

Whether the facts have been dis-

3. Knowledge of Facts by Insured.—It has been stated that the insured must have had knowledge of the facts to constitute the withholding of them a concealment. Whether or not he has such knowledge is a question for the jury;¹ but he must be presumed to have such knowledge as a reasonable man or one of ordinary capacity would or ought to possess under the circumstances.²

Whether or not he must have a knowledge of the materiality of the facts as well as of their existence is a question; some courts holding that when called for, all known material facts must be given, whether they are so in the mind of the insured or not;³ while others hold that only such facts need be stated as may be fairly presumed to have been material in the belief of the insured.⁴

4. Instances of Facts That Must be Stated.—It has been held that the following are facts which must be stated, whether the insured's statement is warranted to be full and true or not, if they are within his knowledge: in fire insurance, attempts or threats to burn contiguous property;⁵ or the property on which the insurance is placed;⁶ the fact that the insured holds the property under a contract of purchase providing that the title shall not pass until full payment is made, and such payment has not been made. In life insurance, threats to assault the insured;⁷ the pregnancy of the insured;⁸ and, under some circumstances, the prior insanity of the insured.⁹

On the other hand, it has been held that the following facts are not required to be stated unless some special provision or enquiry exacts it: Pending litigation;¹⁰ the character or occupation of tenants;¹¹ the manner of heating or lighting, unless unusual;¹² the insolvency of the insured or judgments against him;¹³ the offensiveness of the insured in the community;¹⁴

closed is for the jury. *Tex. Banking & Ins. Co. v. Hutchins*, 53 Tex. 61; s. c., 37 Am. Rep. 750.

1. *Houghton v. Manuf. Mut. F. Ins. Co.*, 8 Met. (Mass.) 114.

2. *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125.

3. *Vose v. Eagle Life & Health Ins. Co.*, 6 Cush. (Mass.) 42; *Miles v. Conn. Mut. L. Ins. Co.*, 3 Gray (Mass.) 580; *Mut. Ben. L. Ins. Co. v. Miller*, 39 Ind. 475; *Lindeneau v. Desborough*, 3 M. & R. 45; *Price v. Phoenix L. Ins. Co.*, 17 Minn. 497.

4. *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52; *Mut. Ben. L. Ins. Co. v. Wise*, 34 Md. 582; *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125.

5. *Walden v. Louisiana Ins. Co.*, 12 La. 134; *Buffe v. Turner*, 6 Taunt. 338.

6. *Bebee v. Hartford Mut. F. Ins. Co.*, 25 Conn. 51; *Curry v. Common-*

wealth Ins. Co., 10 Pick. (Mass.) 535; *N. A. Fire Ins. Co. v. Throop*, 22 Mich. 146; *N. Y. Bowery F. Ins. Co. v. N. Y. Ins. Co.*, 17 Wend. (N. Y.) 359.

7. *Campbell v. Victoria Mut. Ins. Co.*, 17 Can. L. J. 40.

8. *Lefavour v. Ins. Co.*, 1 Phila. (Pa.) 558.

9. *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52.

10. *Hill v. Lafayette Ins. Co.*, 2 Mich. 476.

11. *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266.

12. *Clark v. Mfrs. Ins. Co.*, 8 How. (U. S.) 235; *Girard F. & M. Ins. Co. v. Stephenson*, 37 Pa. St. 293.

13. *Delahay v. Memphis Ins. Co.*, 8 Humph. (Tenn.) 684; *City F. Ins. Co. v. Carrugi*, 41 Ga. 660.

14. *Keith v. Globe Ins. Co.*, 52 Ill. 518.

the character of the adjoining building;¹ or the erection of contiguous structures.²

5. Character of Answers.—If the answers of the insured to the questions put to him are full and fair, as he understands them, and has a right to understand them, it is sufficient. Or if they in some sense call for his opinion, and it is honestly given, it is enough, though it be erroneous.³ But if his answers are equivocal or evasive, when he is in possession of all the facts which the questions call for, although true in a sense, it may amount to a concealment.⁴

VI. PREMIUM.—1. What Is.—The premium is the consideration paid for insurance.

2. Payment.—Its payment and delivery of the policy are usually concurrent acts. But while there must be a promise to pay a sum of money or some other consideration to support an undertaking to insure, still the efficacy of the contract does not depend upon the payment of the premium at the time of the delivery of the policy or other time agreed upon, unless it be otherwise manifested.⁵ However, it is now ordinarily provided that the policy shall not be binding until the premium is paid, though the policy may be delivered; and where this is the case the policy does not take effect, even though delivered, until the provision is complied with.⁶

So where the premium is payable in instalments, and it is pro

1. *Satterthwaite v. Mut. Ben. Ins. Assoc.*, 14 Pa. St. 393.

2. *Gates v. Madison Co. Mut. Ins. Co.*, 1 Seld. (N. Y.) 469.

3. *Haley v. Dorchester Mut. F. Ins. Co.*, 12 Gray (Mass.) 545; *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125; *Higbie v. Guardian L. Ins. Co.*, 53 N. Y. 603; *Fitch v. American etc. L. Ins. Co.*, 59 N. Y. 557; *Moulton v. American L. Ins. Co.*, 101 U. S. 708; *Hill v. Lafayette Ins. Co.*, 2 Mich. 476.

The answer to an enquiry as to the distance of other buildings stated, "East side of the block, small one story sheds, and could not endanger the building if they should burn." *Held*, that if this opinion was honestly entertained, it would not be a misrepresentation avoiding the policy, although the fire was in fact communicated through one of the sheds. *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125.

4. *Smith v. Aetna L. Ins. Co.*, 49 N. Y. 211; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 266; *N. A. Fire Ins. Co. v. Throop*, 22 Mich. 146; *Morrison v. Muspratt*, 4 Bing. 60; *Huckman v. Fernie, Mees. & W.*, 505; *Hutton v. Waterloo Life Ass. Soc.*, 1 F.

& F. 735; *London Ass. Soc. v. Muns*, 48 L. J., Ch. 338.

5. *Woodfin v. Asheville Mut. Ins. Co.*, 6 Jones (N. Car.) 558; *Dwelling House Ins. Co. v. Hardie*, 37 Kan. 67.

A life policy taken out by a father in favor of his children is not *ipso facto* extinguished by the failure of the assured to pay the first maturing premium not taken by the insurers in place of the cash payment required by the policy, merely because of a verbal agreement on the part of the assured, not referred to either in the note or policy, made without the assent of the beneficiary, and after the delivery of the policy to him, that he would surrender the policy on failure to pay the said premium not at its maturity. *Trager v. La. E. Life Ins. Co.*, 31 La. Ann. 235.

6. *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; *Flint v. Ohio Ins. Co.*, Ohio 301; *Schwartz v. Germania L. Ins. Co.*, 18 Minn. 448; *Bradley v. Potomac F. Ins. Co.*, 32 Md. 108; *Giddings v. Northwestern Mut. L. Ins. Co.*, 10 U. S. 108; *Klein v. N. Y. Life Ins. Co.*, 104 U. S. 884; *Ormond v. Fidelity L. Assoc.*, 96 N. Car. 158; *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365.

Provision that Policy Shall Not

vided that the policy shall not be binding while an instalment remains due and unpaid; the nonpayment of an instalment when

Binding While Premium Overdue.—So if it be provided that the policy shall not be binding while the premium or any note given for a premium is overdue, nonpayment of the premium or note when due renders the policy of no effect until paid. *Wall v. Home Ins. Co.*, 36 N. Y. 157; *Baker v. Union L. Ins. Co.*, 43 N. Y. 283; *How v. Union Mut. L. Ins. Co.*, 80 N. Y. 32; *Atty. Gen. v. North American Ins. Co.*, 80 N. Y. 152; *Williams v. Washington L. Ins. Co.*, 31 Iowa 541; *Nedrow v. Farmers' Ins. Co.*, 43 Iowa 24; *Greeley v. Iowa State Ins. Co.*, 50 Iowa 86; *Pitt v. Berkshire L. Ins. Co.*, 100 Mass. 500; *Shaw v. Berkshire L. Ins. Co.*, 103 Mass. 254; *Bigelow v. State etc. Ins. Co.*, 123 Mass. 113; *Robert v. New Eng. Mut. L. Ins. Co.*, 1 Disney (Ohio) 355; *Lewis v. Phoenix etc. Ins. Co.*, 44 Conn. 72; *Patch v. Phoenix L. Ins. Co.*, 44 Vt. 487; *Catoir v. American L. Ins. & Tr. Co.*, 33 N. J. L. 487; *Mason v. Citizens' etc. Ins. Co.*, 10 W. Va. 572; *Moser v. Phoenix etc. Ins. Co.*, 2 Mo. App. 408; *Russum v. St. Louis etc. Ins. Co.*, 1 Mo. App. 228; *Security L. Ins. Co. v. Gober*, 50 Ga. 404; *Howard v. Continental L. Ins. Co.*, 48 Cal. 229; *Forest City Ins. Co. v. School Directors*, 4 Ill. App. 145.

Provision that Policy Shall Be Void When Premium Overdue.—Where the provision is that the policy shall be void if not paid when due or within a certain time thereafter, the policy becomes absolutely void after nonpayment without any action upon the part of the company. *Atty. Gen. v. Continental L. Ins. Co.*, 93 N. Y. 70.

And this though the provision be in the application, where it is stated in the policy that it was issued and accepted in consideration of the agreements made in the application. *Mandego v. Centennial Mut. L. Assoc.*, 64 Iowa 134.

But a policy conditioned to be void on the nonpayment of the premium when due is not made void by the nonpayment at maturity of a promissory note given for the premium, unless such be the provision of the policy. *McAllister v. New Eng. Mut. L. Ins. Co.*, 101 Mass. 558; *New Eng. Mut. L. Ins. Co. v. Hasbrook*, 32 Ind. 447; *Kan. Prot. Union v. Whitt*, 36 Kan. 760, when it is. *Continental Ins. Co. v. Daly*, 33 Kan. 601.

A policy of life insurance contained the usual clause of forfeiture for nonpayment of premiums. The agent had allowed the cash part of the premium to be paid one half cash, the other half by a short note. Upon the 6th of July, 1867, the day the premium was due, the agent received the check of assured for the half cash due, and a six months note, giving the renewal receipt for a year. The note contained the clause "if not paid at maturity said policy is to be null and void." Neither check nor note was paid. *Held*, the mere fact that the note was not paid at maturity did not of itself avoid the policy. It gave the insurance company the option of declaring a forfeiture, but this option must be asserted by clear and unequivocal acts. The clause of forfeiture being inserted in the note for the benefit of the company, may be waived by failure to act, or other circumstances evincing an intention not to claim the benefit of the stipulation. Whether the company has exercised such option or waived their rights is a question of fact for the jury, under all the circumstances of the case. *Mut. Life Ins. Co. v. French*, 30 Ohio St. 240.

Forfeiture for Nonpayment of Interest.—It was *held* in the cases second above cited, where the question was raised, that the nonpayment of the interest when due on a note for the premium forfeits the policy, when the provision is that such shall be the effect of nonpayment of a premium note, but this is denied in *St. Louis Mut. L. Ins. Co. v. Grigsby*, 10 Bush (Ky.) 310. And see *Ohde v. Northwestern etc. Ins. Co.*, 40 Iowa 357.

Where the policy is conditioned to depend upon the prompt payment of interest, a failure to so pay forfeits the policy. *Knickerbocker etc. Ins. Co. v. Harlan*, 56 Miss. 512; *Knickerbocker etc. Ins. Co. v. Dietz*, 52 Md. 16; *Mut. F. Ins. Co. v. Miller Lodge*, 58 Md. 463.

By Whom Premium Must be Paid.—The premium must be paid by the insured or by some one by his authority. *Whiting v. Mass. etc. Ins. Co.*, 129 Mass. 240; s. c., 37 Am. Rep. 317; *Miller v. Union Cent. L. Ins. Co.*, 110 Ill. 102.

And it is paid, for instance, when it is delivered to a carrier designated by the

due suspends the policy until paid, and a loss occurring in the meantime is not therefore covered.¹

In the latter event it is generally considered that the company may sue for and recover the instalments in arrear,² though not where the provision is that the policy shall be *void* on the nonpayment of a matured instalment, even though it be further provided that it shall reattach on payment being made.³

3. Nonforfeitable or Paid Up Policies.—What are termed nonforfeitable or paid up policies are frequently issued, particularly in life insurance. They are usually endorsed “nonforfeiting policy,” and commonly provide that if on the payment of a specified number of premiums, the policy shall cease by reason of the nonpayment of subsequent premiums, a new paid up policy will be issued for such sum as is proportionate with the annual payments which have been made, on compliance with certain conditions by the assured, usually that he shall return the original policy within a fixed time for such purpose; also that if the premiums shall not be paid, the insurers will be liable for so much of the loss as is proportionate with the annual payments made. But it has been held that the surrender of the original policy is not necessary,⁴

company. *Currier v. Continental L. Ins. Co.*, 53 N. H. 538; *Whitley v. Piedmont etc. L. Ins. Co.*, 71 N. Car. 480.

1. *Garlick v. Miss. etc. Ins. Co.*, 44 Iowa 553; *How v. Union Mut. L. Ins. Co.*, 80 N. Y. 32.

Assessment.—The same is true of an assessment. *Southern Mut. Ins. Co. v. Taylor*, 33 Gratt. (Va.) 743; *Lycoming F. Ins. Co. v. Storrs*, 97 Pa. St. 354.

Where Optional with Insurers to Annul Policy.—Though where the company may “at their option annul the policy,” it does not have the effect to *ipso facto* annul the policy, but the company must give notice of the exercise of the option. *Supple v. Iowa State Ins. Co.*, 58 Iowa 29.

Part Payment.—Payment of a part of a premium due will not prevent a forfeiture. *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300.

Effect of Suspension.—When the effect of the provision is merely to *suspend* the policy while the premium or an instalment remains due and unpaid, and not to make it *void*, payment of what is due revives the policy, whether such payment be voluntary or otherwise. *American Ins. Co. v. Klink*, 65 Mo. 78; *American Ins. Co. v. Henley*, 60 Ind. 515.

No premium is earned while the policy is suspended. *Matthews v. Insurance Co.*, 40 Ohio St. 135.

2. *American Ins. Co. v. Henley*, 60 Ind. 515.

This is especially true where it is provided that all the instalments shall at once fall due in case of the nonpayment of one. *American Ins. Co. v. Klink*, 65 Mo. 78; *Williams v. Alban City Ins. Co.*, 19 Mich. 451.

3. *Yost v. American Ins. Co.*, 3 Mich. 531; *American Ins. Co. v. Congle*, 39 Mich. 536; *American Ins. Co. v. Stoy*, 41 Mich. 385; *New York L. Ins. Co. v. Statham*, 5 Big. L. & Acc. Ins. Rep. 607.

4. *Dorr v. Phoenix etc. Ins. Co.*, 6 Me. 438; *Coffey v. Universal etc. Ins. Co.*, 10 Ins. L. J. 525. See also *Winchell v. John Hancock L. Ins. Co.*, 1 Ins. L. J. 652; *Sheerer v. Manhattan L. Ins. Co.*, 16 Fed. Rep. 720; *Coffey v. Universal L. Ins. Co.*, 10 Biss. (U. S.) 354. *Contra*, *Smith v. Continental Ins. Co.*, 3 Ins. L. J. 63; *Schumacher v. Manhattan L. Ins. Co.*, 3 Ins. L. J. 455; *Sheerer v. Manhattan L. Ins. Co.*, 20 Fed. Rep. 886; *Knapp v. Homœopathic Mut. L. Ins. Co.*, 117 U. S. 411.

Nonpayment of Interest on Premium Notes.—So it has been held that nonpayment of the interest on the premium notes does not avoid the policy, notwithstanding a provision of that sort, but that it remains good for a proportionate part; that a policy cannot be declared to be forfeited that has been

and that the assured is entitled to recover where death occurs after default in the payment of the premium, and within the time limited for taking out a paid up policy, though none has been taken out.¹

4. Mode of Payment.—The mode of payment of the premium is immaterial if it be accepted by the company or its agent, and no special mode be provided for.² Thus it has been held that it may be by note;³ bank check;⁴ order on a third person;⁵ or to the agent in depreciated funds, it being according to the

stipulated to be nonforfeitable. *Hull v. Northwestern etc. L. Ins. Co.*, 39 Wis. 397; *Northwestern etc. Ins. Co. v. Little*, 56 Ind. 504; *Symonds v. Northwestern etc. Ins. Co.*, 23 Minn. 491; *Kirkpatrick v. Knickerbocker L. Ins. Co.*, 6 Ins. L. J. 368; *Mound City etc. Ins. Co. v. Twining*, 12 Kan. 475; *Watts v. Atlantic etc. Ins. Co.*, 16 Can. L. J. 215; *Nettleton v. St. Louis etc. Ins. Co.*, 6 Ins. L. J. 426; *Northwestern Mut. L. Ins. Co. v. Ross*, 63 Ga. 199; *Cowles v. Continental L. Ins. Co.*, 63 N. H. 300; *Bruce v. Continental L. Ins. Co.*, 58 Vt. 253.

See also *Franklin L. Ins. Co. v. Wallace*, 93 Ind. 7; *Tutt v. Covenant Mut. L. Ins. Co.*, 19 Mo. App. 677.

Contra, *Holman v. Continental L. Ins. Co.*, 54 Conn. 195.

Where Premiums Required to be Paid for Certain Time.—But where the provision is that if the premiums shall be paid for a stated time the insured shall be entitled to a paid up policy, and there are further stipulations to the effect that the policy shall be void if the premiums are not paid when due, the right to a paid up policy is forfeited by a default in the payment of a premium. *Smith v. Nat. L. Ins. Co.*, 103 Pa. St. 177; s. c., 49 Am. Rep. 121; *Atty. Gen. v. Continental L. Ins. Co.*, 93 N. Y. 70; *Holly v. Metropolitan L. Ins. Co.*, 105 N. Y. 437; *Ashbrook v. Phoenix Mut. Ins. Co.*, 94 Mo. 72.

Defendant issued to C, a married woman, a policy on the life of A, her husband. In case of her death before A, the insurance was payable to their children. Upon a surrender of the policy after two annual premiums had been paid she would be entitled to a paid up policy. She died before A, and before two annual premiums had been paid, without children. A paid the premiums for nine years, when he offered to surrender the policy, and demanded a paid up policy, which was

refused. *Held*, that as C died before the second premium was paid, her administrator had no right to a paid up policy, and the company having treated A as the beneficiary of the policy, he was entitled to a paid up policy. *Continental L. Ins. Co. v. Hamilton*, 41 Ohio St. 274.

A nonforfeitable policy provided that if any premiums were not paid the company should only be liable for an amount proportionate to the number of premiums paid. The insured paid twenty-seven quarterly premiums, when he made default. Subsequent to this four others matured before his death, which were not paid. *Held*, that the beneficiary could recover 27-31 of the amount of the policy with interest. *Baltimore Mut. L. Ins. Co. v. Pratt*, 55 Md. 200.

For What Sum Paid Up Policy Issued.

—A paid up policy should not be issued for the aggregate amount of premiums paid, subject to the amount due, but should be for the equivalent of the present value of the policy. *Farley v. Union Mut. L. Ins. Co.*, 41 Hun (N. Y.) 303.

1. *Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543.

2. *Currier v. Continental etc. Ins. Co.*, 53 N. H. 539; *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390.

3. *Mut. L. Ins. Co. v. French*, 30 Ohio St. 240; *Mowry v. Home Ins. Co.*, 9 R. I. 346; *Pitt v. Berkshire L. Ins. Co.*, 100 Mass. 500; *Carey v. Nagle*, 2 Abb. (U. S.) 156; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487.

And a *Kentucky* case is to the effect that payment with a note, duly accepted as such, suffices, though there be a provision to the contrary in the policy. *Inman v. Globe Ins. Co.*, 4 Ins. L. J. 719.

4. *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390.

5. *National Ben. Assoc. v. Jackson*, 114 Ill. 533.

course of business of the agent known to the company,¹ or in advertising,² board, or whatever else may be agreed upon.³ As it is generally considered that where the insured has money to his credit with the insurers that that must be exhausted before a policy can be declared forfeited for nonpayment.⁴ Thus, if dividends are due the insured, they should be applied to the liquidation of his maturing premiums⁵ in the absence of a contrary arrangement.⁶

The premium must be paid promptly on the day named, unless the policy promises indulgence. But where the day of payment falls on Sunday, it may be made on Monday, even though a loss has intervened;⁷ and where it falls on a weekday it may be made at any hour of that day up to midnight.⁸

5. Waiver with Respect to Premium.—Payment of the premium at the time agreed may be waived by the insurers after the policy takes effect,⁹ and this either expressly or impliedly, and hence

1. *Sands v. N. Y. L. Ins. Co.*, 50 N. Y. 626; *Robinson v. International Assoc.*, 42 N. Y. 54; *Martin v. International L. Assur. Soc.*, 62 Barb. (N. Y.) 181.

See also, as to tender in such currency, *N. Y. L. Ins. Co. v. Clapton*, 7 Bush (Ky.) 179; *N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 20 Barb. (N. Y.) 469.

2. *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96. And it was here held that where the agreement is to take advertising for the premium, the policy cannot be avoided by a failure to furnish sufficient advertising matter.

3. *Pendleton v. Knickerbocker etc. Ins. Co.*, 5 Fed. Rep. 238; *Schwartz v. Germania L. Ins. Co.*, 18 Minn. 448.

4. *Train v. Holland etc. Ins. Co.*, 62 N. Y. 598; *Home Ins. Co. v. Curtis*, 23 Mich. 402; *Thompson v. American etc. Ins. Co.*, 46 N. Y. 674; *Union Ins. Co. v. Grant*, 68 Me. 229; *Staunton v. West. Assur. Co.*, 23 U. C. (Ch.) 81; *Northwestern Mut. L. Ins. Co. v. Fort*, 82 Ky. 269. But consult *Mut. F. Ins. Co. v. Miller Lodge*, 58 Md. 463.

5. *Girard etc. Ins. Co. v. N. Y. Mut. etc. Ins. Co.*, 97 Pa. St. 15; *Manhattan L. Ins. Co. v. Hoelzle*, 8 Ins. L. J. 226; *Bulger v. Washington L. Ins. Co.*, 63 Ga. 328. But custom between the parties may control. *Anderson v. St. Louis Mut. L. Ins. Co.*, 1 Flip. (U. S.) 559.

6. *Ohde v. Northwestern etc. Ins. Co.*, 40 Iowa 357; *Patch v. Phoenix Ins. Co.*, 44 Vt. 487; *Russum v. St. Louis etc. Ins. Co.*, 1 Mo. App. 228;

Anderson v. St. Louis etc. Ins. Co., 5 Big. L. & A. Ins. Rep. 527.

The insurers should in such case give notice to the insured of the amount is called upon to pay. *Home L. Ins. Co. v. Pierce*, 75 Ill. 426, though where it is specially provided what shall be done with the accrued dividends or profits, such provision governs. *Hull v. Northwestern etc. L. Ins. Co.*, 39 Vt. 397.

7. *Hammond v. American Mut. Ins. Co.*, 10 Gray (Mass.) 306; *Holland v. Continental etc. Ins. Co.*, 4 Mass. 499; *Taylor v. Germania Ins. Co.*, 2 Dill. (U. S.) 282; *Campbell v. International L. Ass'n*, 4 Bosw. (N. Y.) 298.

8. *Och v. Homestead etc. Ins. Co.*, 21 Pitts. Leg. Jour. 98.

9. Not at the time it is made. *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 21; *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 279; *Lewis v. Phoenix Ins. Co.*, 44 Conn. 72; *Bushy v. American etc. Ins. Co.*, 40 Md. 143; *Candee v. Citizens' Ins. Co.*, 4 Fed. Rep. 143.

Where the company takes a foreign bill of exchange drawn by the insured for the premium due, with an agreement that the same is not paid at maturity, the policy shall lapse, the company is bound to present the bill at maturity, although the drawee has refused acceptance, although he has in his hands no funds to pay it. Protest is not, however, necessary. *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696.

In *Piedmont etc. L. Ins. Co. v. Lean*, 31 Gratt. (Va.) 517, it was held

by parol as well as by writing.¹ Thus, where the agent delivers the policy and charges the premium to the insured,² especially where there is an agreement between the insured and the agent that this shall be done and that the latter shall be bound to the company for the premium,³ there is such a waiver. So it is a waiver of the provision if the insured be told that payment on delivery of the policy makes no difference,⁴ or be given time,⁵ or where he offers payment and its acceptance is deferred;⁶ or where a note is accepted instead of cash, and a renewal receipt is issued;⁷ or where the premium is habitually paid and received at other times than the days fixed;⁸ or where payment accord-

that the assistant secretary had authority for such purpose.

1. *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; *Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 277; *Miesell v. Globe Mut. L. Ins. Co.*, 76 N. Y. 115; *Lyon v. Travellers' Ins. Co.*, 55 Mich. 141; s. c., 54 Am. Rep. 354; *Hanley v. L. Assoc. etc.*, 69 Mo. 380; *Johnson v. Southern Mut. Ins. Co.*, 79 Ky. 403; *Smith v. St. Paul F. etc. Ins. Co.*, 3 Dak. 80.

Levying a subsequent assessment does not, however, waive payment. *Crawford Co. Mut. Ins. Co. v. Cochran*, 88 Pa. St. 230.

The insured made default, but the company offered to overlook it if payment was made at once. It was not paid for two weeks, at which time he was sick, and he died the next day. *Held*, that the company was not bound. *Servoss v. Western Mut. Aid Soc.*, 67 Iowa 86.

See also cases cited, *infra*, this title, WAIVER AND ESTOPPEL.

2. *Miller v. Brooklyn L. Ins. Co.*, 12 Wall. (U. S.) 288; *Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322; *Boehen v. Williamsburg etc. Ins. Co.*, 35 N. Y. 131; *Wood v. Poughkeepsie etc. Ins. Co.*, 32 N. Y. 619; *Sheldon v. Atl. F. & M. Ins. Co.*, 26 N. Y. 460; *Re Booth*, 11 Abb. N. Cas. (N. Y.) 145; *Bouton v. American Mut. L. Ins. Co.*, 25 Conn. 542; *Equitable Ins. Co. v. McCrea*, 8 Lea (Tenn.) 541; *Lebanon Mut. Ins. Co. v. Hoover*, 113 Pa. St. 591; s. c., 57 Am. Rep. 511.

Plaintiff obtained insurance through a broker, who received the premium from him, and offered it to the defendant company's agent. The agent, having directed the broker to hold the premium for a time, charged him and credited the company with the amount,

and afterwards remitted it to the company. *Held*, that the question of payment of the premium was for the jury, and an instruction to find for the defendant was error. *Pittsburgh Boat Yard Co. v. Western Assur. Co.*, 118 Pa. St. 415.

3. *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207; *Southern L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606. But this is denied in *Greene v. Lycoming F. Ins. Co.*, 91 Pa. St. 387, where there is a provision that the agent shall have no authority to waive payment.

4. *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; *Bragdon v. Appleton Mut. Ins. Co.*, 42 Me. 259.

5. *Alexander v. Continental Ins. Co.*, 67 Wis. 422; s. c., 58 Am. Rep. 869.

6. *N. Y. Cent. Ins. Co. v. Nat. Protection Ins. Co.*, 20 Barb. (N. Y.) 469; *Hallock v. Commercial Ins. Co.*, 2 Dutch. (N. J.) 268.

7. *Mich. Mut. L. Ins. Co. v. Bowes*, 42 Mich. 19; *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252; *Little v. Charter Oak Ins. Co.*, 38 Ohio St. 110.

But the acceptance of a note does not waive future payments according to the terms of the policy. *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487.

8. *Cotton States L. Ins. Co. v. Lester*, 62 Ga. 247; *Ala. Gold L. Ins. Co. v. Garmany*, 74 Ga. 51; *Tripp v. Vermont L. Ins. Co.*, 55 Vt. 100; *Western Horse etc. Ins. Co. v. Scheidle*, 18 Neb. 495.

And in *Girard L. Ins. etc. Co. v. N. Y. Mut. L. Ins. Co.*, 97 Pa. St. 15, it was *held* that a stipulation in an obscure part of a policy, printed in small type, to the effect that the receipt of overdue premiums was to be deemed to constitute no precedent as regards the payment of future premiums, nor to be considered as a waiver of a forfeiture of

ing to the terms of the policy is prevented by the insurer or is attempted to be enforced.²

Indeed, any acts of the insurers which reasonably indicate that they do not mean to insist upon compliance will imply a waiver. But a demand for an overdue premium without receiving it is not a waiver of a forfeiture.⁴

And the prompt payment of an instalment may be waived as well as where the whole premium is due at one time. Acceptance of an instalment or a part thereof,⁵ after it is due, or extension of the time of payment,⁶ is such a waiver,⁷ unless there also be a provision to the effect that acceptance of an overdue premium or an agreement to the extension of the time of payment shall not constitute a waiver, when that governs.⁸

6. Excuses for Nonpayment.—So there may be excuses for nonpayment at the stipulated time. War breaking out between a State or country of the insurer and insured is generally held to be one,⁹ it being considered by the courts that have held so that the policy is suspended during hostilities, and revived

the policy, is not to be regarded as a condition of the policy, but rather as a qualification of the receipt of premiums. The acceptance of occasional payments after due will not, however, amount to a waiver. *Marston v. Mass. L. Ins. Co.*, 59 N. H. 92.

1. *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614; *Hamilton v. Mut. Ins. Co.*, 9 Blatchf. (U. S.) 234.

2. *Robinson v. Pac. F. Ins. Co.*, 18 Hun (N. Y.) 395.

3. *Appleton v. Phoenix Mut. L. Ins. Co.*, 59 N. H. 541; *Goit v. Nat. etc. Ins. Co.*, 25 Barb. (N. Y.) 189; *Heaton v. Manhattan F. Ins. Co.*, 7 R. I. 502; *Pittsburgh Boat Yard Co. v. Western Assur. Co.*, 118 Pa. St. 415; *Winindger v. Globe Mut. L. Ins. Co.*, 3 Hughes (U. S.) 257; *Home Prot. Ins. Co. etc. v. Avery* (Ala.), 5 So. Rep. 143.

Where, by the terms of a policy of life insurance, the nonpayment of the required annual premium at the designated time, is declared to be a ground of forfeiture, but the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policy holder, through a local agent residing in his neighborhood, good faith requires that this mode of collection should not be discontinued, and payment required at the company's office, without notice to the insured. *Union Cent. L. Ins. Co. v. Pottker*, 33 Ohio St. 459. Cases of the same character are

Thompson v. St. Louis etc. Ins. Co. Mo. 469; *Buckbee v. U. S. etc. Co.* Barb. (N. Y.) 541; *Mayer v. Mut. Ins. Co.*, 38 Iowa 304; *Helme v. P. L. Ins. Co.*, 61 Pa. St. 107. In the case it was said that "forfeitures odious, and enforced only where there is the clearest evidence that that was what was meant by stipulation of the parties. There must be no cast of management or trick to entrap a party into a forfeiture."

4. *Cohen v. Continental F. Ins. Co.*, 67 Tex. 325; *Ware v. Mill Mut. M. & F. Ins. Co.*, 45 N. J. L. 5.

5. *Hodsdon v. Guardian L. Co.*, 97 Mass. 144.

6. *Homer v. Guardian etc. Co.*, 67 N. Y. 478; *Kan. Prot. Union Whitt*, 36 Kan. 760.

7. But see *Busby v. North American F. Ins. Co.*, 40 Md. 572, where it was said that the unauthorized receipt of an overdue premium by an agent of the company after the death of the insured is not a waiver, even though the agent was not disclaimed by the company.

Also see *Mowry v. Home Ins. Co.*, 9 R. I. 346, where it is held that the insured must show that he was in good health at the time of the acceptance of the premium. But compare with it *Rockwell v. L. Ins. Co.*, 20 Wis. 335.

8. *Bissell v. American etc. Ins. Co.*, 2 Big. L. & A. Ins. Rep. 150.

9. *Sands v. N. Y. L. Ins. Co.*, 50 N. Y. 626; *Cohen v. N. Y. L. Co.*, 50 N. Y. 610, and many cases

their close.¹ There is a class of cases, however, opposed to this view, the doctrine of which is that such policies become void, and hence not susceptible of enforcement by either party, even when peace is declared.² So it is a sufficient excuse for delay in payment where the policy has been declared by the company to be forfeited, or has otherwise been treated as forfeited;³ or where the agency at which the premium is to be paid is changed, and the insured is unable to find the new one.⁴ But the physical inability of the insured is not a sufficient excuse;⁵ nor is a statement in the company's prospectus, not made a part of the contract, that premiums need not be paid for a given number of days after the nominal date of maturity.⁶ Nor is an injunction restraining the company from doing business pending an examination of its condition;⁷ nor a claim of the insolvency of the company and that payment, therefore, would be unsafe;⁸ nor a failure to give the insured notice, according to usage, of the day on which a note given for premiums will mature,⁹ unless the notice be

and discussed. *Contra*, *Abell v. Penn. Mut. L. Ins. Co.*, 18 W. Va. 400.

1. See also *Odlin v. Ins. Co.*, 2 Wash. (U. S.) 312; *Francis v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 404; *Semmes v. Hartford Ins. Co.*, 13 Wall. (U. S.) 158; *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614; *N. Y. L. Ins. Co. v. Clopton*, 7 Bush (Ky.) 179; *Hamilton v. Mut. L. Ins. Co.*, 9 Blatchf. (U. S.) 234.

A tender of the premium, as it falls due, must be made where possible, in order to make the excuse available. *Manhattan L. Ins. Co. v. Le Pert*, 52 Tex. 504. See also *Attorney General v. Continental L. Ins. Co.*, 64 How. Pr. (N. Y.) 519.

2. *Worthington v. Charter Oak Ins. Co.*, 41 Conn. 372; *Dillard v. Manhattan etc. Ins. Co.*, 44 Ga. 119; *N. Y. L. Ins. Co. v. Statham*, 93 U. S. 24; *Tait v. N. Y. L. Ins. Co.* (C. Ct. Tenn.), 2 Ins. L. J. 863; s. c., 4 Big. L. & A. Ins. Rep. 479.

3. *Pilcher v. N. Y. L. Ins. Co.*, 10 Ins. L. J. 312; *Attorney General v. Guardian Mut. L. Ins. Co.*, 82 N. Y. 336.

4. *Southerp L. Ins. Co. v. McCain*, 96 U. S. 84; *Seamans v. N. W. Mut. L. Ins. Co.*, 3 Fed. Rep. 325; s. c., 1 McCrary (U. S.) 508; *Barwell v. Am. L. Ins. Co.*, 75 N. Car. 8.

DEATH OF THE LOCAL AGENT at the place of residence of the assured is no excuse where premiums are payable at the home office. *Bulger v. Washington L. Ins. Co.*, 63 Ga. 328.

5. *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 277; *Evans v. U. S. L.*

Ins. Co., 64 N. Y. 304; *Carpenter v. Centennial Mut. L. Association*, 68 Iowa 453.

As where the insured is insane. *Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543; s. c., 37 Am. Rep. 594.

6. *Mut. Ben. L. Ins. Co. v. Ruse*, 8 Ga. 534; *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. 516; *Day v. Mut. Ben. L. Ins. Co.*, 1 McCa. (D. C.) 41; s. c., 4 Big. L. & A. Ins. Rep. 15.

See, however, *Collett v. Morrison*, 9 Hare 173; *Wood v. Dwarria*, 11 Exch. 493; *Wheelton v. Hardisty*, 92 E. C. L. 231; *Salvin v. James*, 6 East 571; *Wheelton v. Hardisty*, 8 E. & B. 282; *Cent. Ry. Co. v. Kesch*, 2 H. L. Cas. 99; *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. 516; *Fowler v. Metropolitan L. Ins. Co.*, 41 Hun (N. Y.) 357; *Walsh v. Aetna L. Ins. Co.*, 30 Iowa 133.

7. *Universal L. Ins. Co. v. Whitehead*, 10 Ins. L. J. 337. However see *Coffey v. Universal L. Ins. Co.*, 10 Ins. L. J. 525.

8. *Taylor v. Charter Oak L. Ins. Co.*, 9 Daly (N. Y.) 489.

Otherwise where the company is actually insolvent and has quit business. *People v. Empire Mut. L. Ins. Co.*, 92 N. Y. 105. Though a readiness and willingness to pay, had the company been solvent, must be shown. *People v. Globe Mut. L. Ins. Co.*, 32 Hun (N. Y.) 147.

9. (*Distinguishing N. Y. L. Ins. Co. v. Eggleston*, 96 U. S. 572;) *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252; *Mut. F. Ins. Co. v. Miller Lodge*, 58 Md. 463; *Mandego v. Centennial*

purposely omitted with the design of working a forfeiture; nor a custom of receiving overdue premiums;² nor an absence of demand on a premium note.³

VII. INSURABLE INTERESTS—1. Generally.—The insured must have an interest in the subject matter of the insurance. A policy of insurance obtained upon a subject in which the insured has no interest is void, whether or not it be so stipulated therein. No action can be maintained upon it; and notes given for premium upon such insurance are void for want of consideration.⁴ But just what amounts to an insurable interest has been a matter of much discussion, and cannot be definitely stated for all cases. It is, however, certain that the interest need not be the largest which may be had in the subject matter, nor need it be an absolute or vested interest; indeed, it does not seem to be essential that the insured should have any property in the subject of insurance. Probably it may be safely said that if pecuniary loss would be suffered by the insured by a loss of the subject matter, his interest therein is an insurable one.⁶ The interest must not, however,

Mut. L. Association, 64 Iowa 134. *Contra*, Phoenix Mut. L. Ins. Co. v. Daster, 106 U. S. 30; *People v. Globe Mut. L. Ins. Co.*, 65 How. Pr. (N. Y.) 239; *Atty. Gen. v. Continental L. Ins. Co.*, 33 Hun (N. Y.) 138; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156.

Laws New York, ch. 341, provide that no life insurance company shall declare forfeited any policy thereafter issued or renewed for nonpayment of any premium, unless written notice of the time of payment shall have been mailed to the insured at his last known address. This notice may be given in advance of the time when the premium will become due, and need not be in the words of the statute if it fairly gives notice that a forfeiture will be declared. *Phelan v. Northwestern Mut. L. Ins. Co.*, 42 Hun (N. Y.) 419. Payment of the annual premium constitutes a renewal within the meaning of the statute, and the holder of a policy, issued before passage of the act, who subsequently pays a premium, is entitled to its benefits. *Carter v. Brooklyn L. Ins. Co.*, 110 N. Y. 15. Notice to an unauthorized address does not satisfy the act, and the company takes the risk of delivery, even though previous notices to the same address have been received by the assured, and payments accordingly made. *Carter v. Brooklyn L. Ins. Co.*, 110 N. Y. 15.

It has been held in *Iowa*, under a similar statute, that the assured does not waive his right to such notice by ap-

plying for an extension of the premium note. *Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa 325. The Iowa statute provides that the notice "may be served by registered letter, addressed to the insured." It has been held upon this that service is complete when the registered letter is mailed. *McKenna v. State Ins. Co.*, 73 Iowa 453.

1. *Girard L. Ins. etc. Co. v. N. Y. Mut. L. Ins. Co.*, 97 Pa. St. 15.

2. *Mutual Ins. Co. v. Girard L. Ins. etc. Co.*, 100 Pa. St. 172. *Compare* *Girard L. Ins. etc. Co. v. N. Y. Mut. L. Ins. Co.*, 97 Pa. St. 15.

3. *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188.

4. *Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64; *Fowler v. N. Y. etc. Ins. Co.*, 26 N. Y. 422; *Peabody v. Washington Ins. Co.*, 20 Barb. (N. Y.) 33; *Freeman v. Fulton Ins. Co.*, 38 Barb. (N. Y.) 247; *Talman v. Atlantic Ins. Co.*, 29 How. Pr. (N. Y.) 71; *Sawyer v. Mahew*, 51 Me. 398; *Sweeney v. Franklin Ins. Co.*, 20 Pa. St. 337. *See* *Trenton etc. Ins. Co. v. Johnson*, N. J. L. 576; *Mawry v. Home Ins. Co.*, 9 R. I. 346.

5. *Buck v. Chesapeake Ins. Co.*, Pet. (U. S.) 151, 163.

6. *Rohrback v. Germania F. Ins. Co.*, 62 N. Y. 47; *Fenn v. New Orleans Mut. Ins. Co.*, 53 Ga. 578; *Merritt v. Farmers' Ins. Co.*, 42 Iowa 11; *Agicultural Ins. Co. v. Clancey*, 9 Ill. App. 137.

JUDGE FOLGER, in *Rohrback v. G.*

be an immoral or illegal one. Such interests cannot be thus protected.¹

2. Of Equitable Owner.—One may, for instance, insure his equitable interest in property, the legal title to which is in another.²

3. Of Different Parties Having Different Interests.—So different parties having different interests in the same subject matter may severally procure insurance on their several interests;³ but the mere fact of a person being a part owner of property does not give him an insurable interest in that portion which he does not own.⁴

4. Of Vendor and Vendee.—A person has an insurable interest in property, real or personal, which he has contracted to sell⁵ to the full value of the property, regardless of the price he has contracted to sell for.⁶

So a vendee in possession, under a contract for title on payment of the purchase money, has an insurable interest to the full value of the property,⁷ even though he could not enforce the

mania F. Ins. Co., 62 N. Y. 47, says, after citing Arnold, Bunyon, Hughes, Marshall, Phillips, Sherman, Parsons, Angell, Flanders and May: "The result of a comparison of the text writers above cited is that there need not be a legal or equitable title to the property insured. If there be a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest."

A married woman, who has purchased personal property on credit, and has not paid for it, and refuses to pay, may still have an insurable interest. *Queen Ins. Co. v. Young* (Ala.), 5 So. Rep. 116.

In *Stambaugh v. Blake* (Pa.), 15 Atl. Rep. 705, it is held that a turnpike company, which voluntarily contributes to the construction of a public bridge, over which those using its road, as well as the general public, pass, but which has no other interest therein, has no insurable interest in the bridge.

1. *Lord v. Dall*, 12 Mass. 118; *Mount v. Waite*, 7 Johns. (N. Y.) 434.

2. *Oliver v. Greene*, 3 Mass. 133; *Coursin v. Pa. Ins. Co.*, 46 Pa. St. 323.

After a policy has been assigned with the consent of the company, it cannot object that the assignee has only an equitable interest in the property in-

sured. *Home Prot. etc. Ins. Co. v. Caldwell* (Ala.), 5 So. Rep. 338.

3. *Higginson v. Dall*, 13 Mass. 96; *Locke v. N. A. Ins. Co.*, 13 Mass. 61; *Garrell v. Hanna*, 5 Har. & J. (Md.) 412.

4. *Reed v. Pac. Ins. Co.*, 1 Met. (Mass.) 166; *Foster v. U. S. Ins. Co.*, 11 Pick. (Mass.) 86; *Murray v. Columbian Ins. Co.*, 11 Johns. (N. Y.) 302; *Turner v. Burrows*, 5 Wend. (N. Y.) 541.

5. *Ins. Co. v. Updegraff*, 21 Pa. St. 513; *Wood v. N. W. Ins. Co.*, 46 N. Y. 421; *Tallman v. Atl. F. & M. Ins. Co.*, 4 Abb. Dec. (N. Y.) 345; *McCutcheon v. Ingraham* (W. Va.), 9 S. E. Rep. 260.

6. *Stuart v. Columbian Ins. Co.*, 2 Cranch (U. S.) 442.

7. *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. (N. Y.) 247; *Southern Ins. Co. v. Lewis*, 42 Ga. 587; *Tuckerman v. Home Ins. Co.*, 9 R. I. 414; *Rumsey v. Phoenix Ins. Co.*, 17 Blatchf. (U. S.) 527; *Amsinck v. American Ins. Co.*, 129 Mass. 185; *Reed v. Williamsburg City F. Ins. Co.*, 74 Me. 537. And see *Ayers v. Hartford F. Ins. Co.*, 17 Iowa 176; *Simmes v. Marine Ins. Co.*, 2 Cranch (U. S.) 618; *Rider v. Ocean Ins. Co.*, 20 Pick. (Mass.) 259; *McGivney v. Phoenix F. etc. Ins. Co.*, 1 Wend. (N. Y.) 85; *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385; *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354; *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. (N. Y.) 247; *Imperial F. Ins. Co. etc. v. Dunham*, 117 Pa. St. 460; *Elliott v.*

contract if resisted.¹ Likewise it has been held that one who has bid off property at an execution sale, though he pays no money and takes no deed, has an insurable interest.² And it was adjudged in another case that a purchaser at sheriff's sale may truly declare himself to be the owner of the property, though the sheriff's deed has not, at the time of such declaration been acknowledged.³

5. Of Lessor and Lessee.—A lessor has an insurable interest in property which he has leased.⁴ It has also been held that, for his better security for the rent, he has an insurable interest in structures erected by the lessee, and which the latter has the right to remove,⁵ as well as in those which the lessee has not the right to remove.⁶

The lessee also has an insurable interest in structures which he has leased;⁷ but a mere intruder upon land has no such interest in buildings thereon, even though he may have erected them. A lessee's interest is at an end when he surrenders possession under a notice to quit, or otherwise yields up the premises.⁹

6. Of Mortgagor and Mortgagee.—The interest of both mortgagor and mortgagee in the mortgaged property is insurable.¹⁰ This is true of the interest of the mortgagor, though the property be mortgaged to its full value;¹¹ or after a sale of the property by him, where his personal bond accompanies the mortgage.¹² And where there are several mortgages of the same property, the interest of each mortgagee is an insurable interest, and this although the mortgage note may have been transferred by endorsement.

Ashland Mut. F. Ins. Co., 117 Pa. St. 548.

1. *Ætna Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; *Smith v. Bowditch* etc. F. Ins. Co., 6 Cush. (Mass.) 448; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25.

2. *Ætna Ins. Co. v. Miers*, 5 Sneed (Tenn.) 139.

3. *Susquehanna Mut. F. Ins. Co. v. Staats*, 102 Pa. St. 529.

4. *Mayor of N. Y. v. Brooklyn F. Ins. Co.*, 41 Barb. (N. Y.) 231; *Ely v. Ely*, 80 Ill. 532.

5. *New York v. Exchange F. Ins. Co.*, 9 Bosw. (N. Y.) 424; *Miltenberger v. Beacon*, 9 Pa. St. 198.

6. *New York v. Hamilton F. Ins. Co.*, 10 Bosw. (N. Y.) 537.

7. *Allen v. Sun Mut. Ins. Co.*, 36 La. Ann. 767; *Niblo v. N. A. F. Ins. Co.*, 1 Sandf. (N. Y.) 551; *Lawrence v. St. Mark's Ins. Co.*, 43 Barb. (N. Y.) 479; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 42.

8. *Sweeny v. Franklin Ins. Co.*, 20 419 749; *Tongue v. Nutwell*, 31 Md. 302; *Mitchell v. Home Ins. Co.*, 32 Iowa

Pa. St. 337. And see *Oliver v. Green*, 3 Mass. 133.

9. *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457.

10. *Honore v. Lamar F. Ins. Co.*, Ill. 409; *Lycoming F. Ins. Co. v. Jackson*, 83 Ill. 302; *Washington etc. Ins. Co. v. Kelley*, 32 Md. 421; *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 40; *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; *Tellon v. Kingston etc. Ins. Co.*, 7 Barb. (N. Y.) 570; *Kemmerly v. N. Y. etc. Ins. Co.*, 5 Duer (N. Y.) 1; *McDonald v. Black*, 20 Oh. 185; *Strong v. Mfrs. Ins. Co.*, 1 Pick. (Mass.) 40; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 53; *King v. State etc. F. Ins. Co.*, 7 Cush. (Mass.) 1; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25; *Swift v. Mfrs. Ins. Co.*, 18 Vt. 305; *Kellar v. Merchants' Ins. Co.*, 7 La. Ann. 29; *Phoenix etc. Ins. Co.*, 52 Me. 333.

11. *Higginson v. Dall*, 13 Mass. 6; *Gordon v. Mass. etc. Ins. Co.*, 2 Pick. (Mass.) 249.

12. *Waring v. Loder*, 53 N. Y. 581; *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377.

Likewise one who holds a mortgage as collateral security for a debt has an insurable interest in the mortgaged property so long as the debt remains unpaid.¹

The insurable interest of the mortgagor extends to the full value of the property, equally whether the mortgage was made before or after the policy.² But he ceases to have an insurable interest in the property mortgaged after a sale by a master in chancery under a decree of foreclosure, and payment of a part of the purchase money, and this though the decree is not enrolled, nor the deed executed at the time of sale.³ From the time of sale, the property is at the risk of the purchaser, and the deed relates to that time. However, where a foreclosure sale is vacated for irregularity, and the order of confirmation is set aside, the insurable interest of the mortgagor remains, and continues precisely as though no sale had been attempted;⁴ and in Wisconsin it has been held that this insurable interest continues until the time of redemption expires.⁵

7. Of Lien Holder.—A person entitled to a lien on a building under a lien statute,⁶ or on personal property by virtue of either a statute or the common law, has an interest in the same which is insurable,⁷ as has the owner.⁸

8. Of Assignor.—A debtor has an interest in property which he has assigned for the benefit of his creditors where there is an excess over his liabilities.⁹

9. Of Assignee.—So the assignee of an insolvent debtor,¹⁰ or an assignee for security,¹¹ has an insurable interest in the property assigned.

10. Of Executors and Administrators.—Executors have an insurable interest in real estate devised by the will;¹² and the same is true of administrators where the personal estate is insufficient to pay the debts.¹³

1. *Sussex Co. etc. Ins. Co. v. Woodruff*, 26 N. J. L. 541.

2. *French v. Rogers*, 16 N. H. 177; *Strong v. Mfrs. Ins. Co.*, 10 Pick. (Mass.) 40; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Allen v. Franklin F. Ins. Co.*, 9 How. Pr. (N. Y.) 501.

3. *McLaren v. Hartford F. Ins. Co.*, 5 N. Y. 151; *contra*, *Marts v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 478.

4. *Richland Co. Mut. Ins. Co. v. Simpson*, 38 Ohio St. 672.

5. *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665.

6. *Royal Ins. Co. v. Stinson*, 103 U. S. 25; *Carter v. Humboldt F. Ins. Co.*, 12 Iowa 287.

7. *Hancox v. Fishing Ins. Co.*, 3 Sumn. (U. S.) 132; *Russel v. Union Ins. Co.*, 1 Wash. (U. S.) 409; *Donath*

v. Ins. Co., 4 Dall. (U. S.) 463; *Seamans v. Loring*, 1 Mason (U. S.) 127; *Murray v. Columbian Ins. Co.*, 11 Johns. (N. Y.) 302.

8. *Nussbaum v. Northern Ins. Co.*, 37 Fed. Rep. 524.

9. *Lazarus v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 81.

10. *Herkimer v. Rice*, 27 N. Y. 163; *Marks v. Hamilton*, 7 Exch. 323; *Goulstone v. Royal Ins. Co.*, 1 F. & F. 276.

11. *Wells v. Phila. Ins. Co.*, 9 S. & R. (Pa.) 103.

12. *Phelps v. Gebhard F. Ins. Co.*, 9 Bosw. (N. Y.) 404; *Herkimer v. Rice*, 27 N. Y. 163; *Howard F. Ins. Co. v. Chase*, 5 Wall. (U. S.) 509.

13. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368. But see *Beach v. Bowery F. Ins. Co.*, 8 Abb. Pr. (N. Y.) 261 n.

11. Of Trustee.—A trustee holding the legal title to property may insure it for the use of the beneficiary;¹ and in the case of a trust deed, even though there be a conveyance by the grantor of his interest.²

12. Of Cestui que Trust.—A *cestui que trust* may also insure his interest in the trust property.³

13. Of Tenant by the Curtesy.—Insurance on property in which husband is tenant by the curtesy is valid;⁴ and it has been held that a husband in possession and enjoyment with his wife of his real and personal property, with an inchoate right of curtesy, has an insurable interest in both.⁵

14. Of Husband in Wife's Property.—But it has also been held that a husband must specifically insure the right of using the property of his wife in order to entitle him to recover damages for the loss of it.⁶

15. Of a Partner.—A partner has an interest in the partnership property which he may insure for his own benefit;⁷ and the rule would extend to the case of a building erected with partnership funds on the land of a single partner.⁸ Even a retiring partner has this interest while any liability remains.⁹

16. Of Stockholders in Corporate Property.—But with regard to the interest of a stockholder in a corporation in the corporate property, the cases are at issue as to whether it is insurable.¹⁰

17. Of Agent or Consignee.—An agent or consignee, having the principal's property in his possession, and having a special interest in it to the amount of his commission, may insure it in his own name, and, in case of loss, recover the full amount of the policy holding all beyond his own interest in trust for his principal.

1. *Young v. Union Ins. Co.*, 24 Fed. Rep. 279; *Savage v. Howard Ins. Co.*, 52 N. Y. 502; *Hughes v. Mercantile Ins. Co.*, 44 How. Pr. (N. Y.) 351.

2. *Dick v. Franklin F. Ins. Co.*, 81 Mo. 103; *Graham v. Firemen's Ins. Co.*, 2 Disney (Ohio) 255.

3. *Gordon v. Mass. etc. Ins. Co.*, 2 Pick. (Mass.) 249.

4. *Franklin etc. Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47; *Harris v. York etc. Ins. Co.*, 50 Pa. St. 341; *Abbott v. Hampden Ins. Co.*, 30 Me. 414.

5. *Trade Ins. Co. v. Baracliff*, 45 N. J. L. 543; s. c., 46 Am. Rep. 792. But see *Clark v. Dwelling House Ins. Co. (Me.)*, 17 Atl. Rep. 303, where it is held that under Rev. St. Maine, ch. 61, § 1, rendering the real estate of a married woman, however acquired, her separate estate, with absolute power of disposition, regardless of her husband's consent, only requiring his joinder with her in a conveyance of property derived from him, he has no insurable

interest in a house after conveying it to her.

6. *Cohn v. Va. F. etc. Ins. Co. Hughes (U. S.)* 272.

7. *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227.

8. *Converse v. Citizens' Mut. Ins. Co.*, 10 Cush. (Mass.) 37.

9. *Phoenix Ins. Co. v. Hamilton*, Wall. (U. S.) 504.

10. Affirming: *Seaman v. Enterprise etc. Ins. Co.*, 18 Fed. Rep. 250. A. see *Warren v. Davenport etc. Ins. Co.*, 31 Iowa 464. Denying: *Riggs v. Commercial Mut. Ins. Co.*, 51 N. Y. St. Ct. 466.

11. *Ætna Ins. Co. v. Jackson*, 16 Mon. (Ky.) 242; *Hough v. People's Ins. Co.*, 36 Md. 398; *Baxter v. Hartford F. Ins. Co.*, 11 Biss. (U. S.) 30; *Williams v. Crescent etc. Ins. Co.*, 151 Ann. 651; *De Forest v. Fulton Ins. Co.*, 1 Hall (N. Y.) 84; *Sturm v. Atl. Mut. Ins. Co.*, 63 N. Y. 77; *Graham v. Firemen's Ins. Co.*, 2 Disney (Ohio) 2

Indeed, it has been held that a commission merchant, to whom the cargo of a vessel has been consigned for sale, has an insurable interest in his expected commissions, and may insure the same while the vessel is on her voyage.¹ And it may be said, generally, that a person charged by law, custom or contract with the property of others, or having the right to protect the property, even though not bound to do so, or who will receive benefit from its continued existence, may insure it in his own name.²

Thus,

18. Of Common Carrier.—A common carrier may insure goods entrusted to him for carriage.³ And,

19. Of Builder.—Again, a builder engaged in the construction of a building for which he is not to be paid until after its completion, has an insurable interest therein.⁴

20. Of Creditor in Property of Debtor.—A simple contract creditor has no insurable interest in the real estate of his debtor,⁵ but otherwise with a judgment creditor having a judgment lien.⁶

21. In the Profits of a Voyage or Enterprise.—An interest in the profits of a voyage, whether as owner of the vessel and cargo,⁷ or otherwise, is a lawful subject of insurance,⁸ as are the profits expected to accrue from other property in which the insured has an interest,⁹ or other business in which he is concerned.¹⁰

So,

22. Of Bottomry Interest.—An interest in the freight of a vessel is an insurable one.¹¹ But no other interest is covered by an insurance on freight than freight strictly so-called (that is, an interest accruing to the insured for the use of a vessel of which he is the owner), unless the assured has disclosed the peculiar nature of his interest.¹²

23. Of Master of Vessel.—The master of a vessel, on board which

Compare Parks v. General Interest Assn. Co., 5 Pick. (Mass.) 34. And see *Aldrich v. Equitable etc. Ins. Co.*, 1 Woodb. & M. (U. S.) 272; *Shaw v. Aetna Ins. Co.*, 49 Mo. 578.

1. *Putnam v. Mercantile M. Ins. Co.*, 5 Metc. (Mass.) 386.

2. *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 420.

3. *Savage v. Corn Exchange etc. Ins. Co.*, 36 N. Y. 655; *Chase v. Washington etc. Ins. Co.*, 12 Barb. (N. Y.) 595; *The Sidney*, 23 Fed. Rep. 88.

4. *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411; *Franklin etc. Ins. Co. v. Coates*, 14 Md. 285.

5. *Foster v. Van Reed*, 5 Hun (N. Y.) 322.

6. *Spure v. Home Mut. Ins. Co.*, 8 Sawyer (U. S.) 618; s. c., 15 Fed. Rep. 707. *Contra, Grevenmeyer v. Southern Mut. Ins. Co.*, 62 Pa. St. 340.

7. *Fosdick v. Norwich M. Ins. Co.*, 3 Day (Conn.) 108.

8. *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397; *Locke v. N. A. Ins. Co.*, 13 Mass. 61.

9. *Sun Fire Office v. Wright*, 3 N. & M. (S. Car.) 819; *Putnam v. Mercantile M. Ins. Co.*, 5 Metc. (Mass.) 386; *Loomis v. Shaw*, 2 Johns. Cas. (N. Y.) 36; *Niblo v. N. A. F. Ins. Co.*, 1 Sandf. (N. Y.) 551; *Leonarda v. Phoenix Ins. Co.*, 2 Rob. (La.) 131.

10. *Sawyer v. Dodge Co. etc. Ins. Co.*, 37 Wis. 503.

11. *McGaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 405; *Stone v. Nat. Ins. Co.*, 19 Pick. (Mass.) 34; *Lockwood v. Atlantic etc. Ins. Co.*, 47 Mo. 50; *Griswold v. New York Ins. Co.*, 3 Johns. (N. Y.) 321.

12. *Riley v. Delafield*, 7 Johns. (N. Y.) 522.

there is property consigned to him, has an insurable interest therein.¹ His commission is also insurable.²

24. Insurable Interest in Human Lives.—As the assured in other kinds of insurance must have an interest in the subject matter, in life insurance the assured must have an interest in the life insured. Any person may insure his own life for the benefit of another,³ even a stranger;⁴ and it does not seem to affect the validity of the insurance that that other pays the premiums; but if insurance be effected by one person on the life of another, the assured must show himself to have possessed an interest in the life of that other,⁵ at any rate, at the time the insurance was effected, though it does not seem to be necessary to show that the interest existed at the time of death, unless it be required by the terms of the policy.⁷ Otherwise the insurance would be a mere wager and void.⁸ But this interest need not be strictly legal or definite one. Any substantial pecuniary interest is sufficient.⁹ Thus,

25. Of Sister in Life of Brother.—A sister dependent upon brother for support has an interest in his life which she may insure;¹⁰ and probably this principle would extend to the interest of all persons in the lives of those upon whom they are dependent for comfort and support.

26. Of Parent in Life of Child.—A parent, according to very good authorities, has an insurable interest in the life of a child by reason of such relationship merely;¹¹ but whether this be so or not, as the father is entitled to the services of the child until he

1. *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151, 163.

2. *Holbrook v. Brown*, 2 Mass. 280.

3. *Gilbert v. Moore*, 104 Pa. St. 74; s. c., 49 Am. Rep. 570; *American etc. Ins. Co. v. Robertshaw*, 26 Pa. St. 189; *Campbell v. New Eng. etc. Ins. Co.*, 98 Mass. 381; *Ætna Life Ins. Co. v. France*, 94 U. S. 561; *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Tucker v. Mut. Ben. Life Co. (Wis.)*, 41 N. W. Rep. 968. And compare *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380.

4. *Johnson v. Van Epps*, 110 Ill. 551; *Succession of Hearing*, 26 La. Ann. 326; *Langdon v. Union Mut. L. Ins. Co.*, 14 Fed. Rep. 272; *Valton v. Nat. Fund L. Ass'n Co.*, 20 N. Y. 32.

5. *Ætna L. Ins. Co. v. France*, 94 U. S. 561; *St. John v. American Mut. L. Ins. Co.*, 13 N. Y. 31.

6. *Bevin v. Conn. etc. Ins. Co.*, 23 Conn. 244; *Ruse v. Mut. etc. Ins. Co.*, 23 N. Y. 516; *Guardian Ins. Co. v. Hogan*, 80 Ill. 36; *Franklin Ins. Co. v. Sefton*, 53 Ind. 380. But see *Trenton etc. Ins. Co. v. Johnson*, 24 N. T. L. 576.

7. *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. Rep. 65; *Trenton etc. Ins. Co. v. Johnson*, 24 J. L. 576.

8. *Mut. Benefit Ass'n v. Hoyt*, Mich. 473.

9. *Hoyt v. N. Y. etc. Ins. Co.*, Bosw. (N. Y.) 440.

10. *Lord v. Dall*, 12 Mass. 118.

11. *Grattan v. Nat. L. Ins. Co.*, Hun (N. Y.) 74.

In this case it is said that if such relation of consanguinity or affinity shown as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured, such interest will uphold the policy. And in *Loomis v. Eagle etc. Ins. Co.*, 6 Gray (Mass.) 399, the court say: "We cannot doubt that a parent has an interest in the life of a child, and *vice versa* a child in the life of a parent, not merely because they are bound to support their lineal kindred when in need of relief, but upon considerations of strong morals and the

majority, he has, beyond dispute, an insurable interest in until he reaches that age.¹

Child in Life of Parent.—The relation of parent and child is held sufficient to establish an insurable interest of the life of the parent;² but this principle is also denied, of course, a son in law, as such, has no insurable interest in the life of the mother in law.⁴

Husband and Wife.—Husband⁵ and wife⁶ have each an interest in the life of the other by reason of the relation and it is deemed as coming within this principle where a woman live together as husband and wife for a long term without any marriage ceremony ever having been performed. Indeed, the Missouri court goes still further, holding a man engaged to be married has an insurable interest in the prospective husband's life.⁸

Uncle and Nephew.—The mere relation of uncle and nephew does not constitute an insurable interest to enable either to insure the life of the other.⁹

Employer and Employee.—An employer has an insurable interest in the life of his employee;¹⁰ and an employee, hired for a term, has an insurable interest in the life of his employer.¹¹

Partner in Life of Copartner.—A partner has an insurable interest in the life of his copartner;¹² at any rate, it was so held where one of two copartners advanced the capital of the partnership agreement being that each should contribute an equal share.

Creditor in Life of Debtor.—Though the existence of the relation of debtor and creditor is not essential to an insurable interest, the interest of a creditor in the life of a debtor is insurable.

mutual affections between near relatives operating more efficaciously than the force of positive law."

Ell v. Union etc. Ins. Co.,

etc. Mut. Ins. Co. v. Kane,

154. And see Loomis v.

Co., 6 Gray (Mass.) 396.

etc. Mut. L. Ins. Co. v.

Ill. 35.

person, who is neither a creditor

of his father nor responsible for

him nor in any way dependent

on him has no insurable interest in

his life. *United Brethren*

Loc. v. McDonald (Pa.), 15

39.

etc. v. Piedmont etc. Ins.

Ann. 233; s. c., 48 Am. Rep.

though she lives with him and

rests upon him for support.

v. Blake (Pa.), 15 Atl. Rep.

5. *Currier v. Continental L. Ins. Co., 57 Vt. 496; s. c., 52 Am. Rep. 134.*

6. *McKee v. Phoenix Ins. Co., 28 Mo. 383.*

7. *Watson v. Centennial Mut. L. Ass'n, 21 Fed. Rep. 698; Equitable etc. Assur. Soc. v. Paterson, 41 Ga. 338.*

8. *Chisholm v. Nat. etc. L. Ins. Co., 52 Mo. 213.*

9. *Singleton v. St. Louis Mut. Ins. Co., 66 Mo. 63.*

10. *Miller v. Eagle etc. Ins. Co., 2 E. D. Smith (N. Y.) 268.*

11. *Hebdon v. West, 3 Best & Sn. 578.*

12. *See Valton v. Nat. Fund L. Ass'n Co., 20 N. Y. 32.*

13. *Conn. Mut. L. Ins. Co. v. Luchs, 108 U. S. 498.*

14. *Hoyt v. N. Y. etc. Ins. Co., 3 Bosw. (N. Y.) 440.*

15. *Succession of hearing, 26 La. Ann. 326; Bevin v. Conn. etc. Ins. Co.,*

even though the debtor be an infant.¹ And this insurance interest of the creditor continues, although the statute of limitations would have barred his action before the debtor's death had been pleaded.²

This principle, too, gives a creditor of a firm the right to insure the life of one of the partners thereof, even though another partner may be entirely able to pay the debt, and the estate of the insured perfectly solvent.³ But the policy should be limited to an amount consistent with the amount of the debt, and it has been said, to the amount of the debt with interest, and the amount of premiums, with interest thereon, during the expected life of the life insured, according to the Carlisle tables.⁴

33. Of Assignee of Policy.—An assignee of a life policy, as well as the original beneficiary, must have an interest in the life insured.

34. Interest of Insured Need Not be Disclosed.—It is now almost invariably stipulated that if the interest of the insured or beneficiary in the subject matter be not truly stated in the policy, the same shall be void; but in the absence of such a stipulation it is in general, sufficient that the subject matter of insurance and the nature of the risk are set forth in the policy, without any representation of the nature or extent of the interest of the insured, and in case of loss he will be entitled to recover, upon proof of any insurable interest in the property, or life, covered by the policy.⁶

VIII. INSURANCE AGENTS—THEIR POWER AND AUTHORITY Generally.—The general principles of the law of agency are applicable to insurance as well as other agents, and they need not be restated here. But the business of insurance is carried on almost exclusively, and to a greater extent, perhaps, than any other business through such mediums. This has given rise to doctrines of law, either peculiarly applicable to insurance agents, or sufficiently important to be set out in this connection. In determining the authority of the agent in any matter connected with his business, reference must be had to the manner in which he is held out by the

23 Conn. 244; *Morrell v. Trenton etc. Ins. Co.*, 10 Cush. (Mass.) 282.

1. *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274.

2. *Rowls v. American etc. Ins. Co.*, 27 N. Y. 282; *Mowry v. Home Ins. Co.*, 9 R. I. 346.

3. *Morrell v. Trenton etc. Ins. Co.*, 10 Cush. (Mass.) 282.

4. *Cooper v. Shaeffer* (Pa.), 11 Atl. Rep. 548.

This case holds that where the disproportion between the amount of the policy and the debt is great, as where the insurance is \$3,000 and the debt \$100, it is the duty of the court to declare the transaction a wager, as a matter of law. And it is further held

in *Cooper v. Weaver's Admr.* (11 Atl. Rep. 780, that where a debtor signs a policy of similar amount (\$3,000) to secure a debt of \$100, the transaction is a wager, and if the company pays the loss the assignee cannot retain more than the amount of his debt, with premiums paid, and interest.

5. *Mo. Val. L. Ins. Co. v. S. Kan.*, 18 Kan. 93; *Franklin Ins. Co. v. Ind.*, 53 Ind. 380.

6. *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Str. Mfrs. Ins. Co.*, 10 Pick. (Mass.) 40; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 419; *Smith v. Fitch etc. F. Ins. Co.*, 6 Cush. (Mass.) 282.

the usual mode of doing business, and scope of his employment;² the character of the authority known to have been

v. N. A. Ins. Co., 13 Mass. 546; *Etna Ins. Co.*, 12 Wend. 7; *Turner v. Burrows*, 5 Y. 546.

on Ins. Co. v. Kelly, 24 65; *Gloucester Mfg. Co. v. re Ins. Co.*, 5 Gray (Mass.) 146; *Mass. Ben. Ass'n*, 146; *Warner v. Peoria M. & F. Ins. Co.*, 36 N. Y. 550; *St. Louis Ins. Co.*, 68 N. Malleable Iron Works *v. s. Co.*, 25 Conn. 465; *Combs et al. v. Ins. Co.*, 43 Mo. 148; *Ottawa Agr. Ins. Co.*, 42 U. 82; *Millville Mut. M. & F. Mechanics etc. Ass'n*, 43

party represented himself and conducted himself as if he was an agent of a certain company, exclusively for the purpose of executing the policy, and in good faith paid the premium to the party, never, was in fact a mere agent, and never paid over the money to the company, it was held that the party had a right to treat the party as an agent of the company, and that the company was protected against the nonpayment of the premium. *Fire Ins. Co. v. Ward*, 90 But compare *Germania F. Ins. Co. v. McKee*, 94 Ill. 494.

that of a life insurance company to act as its agent in reinsurance of death. The company, and in its correspondence, recognized the agency, and did not delay in permitting by such the company was held to be its agent. *Travellers' Ins. Co. v. Hamilton*, 122 U. S. 457.

is evidence that an insurance company addressed a circular to a person, referring to the "agent" as "your care," containing instructions in regard to the business of the company, and signed by the agent of the company. The company as agent and after a loss claimed by the general agent, and the company's reply and instructions from the company, sufficient to support the finding of a jury that there was no agency. *Hamilton v. Home Ins. Co.*, 353.

C. of L.—21

An enquirer as to the validity of a policy was referred by the secretary and general manager to a clerk. *Held*, that information respecting the policy given by the enquirer to the clerk was notice to the company. *Clapp v. Mass. Ben. Ass'n*, 146 Mass. 519.

2. *Imperial F. Ins. Co. v. Murray*, 73 Pa. St. 13; *Mentz v. Lancaster Fire Ins. Co.*, 79 Pa. St. 475; *Lycoming Ins. Co. v. Woodworth*, 83 Pa. St. 223; *Wass v. Maine etc. Ins. Co.*, 61 Me. 537; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Emery v. Boston M. Ins. Co.*, 138 Mass. 398; *Putnam v. Home Ins. Co.*, 123 Mass. 324; *Millville Mut. M. & F. Ins. Co. v. Mechanics etc. Ass'n*, 43 N. J. L. 652; *Boice v. Thames etc. Ins. Co.*, 38 Hun (N. Y.) 246; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Cleaver v. Traders' Ins. Co. (Mich.)*, 39 N. W. Rep. 571.

An appointment as agent and surveyor carries with it the presumption, if uncontradicted by the circumstances of the case, that the appointee has all the powers incident to both capacities. *Lycoming F. Ins. Co. v. Woodworth*, 83 Pa. St. 223.

An officer may sometimes bind the company when acting outside of his authority as limited by the charter or by-laws. *Baker v. Colter*, 45 Me. 236.

An agent may act through his clerks. *Eclectic Ins. Co. v. Tahrenkrug*, 68 Ill. 463; *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; *Davis v. Lamar Ins. Co.*, 18 Hun (N. Y.) 230; *Continental Life Ins. Co. v. Goodhall*, 5 Big. L. & A. Ins. Rep. 422; *Mayers v. Mut. Life Ins. Co.*, 38 Iowa 304; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa 600; *Planters' Ins. Co. v. Myers*, 55 Miss. 479. Or sub-agents by him appointed. *Krumm v. Jefferson F. Ins. Co.*, 40 Ohio St. 225. See, however, *Phoenix Ins. Co. v. Spiers (Ky.)*, 8 S. W. Rep. 453.

An insurance agent who, under an arrangement with another to exchange risks that either cannot place, forwards to him an application, on which the other, being a recording agent, issues a policy, occupies as to the company whose policy is issued the position of a soliciting agent under acts 18th Gen. Assem. Iowa, ch. 211, § 1, providing that anyone who shall solicit insurance, or procure applications therefor,

granted;¹ and the particular circumstances of the parties transaction.²

2. Provisions of the Policy Respecting.—The provisions of the policy respecting his authority are, however, usually held to be binding;³ but as the cases cited show, where he is not so limited and is entrusted with the execution of policies, his acts in behalf of the company, even to the extent of changing the terms of the printed portion of the policy, are binding upon the company where they fall within the authority which he is held out as having.

shall be held the soliciting agent of the company issuing a policy on such application, and this though he did not actually solicit the application, but simply received it and asked for a policy upon it. *St. Paul F. & M. Ins. Co. v. Shaver* (Iowa), 41 N. W. Rep. 19. The company is bound by a contract made by the agent's chief clerk for repairing an insured house injured by fire. *Hilton v. Newman*, 6 Mo. App. 304.

In *Dibble v. Northern Assur. Co.* (Mich.), 37 N. W. Rep. 704, the plaintiff had for several years placed his insurance with defendant's agent, and had given him authority to keep his property insured in companies of the agent's selection, including authority to renew policies when necessary. On a verbal application by plaintiff for insurance on certain buildings defendant's agent placed the risks in the S. company, one of those which he represented. But this was cancelled by the company, when the agent at once wrote a policy in the defendant company and placed it in his safe for the plaintiff. He also entered it in his daily register, and reported it to the company, with the premium, at the same time notifying the plaintiff. After the evening of the second day after this, loss occurred, and it was held that the defendant was bound.

An agent is without authority, by giving an antedated receipt for premium, to revive a policy which was forfeited for the nonpayment of the premium. *Diball v. Aetna Life Ins. Co.*, 32 La. Ann. 179.

1. *Southern L. Ins. Co. v. McCain*, 96 U. S. 84.

The insured cannot be bound by secret instructions to the agent. *U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Alman v. Phoenix Ins. Co.*, 27 Iowa 203; *Queens Ins. Co. v. Young* (Ala.), 5 So. Rep. 116; *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 5 Gray (Mass.) 497; *Rivara v. Queens Ins. Co.*,

62 Miss. 720. But see *Wilson v. N. F. Ins. Co.*, 140 Mass. 210.

The powers of the agent are *prima facie* co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the persons with whom he deals. *Lycoming Ins. Co. v. Schollerberger*, 8 Wright (Pa.) 259; *Bebee v. Hartford etc. F. Ins. Co.*, 25 Conn. 3; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276; *Beal v. Park F. Ins. Co.*, 16 Wis. 241; *Equitable Assur. Co. v. Brobst*, 18 Neb. 526.

An unrestricted authority to negotiate a contract of insurance by issuing a policy includes authority to make a valid preliminary contract for such issue. *Humphry v. Hartford F. Ins. Co.*, 15 Blatchf. (U. S.) 35.

2. *U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549. The distance of the agent from the principal may have an important bearing, the ease of communication with the principal arguing for or against the authority claimed, according as it is difficult or otherwise. *Eames v. Home Ins. Co.*, 94 U. S. 62; *Union Mut. L. Ins. Co. v. Wilkins*, 13 Wall. (U. S.) 222.

3. *Catoir v. American L. Ins. Co.*, 33 N. J. L. 487; *Merserau v. Phoenix Mut. L. Ins. Co.*, 66 N. H. 274; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen (Mass.) 332; *Loehr v. Home Mut. Ins. Co.*, 17 Mo. 2; *Bleakley v. Niagara Dist. Mut. F. Ins. Co.*, 16 Gr. Ch. (U. C.) 198; *Brown v. Am. F. & L. Ins. Co.*, 101 Mass. 2; *Big F. & L. Ins. Rep.* 150; *Brown v. Mass. Mut. L. Ins. Co.*, 59 N. H. 2; *s. c.*, 47 Am. Rep. 205; *Lycoming Ins. Co. v. Langley*, 62 Md. 1; *Gladding v. California Farmers' Mut. Ins. Co.*, 66 Cal. 6; *Enos v. Sun Ins. Co.*, 67 Cal. 621.

But see *Bartlett v. Fireman's F. Ins. Co.* (Iowa), 41 N. W. Rep. 6; *Miaghan v. Hartford F. Ins. Co.*,

be justified by the usual mode of transacting such business within the scope of his employment, or the particular circumstances of the case.¹

Construction of Authority.—In the construction of the authorities, the policy of the law is to give a liberal interpretation in favor of their competency in the matter.²

General Agent.—An agent authorized to issue and renew policies to transact the business of the company in the particular, is a general agent;³ and possession of blank policies and receipt receipts is evidence of this.⁴ A general agent of an insurance company in a State is presumed to have authority to appoint sub-agents.⁵ Indeed, a general agent for a particular vicinity has been held to have this power.⁶

Notice to Agent.—Notice to a general agent is notice to the company.⁷ And this comprehends knowledge acquired of facts

(N. Y.) 58; *Haight v. Continental Ins. Co.*, 92 N. Y. 51; *McGurk v. Hartford F. Ins. Co.* (Conn.), 16 Conn. 263; *Carson v. Jersey City F. Ins. Co.*, 43 N. J. L. 300; s. c., 39 N. J. 584; *American Cent. Ins. Co. v. Crea*, 8 Lea (Tenn.) 513; *Am. Rep.* 647; *Shafer v. F. Ins. Co.*, 53 Wis. 361; *Ind. Ins. Co. v. Dehart*, 108 Ind. 270. The charter of an insurance company provided that "if the premises insured, the policy shall be void, and the title of the assured and the insurance on the premises be extinguished," it was held that no agent of the company could bind it by such provision. *Leonard v. F. Ins. Co.*, 97 Ind. 299.

A policy, for instance, procured without the consent of the company, and that the agent has no authority to modify its conditions, and that he procures additional insurance without the representation of the company, it will be all right, the company is not estopped to deny its liability, and the insured, through no fault of the company or its agent, had never been insured, and though the agent was acting in a certain way to conditionally insure, and had no authority in other cases, he not having authority in this case within the line of his authority, or in the manner prescribed by the policy. *Cleaver v. F. Ins. Co.* (Mich.), 39 N. W. 23. But notices on the back of a policy are not binding. *McNeilly v. Hartford F. Ins. Co.*, 66 N. Y. 23. It, however, *Hartford F. Ins.*

Co. v. Webster, 69 Ill. 392; *Linford v. Provincial Horse & Cattle Ins. Co.*, 10 Jur. N. S. 1066.

It is also held that the agent may bind the company by a parol agreement to issue a policy. *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171; *Boice v. Thames etc. Ins. Co.*, 38 Hun (N. Y.) 246. Or to renew. *Baubie v. Aetna Ins. Co.*, 2 Dill. (U. S.) 156.

2. *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

3. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Continental Ins. Co. v. Ruckman* (Ill.), 20 N. E. Rep. 77.

Where a policy is written for and delivered to the insured by one whose name was endorsed upon the policy as agent, the policy containing no limitation upon the agent's authority, and no intimation being given to the insured of the existence of any restriction thereon, such agent is to be regarded as the general agent of the company so far as to bind it for any act by him done within the apparent range of his employment. *Millville etc. M. & F. Ins. Co. v. Mechanics' etc. Assoc.*, 43 N. J. L. 652.

4. *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292; *Continental Ins. Co. v. Ruckman* (Ill.), 20 N. E. Rep. 77.

5. *Kuney v. Amazon Ins. Co.*, 36 Hun (N. Y.) 66.

6. *Krumm v. Jefferson F. Ins. Co.*, 40 Ohio St. 225.

7. *Peck v. New London Co. Mut. Ins. Co.*, 22 Conn. 575; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Deebold v. Phoenix Ins. Co.*, 33

after the execution of the policy, which, unless waived, would avoid it,¹ as well as of inaccuracies of statement by the applicant,² and of the existence of other facts prior to the execution

Fed. Rep. 807; New Eng. F. & M. Ins. Co. v. Schettler, 38 Ill. 166; Continental L. Ins. Co. v. Thoenes, 26 Ill. App. 495; North British etc. Ins. Co. v. Crutchfield, 108 Ind. 518; Phoenix Mut. L. Ins. Co. v. Hinesley, 75 Ind. 1; Bennett v. Agricultural Ins. Co., 15 Abb. N. Cas. (N. Y.) 234; Hamilton v. Home Ins. Co., 94 Mo. 353; Key v. Des Moines Ins. Co. (Iowa), 41 N. W. Rep. 614.

But not to a broker. Ben. Franklin Ins. Co. v. Weary, 4 Ill. App. 74; Kings Co. F. Ins. Co. v. Swigert, 11 Ill. App. 590; Arff v. Star F. Ins. Co., 2 N. Y. S. Nat. Rep. 188.

Canvassing or Soliciting Agent.—Notice to canvassing or soliciting agents of the company bind it. Liverpool etc. Ins. Co. v. Van Os, 63 Miss. 431; Heath v. Springfield F. Ins. Co., 58 N. H. 414; Hamilton v. Aurora F. Ins. Co., 15 Mo. App. 59; Phoenix Ins. Co. v. Spiers (Ky.), 8 S. W. Rep. 453; Arff v. Star F. Ins. Co., 2 N. Y. S. Nat. Rep. 188; Shimp v. Cedar Rapids Ins. Co., 26 Ill. App. 254.

Contra, American Ins. Co. v. Luttrell, 89 Ill. 314; Jordan v. State Ins. Co., 64 Iowa 216; Donnelly v. Cedar Rapids Ins. Co., 70 Iowa 693; Mullin v. Vermont Mut. F. Ins. Co., 58 Vt. 113.

Agent of Mutual Company.—Notice to the agent of a mutual company binds his principal. Redstrake v. Cumberland Mut. F. Ins. Co., 44 N. J. L. 294.

Miscellaneous Agents.—In Iowa it is held that notice to the agent's clerk is the same as notice to the agent. Bennett v. Council Bluffs Ins. Co., 70 Iowa 600.

So in Kentucky it is held that a local agent of a company in a distant state, who solicits insurance, takes the application, receives the premium and delivers the policy, is to be regarded as the agent of the company for the purpose of receiving notice of an additional insurance, no particular notice being required in the policy. Phoenix Ins. Co. v. Spiers (Ky.), 8 S. W. Rep. 453. The same case, however, holds that conversations with a subagent, appointed without the knowledge or authority of the company, are not admissible in evidence against it.

Where a party is specially referred to a clerk by the secretary, notice to

him respecting the matter referred to notice to the company. Clapp v. Mass. Ben. Assoc., 146 Mass. 519.

1. Manhattan Fire Ins. Co. v. Weill, 29 Gratt (Va.) 389; Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 20; Mobile etc. Ins. Co. v. Miller, 58 G. 420; Peck v. New London etc. Ins. Co., 22 Conn. 575; McGurk v. Metropolitan L. Ins. Co. (Conn.), 16 Atl. Rep. 263.

Where an agent has knowledge of other insurance, in violation of the terms of the policy, and does not cancel it, the company is estopped from claiming a forfeiture on that account. Hamilton v. Home Ins. Co., 94 Mo. 353.

See also cases cited, *infra*, this title. **WAIVER AND ESTOPPEL.**

2. Peck v. New London etc. Ins. Co., 22 Conn. 575; Marshall v. Columbia Mut. Ins. Co., 7 Post (N. H.) 15; Hadlay v. N. H. Fire Ins. Co., 55 N. H. 110; Clark v. Union Mut. F. Ins. Co., 40 N. H. 333; Patten v. Merchants' etc. Ins. Co., 40 N. H. 375; Campbell v. Merchants' etc. Ins. Co., 37 N. H. 35; Hartford Pr. Ins. Co. v. Harmer, 2 Ohio St. 4; Farmers' Ins. Co. v. Williams, 39 Ohio St. 584; Miller v. Mut. Ben. L. Ins. Co., 31 Iowa 216; Eggleston v. Council Bluffs Ins. Co., 65 Iowa 308; Stone v. Hawkeye Ins. Co., 68 Iowa 70; Key v. Des Moines Ins. Co. (Iowa), 41 N. W. Rep. 614; Ayers v. Home Ins. Co., 21 Iowa 185; Poughkeepsie Sav. Bank v. Manhattan F. Ins. Co., 30 Hun (N. Y.) 473; Hodgkins v. Montgomery Co. Mut. Ins. Co., Barb. (N. Y.) 213; Plumb v. Cataraugus Co. Mut. Ins. Co., 18 N. Y. 3; Pechner v. Phoenix Ins. Co., 65 N. Y. 195; Cone v. Niagara Falls Ins. Co., 60 N. Y. 619; Mowry v. Rosendin, 74 N. Y. 360; O'Brien v. Home B. Soc., 4 N. Y. S. Nat. Rep. 275; Pitt v. Glens Falls Ins. Co., 65 N. Y. 1; Flynn v. Equitable Life Ins. Co., N. Y. 568; Landers v. Watertown Fire Ins. Co., 19 Hun (N. Y.) 1; Howard F. Ins. Co. v. Bruner, 23 St. 50; Commercial Union Ass'n v. Elliott (Pa.), 13 Atl. Rep. 970; Sw. v. Watertown F. Ins. Co., 96 Pa. 37; Susquehanna Mut. F. Ins. Co. v. Cusick, 109 Pa. St. 157; Farm

Ins. Co. v. Taylor, 73 Pa.
 Kelley v. Troy F. Ins. Co.,
 1; Winans v. Allemanie
 Co., 38 Wis. 342; Dunbar v.
 Ins. Co. (Wis.), 40 N. W.
 Dodge Co. Mut. Ins. Co. v.
 Wis. 337; Baker v. Ohio
 Ins. Co. (Mich.), 38 N. W.
 North American Fire Ins.
 Co., 22 Mich. 146; McGraw
 v. F. Ins. Co., 54 (Mich.)
 Sink v. Metropolitan L.
 (Mich.), 40 N. W. Rep. 469;
 F. Ins. Co. v. Jones, 62
 American Ins. Co. v. Luttrell,
 Phoenix Ins. Co. v. Tucker,
 Germania Fire Ins. Co. v.
 17 N. E. Rep. 792; Germania
 v. McKee, 94 Ill. 494; Phœ-
 v. Allen, 109 Ind. 273;
 Mut. Ins. Co. v. Deford, 38
 planters' Ins. Co. v. Sorrells,
 enn.) 352; Williamson v.
 Ins. Co. (Ala.), 4 So.
 Hayward v. National Ins.
 181; Continental Ins. Co.
 39 Kan. 396; American
 Co. v. M'Lanathan, 11
 Sullivan v. Phoenix Ins.
 ann. 170; Nat. Mut. F. Ins.
 nes (Kan.), 21 Pac. Rep.
 n v. Ottawa Agr. Ins. Co.,
 (Q. B.) 282; Hartford Fire
 Haas (Ky.), 9 S. W. Rep.
 ack v. Phoenix Ins. Co.
 ep. 218; Menk v. Home Mut.
 (Cal.), 18 Pac. Rep. 117;
 v. North British etc. Ins.
 18 Pac. Rep. 758; Geib v.
 Ins. Co., 1 Dill. (U. S.)
 s v. Home Ins. Co., 94
 Union Mut. L. Ins. Co. v.
 13 Wall. (U. S.) 222;
 Ins. Co. v. Mahone, 21
 S.) 152; Langdon v. Union
 Ins. Co., 14 Fed. Rep. 272;
 Phoenix Ins. Co., 33 Fed.
 Schwarzbach v. Ohio Val.
 n, 25 W. Va. 622; Deitz v.
 Washington Ins. Co. (W.
 E. Rep. 616; Ring v. Wind-
 c. Ins. Co., 51 Vt. 563. See
 cited under heading of
 and Estoppel, this article.
 Rowley v. Empire Ins. Co.,
 550; Kennedy v. St. Law-
 Mut. Ins. Co., 10 Barb. (N.
 nings v. Chenango Co. Mut.
 2 Den. (N. Y.) 75; Perry
 Co. v. Stewart, 19 Pa. St. 45;
 v. Atlantic F. Ins. Co., 42
 Michael v. Mut. Ins. Co., 10
 737; Beal v. Park F. Ins.

Co., 16 Wis. 241; Roth v. City Ins.
 Co., 6 McLean (U. S.) 324; Davis v.
 Scottish Prov. Ins. Co., 16 U. C. (C.
 P.) 176; N. Y. Life Ins. Co. v.
 Fletcher, 117 U. S. 519.

In most of these cases the fact was
 that the inaccuracy of statement occur-
 red in the application, which, though
 signed by the applicant, was prepared
 by the agent of the company; and one
 of the principal points contended for
 by the companies has been that to re-
 ceive parol evidence of this, and that a
 statement made is rather the statement
 of the agent than the applicant, would
 be to violate the rule which excludes
 evidence to vary or contradict the
 terms of a written contract. Upon
 this point The Union Mut. L. Ins. Co.
 v. Wilkinson, 13 Wall. (U. S.) 222, is
 one of the leading cases. JUSTICE MIL-
 LER, delivering the opinion, says:
 "The great value of the rule here in-
 voked cannot be easily overestimated.
 As a means of protecting those who
 are honest, accurate and prudent in
 making their contracts, against fraud
 and false swearing, against carelessness
 and inaccuracy, by furnishing evidence
 of what was intended by the parties,
 which can always be produced without
 fear of change or liability of miscon-
 struction, the rule merits the eulogies
 it has received. But experience has
 shown that in reference to these very
 matters the rule is not perfect. The
 written instrument does not always
 represent the intention of both parties,
 and sometimes it fails to do so as to
 either; and where this has been the re-
 sult of accident or mistake, or fraud,
 the principle has been long recognized
 that under proper circumstances, and
 in an appropriate proceeding, the in-
 strument may be set aside or reformed,
 as best suits the purposes of justice.
 A rule of evidence adopted by the
 courts as a protection against fraud
 and false swearing would, as was said
 in regard to the analogous rule known
 as the Statute of Frauds, become the
 instrument of the very fraud it was in-
 tended to prevent, if there did not exist
 some authority to correct the uni-
 versality of its application. It is upon
 this principle that courts of equity pro-
 ceed in giving the relief just indicated;
 and though the courts in a common
 law action may be more circumscribed
 in the freedom with which they enquire
 into the origin of written agreements,
 such an enquiry is not always forbidden
 by the mere fact that the party's name

has been signed to the writing offered in evidence against him.

"In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument and that the representation is untrue. But the parol testimony makes it clear beyond a question that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and in fact had refused to make any statements on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by someone who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

"If however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of enquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

"It is in precisely such cases as this

that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is, that where one party has by his representations or his conduct induced another party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity, where the technical advantage thus obtained is set aside and relied on to defeat the ends of justice or establish a dishonest claim.

"It has been applied to the present class of cases of the one before us in numerous well considered judgments. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering Ball, the insurance agent, who made the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of little doubt that if Ball was the agent of the insurance company and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were principal.

"Although the very well considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by answer to be given to the question, 'Whose agent was Ball in filling up the application?'

"This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured and if left to himself or to such assistance as he might select, the person selected would be his agent, and alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of a State, and having in that State their principal business office, send their agents all over the land, with directions to solicit and procure applications

frnishing them with printed in favor of the value and life insurance, and of the advantages of the corporation agent represents. They pay large commissions on the policy obtained, and the policy is delivered at their hands to the agents who are stimulated by instructions to activity in contracts, and the party who is induced to take out a policy sees or knows anything of the company or its officers by the agent issued, but looks to and trusts the agent who has permitted to effect insurance as the complete representative of the company, all that is said or done in connection with the contract. Has he not a right to regard him? It is quite true that the reports of judicial decisions with the efforts of these companies and their counsel, to establish the right that they can do all this and shift their responsibility for the acts of their agents to the simple receipt of premium and delivery of the policy, the argument being that, as the agent is assured, this proposition has support in some of the decisions on the subject; and, at times when insurance companies are parties to come to them to receive, or to forward applications on their own motion, the doctrine is a reasonable foundation to rest upon to apply such a doctrine, in fact, to the system of selling through agents, which we have seen to be a snare and a delusion, as it has done in numerous cases, to the grossest frauds, of insurance corporations renegeing, and the parties supposing themselves insured are the victims. The tendency of the modern system in this country is steadily in this direction. The powers of the agent, *prima facie*, co-extensive with the business entrusted to his care, cannot be narrowed by limitations imputed to the person with whom the business is dealt. An insurance company, in establishing a local agency, must be responsible to the parties with whom it transacts business for the declarations of the agent, and the scope of his employment, as determined by the principal. The fifth edition of American Insurance, 917, after a full consid-

eration of the authorities, it is said: 'By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured by a false or erroneous statement of what the application should contain; or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.' (*Rowley v. Empire Ins. Co.*, 36 N. Y. 550.)

"The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."

The courts of *Massachusetts*, and a few others, have held contrary to this case, even under extreme circumstances, their view being that to receive evidence that a statement is not of the person that it purports to be would violate the rule indicated. See *Lee v. Howard F. Ins. Co.*, 3 Gray (Mass.) 583; *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175; *Kibbe v. Hamilton Mut. Ins. Co.*, 11 Gray (Mass.) 163; *Holmes v. Charlestown Mut. F. Ins. Co.*, 10 Met. (Mass.) 211; *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175; *Abbott v. Shawmut Mut. F. Ins. Co.*, 3 Allen (Mass.) 213; *McCoy v. Metropolitan L. Ins. Co.*, 133 Mass. 82; *Franklin F. Ins. Co. v. Martin* (N. J.), 8 Ins. L. J. 134; *Smith v. Cash etc. F. Ins. Co.*, 24 Pa. St. 320; *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411. And in *Pennsylvania* it is held that where an agent of an insurance company examines and inspects the building on which insurance is sought, and afterwards fills up

of the policy, the omission to state which would otherwise vitiate it.¹

This knowledge may come to the agent at any time, even while not acting in the principal's business, or in such capacity, and it will be binding if present to his mind at the time of the transaction.²

Of course, if fraud be perpetrated by the collusion of the agent and applicant, the latter has no remedy on the contract thus procured.³ And it has been held, too, that the knowledge of

the application, which he reads and explains to the owner, who signs it, the agent is to be regarded, as to the application, as the agent of the owner and not of the company, and hence that the company may set up, by way of defence to a suit on the policy, the falsehood of statements in the application as to the condition and use of the building. *Pottsville Mut. F. Ins. Co. v. Fromm*, 100 Pa. St. 347. See also *Ala. Gold L. Ins. Co. v. Garner*, 77 Ala. 210; *Cuthbertson v. N. Car. Home Ins. Co.*, 96 N. Car. 480.

Where an agent of the insurer had cheated the insured into signing the warranty and paying the premium, and the policy was issued upon the false statements of the agent himself, held that the insured might prove the fact, and hold the principal to the contract as if he had committed the wrong. *Eilenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. St. 464; *Rivara v. Queens Ins. Co.*, 62 Miss. 720. See also *Swan v. Watertown F. Ins. Co.*, 96 Pa. St. 37, where it is further held that the insured should make the false statements known within a reasonable time after discovering them.

Medical Examiner, Agent.—The medical examiner is to be treated as the agent of the company for the purpose of reporting the answers of the applicant. *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; s. c., 44 Am. Rep. 372.

1. *People's Ins. Co. v. Spencer*, 53 Pa. St. 353; *Cumberland etc. Ins. Co. v. Schell*, 29 Pa. St. 31; *Beal v. Park F. Ins. Co.*, 16 Wis. 241; *Kelley v. Troy F. Ins. Co.*, 3 Wis. 254; *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 291; *Plumb v. Cattaraugus Mut. Ins. Co.*, 18 N. Y. 392; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253; *Liddle v. Market F. Ins. Co.*, 4 Bosw. (N. Y.) 179; *Woodward v. Republic F. Ins. Co.*, 32 Hun (N. Y.) 365; *Brothers v. California Ins.*

Co., 3 N. Y. S. Nat. Rep. 89; *Houghton City F. Ins. Co.*, 29 Conn. 10; *Jordan State Ins. Co.*, 64 Iowa 216; *Keenan Mo. etc. Ins. Co.*, 12 Iowa 126; *Conover v. Hannibal etc. Ins. Co.*, 43 Mo. 1; *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *German F. Ins. Co. v. Carrow*, 21 Ill. App. 631; *Ashford v. Victoria Mut. Ins. Co.*, 20 U. C. (Ct.) 434; *Campbell v. Merchants etc. Ins. Co.*, 37 N. H. 35; *Rivara v. Queens Ins. Co.*, 62 Miss. 720; *Liverpool Ins. Co. v. Ende*, 65 Tex. 118.

Notice of other insurance is notice to the company. *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422; *Combs v. Shrewsbury Mut. F. Ins. Co.*, 34 N. J. Eq. 42; *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393; *Redstrake v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 1; *Rivara v. Queens Ins. Co.*, 62 Mo. 720; *Goldwater v. Liverpool etc. Ins. Co.*, 39 Hun (N. Y.) 176; *Kitchener v. Hartford F. Ins. Co.*, 57 Mich. 1; *Phoenix Ins. Co. v. Spiers (Ky.)*, 1 W. Rep. 453; *Baile v. St. Joseph L. Ins. Co.*, 73 Mo. 371.

Where the policy provides that no notice of additional insurance, or of change in existing insurance, shall be given to the company by the insured in writing, and be acknowledged in writing by the secretary, the mere knowledge of the company's agent, as to subsequent insurance, or change in existing insurance, is not such notice as the company as will bind it. *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, 98 Pa. St. 41. See also *Stennett v. Penn. F. Ins. Co.*, 68 Iowa 674. *Combs v. Redstrake v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 294. See also cited under heading WAIVER AND FORFEITURE, this article.

2. *Shafer v. Phoenix Ins. Co.*, 1 Wis. 361.

3. *Ryan v. World Mut. L. Ins. Co.*, 41 Conn. 168; *Smith v. Cash Mut. Ins. Co.*, 24 Pa. St. 320. And see

to make it chargeable to the company, must at any rate be made not earlier than the negotiations; that notice acquired at such time is not binding.¹

Agent only having authority to receive applications and issue certificates of insurance subject to approval of the company, cannot bind the same by the receipt of notice or of a policy obtained outside of such sphere of action;² nor by a policy not approved;³ nor by an assignment, when the blank policy shows that the consent of an officer of the company is required;⁴ nor by receiving notice and fixing the additional premium under a provision that in case the premises shall be vacated, the policy shall be void, unless immediate notice be given to the company and an additional premium paid.⁵ Nor by a promise to deliver up the premium note on the delivering up and cancellation of the policy.⁶ Indeed it has been held that where the agent is not a special one, it is the duty of the applicant to inform himself of the actual authority which he possesses.⁷

Representations of Agent.—Representations of the agent, even if made in good faith, are not binding on the company, unless the sufficiency of the description or statements in the application is shown.⁸

Am. Life Ins. Co., 5 Big. L. & C. 18.

Boys v. American Ins. Co., 30

Ch. v. Farmers' Mut. F. Ins.

Ohio St. 287; Mitchell v. Ly-

mut. Ins. Co., 51 Pa. St. 402;

Mechanics' etc. Ins. Co., 83

8. Contra, Sexton v. Mont-

go. Mut. Ins. Co., 9 Barb. (N.

McEwen v. Montgomery

Ins. Co., 5 Hill (N. Y.) 101;

v. Mercer Co. Mut. Ins. Co.,

(N. J.) 447.

See v. St. Paul's F. & M. Ins.

inn. 407; New York etc. Ins.

Johnson, 23 Pa. St. 72; Arm-

State Ins. Co., 61 Iowa 212.

Agent merely authorized to re-

dications cannot accept them.

v. Fireman's Ins. Co., 33 La.

ingham v. St. Nicholas Ins.

eyes (N. Y.) 280. See, how-

ever, Farmers' Mut. F. Ins. Co. v. Tay-

lor, 31 St. 342.

Johnson v. City F. Ins. Co., 9

Mass. 231.

Bluehead Mut. F. Ins. Co. v.

Wood, 3 Gray (Mass.) 210.

Table L. Ins. Co. v. Poe

Ins. L. J. 871.

When the agent is authorized to

issues, he cannot waive a for-

feiture. Tate v. Citizens' Mut. Ins.

Co. (Mass.) 79; Phoenix Ins.

Co. v. Lawrence, 4 Metc. (Ky.) 9;

Bartholomew v. Merchants' Ins. Co.,

25 Iowa 507. Or the requirements of

the policy as to proofs of loss. Mer-

serau v. Phoenix Ins. Co., 66 N. Y. 274;

Van Allen v. Farmers' etc. Ins. Co.,

64 N. Y. 469; Bush v. Westchester

Ins. Co., 63 N. Y. 531.

8. Boehen v. Williamsburg etc. Ins.

Co., 35 N. Y. 131; Columbia Ins. Co. v.

Cooper, 50 Pa. St. 331; Keeler v.

Niagara Ins. Co., 16 Wis. 523; May v.

Buckeye Mut. Ins. Co., 25 Wis. 291;

Franklin v. Atl. F. Ins. Co., 42 Mo.

456; American Ins. Co. v. Neiberger,

74 Mo. 167; Viele v. Germania Ins. Co.,

26 Iowa 9; Peoria M. & F. Ins. Co. v.

Hall, 12 Mich. 202; Mut. Ben. L. Ins.

Co. v. Daviess' Exr. (Ky.), 9 S. W.

Rep. 812; Deitz v. Providence Wash-

ington Ins. Co. (W. Va.), 8 S. E. Rep.

616.

Telling the applicant that it is not

necessary that he should state a sun-

stroke, *Boos v. World Mut. L. Ins.*

Co., 64 N. Y. 236, or that he occa-

sionally had swimming in the head,

Mut. Ben. L. Ins. Co. v. Daviess' Exr.

(Ky.), 9 S. W. Rep. 812; or that pur-

chase money due from a party holding

a bond for a deed, or that a judgment

and lease do not constitute encum-

brances, Columbian Ins. Co. v. Coop-

er, 50 Pa. St. 331; Key v. Des Moines

Ins. Co. (Iowa), 41 N. W. Rep. 614;

or that an accidental omission makes

and the binding force or scope of the policy,¹ unless the power to the knowledge of the insured,² are binding upon the company.³ Even agents merely authorized to

no difference, *F. & M. Ins. Co. v. Chesnut*, 50 Ill. 111, estops the company from taking any advantage of omissions in those regards.

It does not matter that the agent represents a mutual company. *Columbian Ins. Co. v. Cooper*, 50 Pa. St. 331; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Combs v. Shrewsbury Mut. F. Ins. Co.*, 34 N. J. Eq. 403. See, however, *Evans v. Trimountain Mut. F. Ins. Co.*, 9 Allen (Mass.) 329; *Baxter v. Chelsea Mut. F. Ins. Co.*, 1 Allen (Mass.) 294; *Priest v. Citizens' Mut. F. Ins. Co.*, 3 Allen (Mass.) 602; *Smith v. Haverhill Mut. F. Ins. Co.*, 1 Allen (Mass.) 297; *Hale v. Mechanics' Mut. Ins. Co.*, 6 Gray (Mass.) 169; *Brewer v. Chelsea Mut. F. Ins. Co.*, 14 Gray (Mass.) 293; *Belleville Mut. Ins. Co. v. Van Winkle*, 1 Beas. (N. J.) 333; *Hackney v. Alleghany Mut. Ins. Co.*, 4 Barr. (Pa.) 185; *Smith v. Cash Mut. F. Ins. Co.*, 24 Pa. St. 320.

Where a policy was issued upon a dwelling occupied by a tenant, and the agent assured the owner that it would not matter if the premises should become vacant; but the policy contained a clause to the effect that, if the building should become vacant at any time, the policy should become void; and the agent kept the policy in his possession until after a loss, which occurred when the building was unoccupied. The owner having no knowledge of the existence of such a clause, it was held that the insured had a right to suppose that the policy would conform to the contract as he made it with the agent, and that the company, having failed to notify the insured of the change, so that he might either repudiate or ratify it was bound by the contract as made with the agent. *St. Paul F. etc. Ins. Co. v. Wells*, 89 Ill. 82.

Where the agent of a mutual company was notified of other insurance, and he subsequently told the insured that his insurance was all right, it was held to be binding on the company. *Combs v. Shrewsbury Mut. F. Ins. Co.*, 34 N. J. Eq. 403.

The company is liable for any material and injurious statements of the agent, in the course of his employment, concerning the condition and standing

of the company. *Fogg v. Gray*, 1 Allen (Mass.) 1; *Devendorf v. E. E. E. Ins. Co.*, 23 Barb. (N. Y.) 656; *Johnson v. Dana*, 24 Barb. (N. Y.) 395; *Berger v. Protection Mut. Ins. Co.*, 1 Pa. St. 464; *New York L. Ins. Co. v. McGowan*, 18 Kan. 300; *American Ins. Co. v. Capps*, 4 Mo. App. 571; *Devendorf v. Aetna L. Ins. Co.*, 4 Ins. L. Farmers' Mut. F. Ins. Co. v. M. 29 Vt. 23. And the insured may introduce this defence in a suit for the premium money. *Sunbury F. Ins. Co. v. Allen*, 100 Pa. St. 495.

The company is not liable for an agent's statements concerning the company within which it operates. *Hale v. Alleghany Co. Mut. Ins. Co.*, 14 Pa. St. 185.

The agent cannot bind the company by a promise that the insured should be required to pay assessments on premium notes, otherwise assessed. *Keller v. Equitable F. Ins. Co.*, 21 Pa. St. 170. But compare *Michigan L. Ins. Co. v. Beaver*, 26 Ill. App. 349. by representations as to the amount of profits to be realized from an element policy. *Hale v. Continental Ins. Co.*, 20 Blatchf. (U. S.) 51. the merits of the plan. *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309.

1. *Manhattan Ins. Co. v. W. W. Smith*, 9 P. F. Smith (Pa.) 227; *Ansley v. Winnishiek Ins. Co.*, 23 Iowa 81; *Peoria F. Ins. Co. v. Eddy*, 55 Ill. 51; *Keith v. Globe Ins. Co.*, 52 Ill. 51.

But see *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202.

He may bind the company by a statement of the construction of the policy as to when the premium is payable. *Campbell v. International L. Society*, 4 Bosw. (N. Y.) 298.

He may orally extend the time for the subsequent to its execution, to provide for not originally covered, but of the same character. *Kennebec Co. v. A. A. Ins. etc. Co.*, 6 Gray (Mass.) 204.

He may correct errors after the fact. *Warnen v. Peoria M. & F. Ins. Co.*, 38 Wis. 318.

2. *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen (Mass.) 332; *Chambers v. Hamilton Ins. Co.*, 20 N. Y. 52.

3. *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn.

ward applications may bind the company by suggestions as description or otherwise within such limits.¹ They can never, bind the company by a statement as to the time y attached.²

company is not liable to the insured for false representa- the agent concerning the validity of the policy by which red is induced to settle a loss for less than his claim.³ gent who knowingly makes false representations to the concerning the insurance is liable for the damages result-

Mistakes and Omissions of Agent.—Likewise the mistakes and s of the agent in preparing the description, or otherwise, ed as those of the company.⁵

Waiver of Terms of Policy.—Unless forbidden by the express the policy or otherwise to the knowledge of the insured, acting within the scope of his employment may waive ns of the policy,⁶

Hartford F. Ins. Co., 17 Iowa vitz v. Equitable Ins. Co., 40 Howard Ins. Co. v. Bruner, Pa.) 50; Union Mut. L. Ins. e, 110 Ill. 35.

agent has no implied power e company by his representa- ecting the purchase of the f a local agency, such as right of the local agent y the good will thereof to sell s should relinquish his agency, s been and would be recog- rber v. Conn. Mut. L. Ins. d. Rep. 312.

s v. Hannibal etc. Ins. Co., s. ton v. Fireman's Ins. Co., n. 577; s. c., 39 Am. Rep.

pson v. Phœnix Ins. Co., s. c., 46 Am. Rep. 357. en v. Griffin, 136 Mass. 229; m. Rep. 25.

insurance agent procured, at his ation, for A a policy upon g. The policy contained a hibiing the keeping of pe n the premises, and providing s should be done the policy void. A called the attention nt to this clause, and told him s obliged to keep a little pe n the premises. The agent his would make no difference; more than a barrel was kept ver taken notice of. The was burned and A was de- suit on the policy by reason kept petroleum on the prem-

ises: *Held*, that he could maintain an action against the agent for the misrep- resentation. *Kroeger v. Pitcairn*, 101 Pa. St. 311; s. c., 47 Am. Rep. 718.

5. *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *New Eng. F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 298; *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 392; *O'Brien v. Home Ben. Soc.*, 4 N. Y. S. Nat. Rep. 275; *Howard Ins. Co. v. Bruner*, 23 Pa. St. 50; *Meadowcraft v. Standard F. Ins. Co.*, 61 Pa. St. 91; *Nassauer v. Susquehanna Mut. F. Ins. Co.*, 109 Pa. St. 507; *Dayton Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Ayers v. Home Ins. Co.*, 21 Iowa 185; *Ætna Live Stock etc. Ins. Co. v. Olmstead*, 21 Mich. 246; *Emery v. Piscataqua F. & M. Ins. Co.*, 52 Me. 322.

6. *Silverberg v. Phœnix Ins. Co.*, 67 Cal. 36; *Mattocks v. Des Moines Ins. Co. (Iowa)*, 37 N. W. Rep. 174; *Niagara F. Ins. Co. v. Brown*, 123 Ill. 356. But see *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43, where it was *held* that a local agent, with authority to receive premiums and issue policies, has no authority, as such, to waive the condition of a policy requiring assent of the company to any change in the situation or circumstances affecting the risk. See also *Queens Ins. Co. v. Young (Ala.)*, 5 So. Rep. 116, to the same effect.

Evidence that the insured's claim was placed in the hands of the company's agent for adjustment raises the presumption that he had authority to make

as those regarding payment;¹ change of residence;² tit

certain demands, in the course of the adjustment, which constituted a waiver of a condition in the policy. *Brown v. State Ins. Co.* (Iowa), 38 N. W. Rep. 135.

Where the by-laws of an insurance company provide that there shall be no waiver of the terms of the policy without the concurrence of the secretary endorsed or specifically acknowledged, if the secretary signs orders for payment, on the adjustment of the loss, it is a conclusive waiver in writing, if he knew all the facts. *Farmers' Mut. F. Ins. Co. v. Gargett*, 42 Mich. 289. And in *McGurk v. Metropolitan L. Ins. Co.* (Conn.), 16 Atl. Rep. 263, it was held that the company was affected by knowledge of the agent of a violation of the terms of the policy, and that by afterwards collecting premiums on the policy the forfeiture was waived, though the policy expressly stated that agents had no authority to waive forfeitures.

A clause in the blank policies that "it is fully understood and made a part of this contract that the agent of this company has no authority to waive, modify or strike from this policy any of its printed conditions," is not a limitation on the powers of the agent to make a contract of insurance, but only on his powers to waive the conditions contained in the executed policy, and the delivery of a policy containing such clause cannot be set up as notice to the insured of the agent's limited powers, especially where the agreement to insure was made the day before the policy was issued, and when the insured had no notice that the blank policies contained any such clause. *Continental Ins. Co. v. Ruckman* (Ill.), 20 N. E. Rep. 77.

C, the commissioned agent of an insurance company, employed H to assist in obtaining risks, making surveys, collecting premiums, and delivering policies. C gave H, therefore, part of the earnings, accepted H's acts, and adopted his judgment. Held, that H had power to bind the company and waive the conditions of a policy delivered by himself. *Davis v. Lamar Ins. Co.*, 18 Hun (N. Y.) 230.

Showing that the company has sanctioned a similar waiver of the agent in the past, does not establish a custom to such effect. *Clevenger v. Mut. Life Ins. Co.*, 2 Dak. 114.

Rev. Stat. Maine, ch. 49, §§ 21, providing that the agents of insurance companies shall be regarded as in place of the company in all respects regarding any insurance effected by them, and that all provisions in any policy conflict with such statute shall be null and void, a provision of a policy that no act of any agent of the company other than the secretary or president shall be held to be a waiver of a strict compliance with all conditions of the policy, is void. *Day v. Dwelling House Ins. Co.* (Me.), 16 Atl. R. 894.

See further cases cited, *infra*, under title, WAIVER AND ESTOPPEL.

1. *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; *Dilliber v. Knickerbocker L. Ins. Co.*, 76 N. Y. 567; *Marvin v. St. Louis F. Ins. Co.*, 68 N. Y. 61; *Sheldon v. Atl. F. Ins. Co.*, 26 N. Y. 460; *N. Y. Cent. Ins. Co. v. Nat. F. Ins. Co.*, 20 Barb. (N. Y.) 468; *Gottschalk v. Nat. etc. Ins. Co.*, 25 Barb. (N. Y.) 11; *Southern L. Ins. Co. v. Booker Heisk.* (Tenn.) 607; *Hallock v. Commercial Ins. Co.*, 2 Dutch. (N. J.) 21; *Ball & Sage Wagon Co. v. Aurora & M. Ins. Co.*, 20 Fed. Rep. 232.

But it was held in *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278, that where a policy provides for forfeiture in case of nonpayment of premium at the stipulated time, and that no alteration or waiver of any condition shall be valid "unless made at the head office and signed by an officer of the company," an oral extension of the time of payment, by a general agent, at another place, is invalid.

So in *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300, it was held that a mere local agent of an insurance company cannot waive a condition of the policy that the premium shall be paid in money.

See also *Brown v. Mass. Mut. L. Ins. Co.*, 59 N. H. 298; s. c., 47 N. H. Rep. 205.

2. *Wing v. Harvey*, 27 Eng. L. & Eq. 141; *Hodsdon v. Guard L. Ins. Co.*, 97 Mass. 144; *Gloucester Manuf. Co. v. Howard F. Ins. Co.*, 5 Gray (Mass.) 497; *North Berwick Co. v. New F. & M. Ins. Co.*, 52 Me. 336; *Mine Phœnix Ins. Co.*, 27 Wis. 693; *Wells v. Ætna L. Ins. Co.*, 30 Iowa 114. But see *Acie v. Fernie*, 2 Mees. & Wels. 151.

insured;¹ assignment;² proofs of loss;³ alteration of the property insured;⁴ other insurance;⁵ counting;⁶ repairs and vacancy;⁷ and limitations of action.⁸ He may stipulate with regard to occupancy,⁹ and may give permission to remove property insured to another location; to change the title;¹¹ mortgage it;¹² or procure other insurance.¹³ But a mere soliciting agent cannot bind the company without assent to an assignment of a policy or otherwise beyond the scope of his employment.¹⁴

Authority of Agent with Regard to Premiums.—An insurance agent, in the absence of any other knowledge, is presumed to be authorized to receive premiums in any usual mode, and to make any necessary arrangement with regard thereto. He may receive premiums;¹⁵ depreciated funds;¹⁶ or the credit of the insured, be responsible for the premium himself;¹⁷

See Ins. Co. v. Duke, 84 Ind. 101; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; *Wheeler v. Watertown F. Ins. Co.*, 131 Mass. 1. 8. *Brady v. Western Assur. Co.*, 17 U. C. (C. P.) 597. 9. *Continental Ins. Co. v. Ruckman* (Ill.), 20 N. E. Rep. 77. 10. *New Eng. F. & M. Ins. Co. v. Schettler*, 33 Ill. 166. 11. *Ill. Mut. F. Ins. Co. v. Stanton*, 57 Ill. 354. 12. *Mattocks v. Des Moines Ins. Co.* (Iowa), 37 N. W. Rep. 174. 13. *Schoener v. Hekla F. Ins. Co.*, 10 Ins. L. J. 306; *Mattocks v. Des Moines Ins. Co.* (Iowa), 37 N. W. Rep. 174. This last case decides that the consent need not be on the policy, though it be required to be in writing. But not against a provision in the by-laws of a mutual company. *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 347. 14. *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa 466. 15. *Tayloe v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390. 16. *Confederate notes. Robinson v. International L. Assur. Soc.*, 42 N. Y. 54. 17. *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207; *Bouton v. Am. Mut. L. Ins. Co.*, 25 Conn. 542; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185; *Gerlach v. Amazon Ins. Co.* (Ct.), 4 Ins. L. J. 239; *Miss. L. Ins. Co. v. Myland*, 9 Bush (Ky.) 431; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Agricultural Ins. Co. v. Montague*, 33 Mich. 548; *Chickering v. Globe Mut.*

See Ins. Co. v. Duke, 84 Ind. 101; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; *Wheeler v. Watertown F. Ins. Co.*, 131 Mass. 1. 8. *Brady v. Western Assur. Co.*, 17 U. C. (C. P.) 597. 9. *Continental Ins. Co. v. Ruckman* (Ill.), 20 N. E. Rep. 77. 10. *New Eng. F. & M. Ins. Co. v. Schettler*, 33 Ill. 166. 11. *Ill. Mut. F. Ins. Co. v. Stanton*, 57 Ill. 354. 12. *Mattocks v. Des Moines Ins. Co.* (Iowa), 37 N. W. Rep. 174. 13. *Schoener v. Hekla F. Ins. Co.*, 10 Ins. L. J. 306; *Mattocks v. Des Moines Ins. Co.* (Iowa), 37 N. W. Rep. 174. This last case decides that the consent need not be on the policy, though it be required to be in writing. But not against a provision in the by-laws of a mutual company. *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 347. 14. *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa 466. 15. *Tayloe v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390. 16. *Confederate notes. Robinson v. International L. Assur. Soc.*, 42 N. Y. 54. 17. *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207; *Bouton v. Am. Mut. L. Ins. Co.*, 25 Conn. 542; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185; *Gerlach v. Amazon Ins. Co.* (Ct.), 4 Ins. L. J. 239; *Miss. L. Ins. Co. v. Myland*, 9 Bush (Ky.) 431; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Agricultural Ins. Co. v. Montague*, 33 Mich. 548; *Chickering v. Globe Mut.*

but not a horse.¹ An agent authorized to receive applications and collect premiums, but not authorized to issue policies, cannot extend the time of payment of renewal premiums.² But it is held that the general agent of a foreign insurance company has the power of this character.³

A party authorized to deliver a policy, though not an agent of the company, is also authorized to receive the premium.⁴

10. Provision that Agent Shall be Deemed Agent of Insured.—Sometimes, perhaps usually now, it is provided in the policy that a person other than the insured who procures the insurance to be taken by the company shall be deemed to be the agent of the insured, and not of the company. But such stipulations cannot change the facts, and where a duly appointed agent of the company acts in its behalf, within the scope of his authority as otherwise determined, his acts are binding upon the company.⁵

L. Ins. Co., 116 Mass. 321. See also *Pittsburgh Boatyard Co. v. Western Assur. Co.*, 118 Pa. St. 415. *Contra*, *Belville Mut. Ins. Co. v. Van Winkle*, 1 Beas. (N. J.) 331; *Catoir v. American etc. Co.*, 33 N. J. L. 487.

Otherwise where the insured is required to remit direct. *Co-operative L. Ass'n v. McConnico*, 53 Miss. 233.

After the terms of the insurance had been agreed upon between the applicant and the agent, the former tendered to the latter the premium money; but the agent living in the house, and being indebted to the applicant for rent, told him he had in his hands money belonging to him for rent, and would credit him for the amount. *Held*, that this was a valid payment of the premium. *Woody v. Old Dominion Ins. Co.*, 31 Gratt. (Va.) 362.

1. *Hoffman v. Hancock Mut. L. Ins. Co.*, 92 U. S. 161.

2. *Critchett v. American Ins. Co.*, 53 Iowa 404; s. c., 36 Am. Rep. 230. But see the dissenting opinion of Beck, J.

3. He may waive a provision printed in the policy and application that the policy shall not attach until the premium is paid. *O'Brien v. Union Mut. L. Ins. Co.*, 22 Fed. Rep. 586.

4. *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149.

5. *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Newark F. Ins. Co. v. Summons*, 110 Ill. 166; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Susquehanna Mut. F. Ins. Co. v. Cusick*, 109 Pa. St. 157; *Nassauer v. Susquehanna Mut. F. Ins.*

Co., 109 Pa. St. 507; *Eilenberger Protection Ins. Co.*, 89 Pa. St. 4; *Bussell v. American F. Ins. Co.*, 109 Pa. St. 415; *Hughes (U. S.)*, 531; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. (S.) 368; *Andes Ins. Co. v. Loehr* (N. Y.), 4 Ins. L. J. 465; *Whited v. Germania etc. Ins. Co.*, 76 N. Y. 415; *Marrison v. Ins. Co.*, 69 Tex. 353; *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170; *Cason v. Jersey City F. Ins. Co.*, 43 N. J. L. 300; s. c., 39 Am. Rep. 584; *Davis v. Providence Washington Ins. Co.* (W. Va.), 8 S. E. Rep. 616.

But see *Rohrback v. Germania F. Ins. Co.*, 62 N. Y. 47; *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 4; *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen (Mass.) 332; *Mulrey v. Shawmut Mut. F. Ins. Co.*, 4 Allen (Mass.) 116; *Wood v. Firemen's Ins. Co.*, 116 Mass. 316; *Moore v. Conn. Mut. F. Ins. Co.*, 41 U. C. (Q. B.) 282.

And this is true of a subagent or solicitor appointed by the local agent. *Commercial Ins. Co. v. Ives*, 56 Pa. St. 402; *Woodbury Savings Bank v. Chatter Oak Ins. Co.*, 31 Conn. 517.

Giving notice of loss and rendering the particular account required by the policy to the agent, is notice to the company. Nor does it matter that the policy contains a provision that the person procuring the insurance shall be deemed the agent of the assured, not of the company, where the validity of the policy is made to depend on the counter signature of such agent. *North British etc. Ins. Co. v. Crutchfield*, 10 Ind. 518.

The provision must be deemed to apply to matters immediately connected with the insurance.

if the applicant make certain facts known to the agent the latter fails to communicate to the insurers, the fault is imputable to them, not the applicant.¹

Agent Cannot Underwrite Policy on His Own Property.—An agent cannot underwrite a policy on his own property which will be on the company.² Nor can he consent for the company's assignment of his own policy.³

Powers of Agent with Reference to Contracts Made.—The powers of an agent with respect to contracts which are made are as extensive as in negotiations prior to their consummation.⁴

With the procurement of the policy, the agent cannot be deemed the agent of the insured in such a sense as to give notice to him that the company has an option reserved to terminate the policy a notice to the insured is evidence of a usage that the insured agent make a notice on such agent in the insured admissible. *American Cent. Ins. Co.*, 109

of a mutual company, fill an application, is the agent of the company notwithstanding a stipulation to the contrary in the policy. *Kansal v. Ins. Co.*, 31 Minn. 17; *Ins. Rep.* 776.

A stipulation that the insurance will be afterwards deemed the insurance of the insured is not binding. *Ins. Co.*, 23 Fed. Rep.

A provision is applicable where the insured procures the insurance through an agent, but who is not the agent of the insurers. *Atlantic Ins. Co.*, 58 Md. 336.

A stipulation of whose the agent is, in a contract. *Ind. Ins. Co. v. Hartford*, 566; *Commercial Union Ins. Co. v. Elliot* (Pa.), 13 Atl. Rep. 185. And in *Pennsylvania* it is held that where the agent of an insurance company examines the building on which the insurance is wanted, and afterwards fills an application, which he reads and shows to the owner, who signs it, the agent is to be regarded, as to the appli-

cation, as the agent of the owner and not of the company. *Pottsville Mut. F. Ins. Co. v. Fromm*, 100 Pa. St. 347.

An insured whose policy provided that it should be void should the premises become and remain vacant more than ten days, deposited it for safe keeping with the insurance agent, and was afterwards informed by him that the time was thirty days. *Held*, that he thus made the agent his own, whose misstatement would avail him nothing. *Harrison v. Hartford F. Ins. Co.*, 30 Fed. Rep. 862.

So an agent receiving an application from the insured for a change in the policy and undertaking to procure such change, is to be treated as the agent of the insured. *Duluth Bank v. Knoxville F. Ins. Co.*, 85 Tenn. 76.

1. *Bebee v. Hartford Mut. F. Ins. Co.*, 25 Conn. 51; *Columbian Ins. Co. v. Cooper*, 50 Pa. St. 331; *Masters v. Madison etc. Ins. Co.*, 11 Barb. (N. Y.) 624; *Naughton v. Ottawa Agr. Ins. Co.*, 43 U. C. (Q. B.) 121.

A valuation made by such an agent alone cannot be taken advantage of by the company. *Cumberland Val. etc. Co. v. Schell*, 29 Pa. St. 31.

2. *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421.

But a person employed as a watchman of property is not, by such employment, incapacitated to issue a valid policy upon it in behalf of a company of which he is the agent. *Northrup v. Germania Fire Ins. Co.*, 48 Wis. 420; s. c., 33 Am. Rep. 815.

Nor if the agent be specially authorized to countersign a policy on his own property, can he bind the company by one dated before the loss but signed afterwards. *Glens Falls Ins. Co. v. Hopkins*, 16 Ill. App. 220.

3. *Ex parte Hennessy*, 1 Con. & Law. 559.

4. *Healey v. Imperial F. Ins. Co.*, 5 Nev. 268.

His power to change, modify or waive any of their terms is limited.¹

13. Territorial Limit of Authority.—Insurance agents are generally authorized to act within a specified territory, but a policy on a subject matter beyond such limits is binding, unless knowledge of the want of authority on the part of the agent is brought home to the insured.²

14. Authority to Adjust and Pay Losses.—Authority to an agent to adjust and pay losses is authority to endorse notes belonging to the company in payment;³ or to extend the time of proof, but there is no presumption that he has authority to waive the forfeiture of a policy.⁵

15. Neglect of Agent in Forwarding Premium.—Neglect of the agent in forwarding the premium is chargeable to the company. And this notwithstanding a provision that the agent shall be treated as that of the insured.⁷

IX. WAIVER AND ESTOPPEL—1. **Generally.**—The general rules of the law of waiver and estoppel are applicable to the parties to contracts of insurance, at the foundation of which is the rule that where one party has by his representations or conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he will not, in a court of justice, be permitted to avail himself of that advantage.⁸ The doctrine will be considered here only in its most general features. Its particular application will be stated in connection with the various subjects wherein it has been applied.

2. Effect of Conduct with Knowledge of Facts.—If the insured with full knowledge of facts which would avoid the policy, nevertheless execute and deliver it,⁹ or if, after its delivery, they

1. *Bush v. Westchester F. Ins. Co.*, 63 N. Y. 531; *Wilson v. Genesee Mut. Ins. Co.*, 14 N. Y. 418; *Lohnes v. Ins. Co.*, 121 Mass. 439; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131.

2. *Lightboy v. North American Ins. Co.*, 23 Wend. (N. Y.) 18.

3. *Baker v. Cotter*, 45 Me. 236.

4. *Lycoming Co. Mut. Ins. Co. v. Schallenberger*, 44 Pa. St. 259.

5. *Hollis v. State Ins. Co.*, 65 Iowa 454.

See, however, case cited, *infra*, this title, **WAIVER AND ESTOPPEL**.

6. *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645.

7. *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545.

8. *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

Knowledge of Facts.—There must be knowledge of the facts. *Wheaton v. North British etc. Ins. Co.* (Cal.), 18

Pac. Rep. 758. *Finley v. Lycoming etc. Ins. Co.*, 30 Pa. St. 311; *Allen v. Vermont Mut. F. Ins. Co.*, 12 Vt. 3; *Forbes v. Agawam Mut. Ins. Co.*, 3 Cush. (Mass.) 470; *Robertson v. Metropolitan L. Ins. Co.*, 88 N. Y. 5; *Queens Ins. Co. v. Young* (Ala.), 5 Rep. 116.

Insured Must be Prejudiced.—The insured must be prejudiced. *Jewett v. Home Ins. Co.*, 29 Iowa 562; *Securities Ins. Co. v. Fay*, 22 Mich. 467; *Wheaton v. North British etc. Ins. Co.* (Cal.) Pac. Rep. 758.

The Act of Waiver Must be Done Knowingly.—*Diehl v. Adams Co. Mut. Ins. Co.*, 58 Pa. St. 443; *Beatty v. Lycoming etc. Ins. Co.*, 66 Pa. St. 9.

The course of dealing between parties may be shown. *Peoria Sugar Refinery v. Susquehanna Mut. F. Ins. Co.*, 20 Fed. Rep. 480.

9. *North British etc. Ins. Co. v. St.*

wledge of such facts and subsequently treat it as valid
ing, by any acts, words or conduct which might reason-
the insured to suppose himself to be still insured,¹

p. 228; Commercial Ins. Co.
ll. 402; Union Ins. Co. v.
ll. 96; Germania F. Ins. Co.
4 Ill. 494; Continental L.
Thoenä, 26 Ill. App. 495;
v. Niagara F. Ins. Co., 79
ennett v. North British etc.
N. Y. 273; Van Schoick v.
Co., 68 N. Y. 134; Miag-
tford F. Ins. Co., 24 Hun
Smith v. Commonwealth
9 Wis. 322; Mich. etc. Ins.
s, 30 Mich. 41; Peoria M.
o. v. Perkins, 16 Mich. 380;
ottish Commercial Ins. Co.,
p. 761; Diebold v. Phoenix
Fed. Rep. 807; Geib v. En-
Co., 1 Dill. (U. S.) 449;
Commonwealth Ins. Co., 18
S.) 368; American Ins. Co.
21 Wall. (U. S.) 152; Baile v.
F. & M. Ins. Co., 73 Mo.
urg-Bremen F. Ins. Co. v.
66 Tex. 103; Crescent Ins.
p (Tex.), 9 S. W. Rep. 473;
ns. Co. v. Griffin, 59 Tex.
v. Des Moines Ins. Co.
N. W. Rep. 614; Morrison
etc. Ins. Co., 8 L. R. (Ex.)
can Cent. Ins. Co. v.
Lea (Tenn.) 513; s. c., 41
47; Oakes v. Manufactur-
Ins. Co., 135 Mass. 248.
Key v. Des Moines Ins. Co.
N. W. Rep. 614, the
ated in his application
the sole owner of the prop-
at it was not encumbered.
only had a bond for a deed,
d no part of the purchase
all the facts were disclosed
, who told him that the un-
use money did not consti-
tutance, and it was held
pany could not avail itself
in the policy that the appli-
d form a part of it, and that
statement as to encumbrances
the policy.
erpool & London etc. Ins.
de, 65 Tex. 118, where the
ered the policy with full
of the state of the title,
pany took the premium, it
at the company could not
right of recovery on the
n ownership other than the
C. of L.—22

entire, unconditional and sole owner-
ship.

Unanswered Questions.—Where a pol-
icy is issued upon a written application
containing questions which are left un-
answered by the applicant, the under-
writer thereby waives the answers to
such questions. Lorillard F. Ins. Co. v.
McCulloch, 21 Ohio St. 176; Dayton
Ins. Co. v. Kelly, 24 Ohio St. 345;
Armenia Ins. Co. v. Paul, 91 Pa. St.
520; s. c., 36 Am. Rep. 676; Hall v.
People's Mut. Ins. Co., 6 Gray (Mass.)
185; Blake v. Exchange Mut. Ins. Co.,
12 Gray (Mass.) 265; Nichols v. Fay-
ette Mut. F. Ins. Co., 1 Allen (Mass.) 63;
Geib v. Enterprise Ins. Co., 1 Dill.
(U. S.) 449; Phoenix L. Ins. Co. v.
Ruddin, 120 U. S. 183; Tiefenthal v.
Citizens' Mut. F. Ins. Co., 53 Mich. 306;
Carson v. Jersey City F. Ins. Co., 43 N.
J. L. 300; s. c., 39 Am. Rep. 584; Am-
erican L. Ins. Co. v. Mahone, 56 Miss.
180; Schwarzbach v. Ohio Val. Prot.
Union, 25 W. Va. 622.

Impossible Conditions.—So if there
are conditions which the insurers know
to be impossible of performance.
Young v. Mut. L. Ins. Co. (C. Ct.
Cal.), 2 Ins. L. J. 289; Andes Ins. Co.
v. Shipman, 77 Ill. 189.

**Where Insurer Should Have Knowl-
edge.**—Some of the cases seem to hold
that if the insurers should have knowl-
edge of the facts, whether or not they
do have it, they waive any advantage
that they might otherwise take of such
facts. Sibley v. Prescott Ins. Co., 57
Mich. 14; Broadwater v. Lion F. Ins.
Co., 34 Minn. 465.

Delivery Waives Premium Clause.—
Delivery of the policy is a waiver of a
condition requiring the premium note
to be delivered before the policy takes
effect. Behler v. German Mut. F. Ins.
Co., 68 Ind. 347.

1. Georgia Home Ins. Co. v. Kin-
nier, 28 Gratt. (Va.) 88; Pa. F. Ins. Co.
v. Kittle, 39 Mich. 51; Eddy v. Mer-
chants' etc. Ins. Co. (Mich.), 40 N. W.
Rep. 775; Titus v. Glens Falls Ins. Co.,
81 N. Y. 410; Carroll v. Charter Oak
Ins. Co., 38 Barb. (N. Y.) 402; Haas
v. Montauk F. Ins. Co. (N. Y.), 1 N.
Y. S. Nat. Rep. 895; Lycoming Mut.
Ins. Co. v. Stockbower, 26 Pa. St. 199;
Elliott v. Ashland Mut. F. Ins. Co.,

they will have waived the defect, and be estopped to ass

3. Knowledge of Insured of Fraudulent Statements by Insurers. rule works both ways. If the insured knows that the insured have made fraudulent statements for the purpose of inducing to enter into the contract, and he, nevertheless, does enter into it, and gives his premium note therefor, he will be estopped to make this defence against the note.²

4. Powers of Agent with Respect to Waiver.—The knowledge of the company may be acquired through its agent. Independent knowledge of the agent of matters within the scope of his employment is, in this as in other matters, the knowledge of the company.³ And it is held that the waiver of an agent oth

117 Pa. St. 548; Cumberland etc. Ins. Co. v. Mitchell, 48 Pa. St. 374, 384; Home Mut. L. Ass'n v. Riel (Pa.), 17 Atl. Rep. 36; Keenan v. Dubuque Mut. F. Ins. Co., 13 Iowa 375; Hallis v. State Ins. Co., 65 Iowa 454; Anson v. Winnisheik Ins. Co., 23 Iowa 84; Lewis v. Council Bluffs Ins. Co., 63 Iowa 193; North Berwick Co. v. New Eng. F. & M. Ins. Co., 52 Me. 336; Wetherell v. Maine Ins. Co., 49 Me. 200; Hodsdon v. Guardian L. Ins. Co., 97 Mass. 144; Bevin v. Connecticut Mut. L. Ins. Co., 23 Conn. 244; Rathbone v. City F. Ins. Co., 31 Conn. 193; Gilliat v. Pawtucket etc. F. Ins. Co., 8 R. I. 282; Md. F. Ins. Co. v. Gusdorf, 43 Md. 506; Southern L. Ins. Co. v. McCain, 96 U. S. 84; Hale v. Union Mut. F. Ins. Co., 32 N. H. 295; New Eng. etc. Ins. Co. v. Wetmore, 32 Ill. 221; Keeler v. Niagara F. Ins. Co., 16 Wis. 523; Wing v. Harvey, 2 De G., M. & G. 265; s. c., 27 Eng. L. & Eq. 140; Law v. Hand-in-Hand Ins. Co., 29 U. C. (C. P.) 1; Hamilton v. Home Ins. Co., 94 Mo. 353.

A policy conditioned to be void if assigned without the company's assent endorsed thereon was assigned on March 29th, and on April 17th the company's agent, authorized to assent to assignments, with knowledge of such assignment, endorsed the company's assent thereto on the policy, and reported the same to the company, which made no objection, as was usual when the agent's acts were disapproved. *Held*, that the forfeiture was waived. *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460.

Where payment of an assessment was accepted after the time limited, "on condition that member is in good health," but nothing was said by the member, and no enquiries were made relative thereto at that time, the subsequent

levy and unconditional acceptance by the company of six assessments from a member operated as a waiver of forfeiture, although the member was in ill health. *Rice v. New Eng. Aid Soc.*, 146 Mass. 248.

A company waives a provision requiring the insured to keep his property of invoice secure from fire by reporting the insured, after a fire, to incur the expense and trouble of obtaining receipts and vouchers of all his goods received several years prior thereto. *B. State Ins. Co. (Iowa)*, 38 N. H. 135.

1. Consideration and Estoppel. There need be no new consideration, nor need there be a technical consideration. *Prentice v. Knickerbocker L. Co.*, 77 N. Y. 483; *Titus v. Glenns F. Co.*, 81 N. Y. 410.

2. Lycoming Ins. Co. v. Worth, 83 Pa. St. 223.

3. Plumb v. Cattaraugus L. Ins. Co., 18 N. Y. 392; *Rowley v. Empire L. Co.*, 36 N. Y. 550; *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; *Bennett v. North British etc. Ins. Co.*, 8 N. Y. 273; *Miaghan v. Hartford F. Ins. Co.*, 24 Hun (N. Y.) 58; *Couch v. German F. Ins. Co.*, 25 Hun 469; *Dilliber v. Knickerbocker L. Co.*, 76 N. Y. 56; *Security Ins. Co. v. Fay*, 22 Mich. 473; *North American Ins. Co. v. Throop*, 22 Mich. 1; *na etc. Ins. Co. v. Olmstead*, 2 Mich. 246; *Southern L. Ins. Co. v. B. Heisk. (Tenn.)*, 607; *Hallock v. Commercial Ins. Co.*, 2 Dutch (N. H.) 144; *Hodsdon v. Guardian L. Ins. Co.*, 97 Mass. 144; *North Berwick Co. v. New Eng. F. & M. Ins. Co.*, 52 Me. 336; *Phoenix Ins. Co.*, 27 Wis. 60; *Bride v. Republic F. Ins. Co.*, 562; *Walsh v. Ætna L. Ins.*

true,¹ or that the risk is prohibited by the by-laws of the company;² or that there is other insurance in contravention of its terms;³ or that the premises are vacant in violation of the provisions of the policy.⁴

Examples of waiver or estoppel by acts of the insurers after knowledge of some infirmity respecting the policy acquired subsequent to its delivery, are, saying to the insured, after knowledge of other insurance in violation of its terms, that it makes no difference.⁵ Accepting an assessment or payment of a premium after knowledge of the infirmity;⁶ consenting to an assignment after knowledge of the vacancy of the premises, or other ground of forfeiture;⁷ or paying a dividend after knowledge of the alienation of an interest.⁸

6. Effect of Conduct of Insurers Subsequent to Loss.—The insurer may even be estopped to deny their obligation by acts or conduct subsequent to the loss.⁹ Such is the effect of a statement that it is only the quantity and value of the property that is disputed;¹⁰ or the absence of objections to the proofs of loss,¹¹

502; *Equitable Ins. Co. v. McCrea*, 8 Lea (Tenn.) 541; *Hanley v. L. Ass'n etc.*, 69 Mo. 380; *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 347; *Little v. Charter Oak L. Ins. Co.*, 38 Ohio St. 110; *Universal F. Ins. Co. v. Block*, 109 Pa. St. 535; *Elkins v. Susquehanna Mut. F. Ins. Co.*, 113 Pa. St. 386.

1. *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124; *Witherell v. Maine Ins. Co.*, 49 Me. 200.

Or where it has abundant evidence of such fact. *Morrison v. Wis. Odd Fellows' Mut. L. Ins. Co.*, 59 Wis. 162.

2. *Merchants & Mfrs. Ins. Co. v. Curran*, 45 Mo. 142.

3. *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402; *Hamilton v. Home Ins. Co.*, 94 Mo. 353.

4. *Short v. Home Ins. Co.*, 90 N. Y. 16; s. c., 43 Am. Rep. 138; *Haight v. Continental Ins. Co.*, 92 N. Y. 51.

5. *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143.

6. *Osterloh v. New Denmark etc. Ins. Co.*, 60 Wis. 126; *Story v. Hope Ins. Co.*, 37 La. Ann. 254; *Phoenix L. Ins. Co. v. Raddin*, 120 U. S. 183; *Smith v. St. Paul F. etc. Ins. Co.*, 3 Dakota 80; *Northwestern Mut. L. Ins. Co. v. Amerman*, 16 Ill. App. 528; *Frost v. Saratoga Co. Mut. Ins. Co.*, 5 Denio (N. Y.) 154; *Clapp v. Mass. Ben. Ass'n*, 146 Mass. 519; *Germania Ins. Co. v. Rudwig*, 80 Ky. 223; *National L. Ins. Co. v. Tullidge*, 39 Ohio St. 240; *Schwarzbach v. Ohio Val. Prot. Union*, 25 W. Va. 622. But

see *Shimp v. Cedar Rapids Ins. Co.* (Ill.), 16 N. E. Rep. 229; *Palmer Factors' etc. Ins. Co.*, 33 La. Ann. 1336.

7. *Garland v. North American Ins. Co.*, 9 Ill. App. 571; *Pomeroy v. Rock Mountain Ins. etc. Inst.*, 9 Colo. 20; *Ellis v. Council Bluffs Ins. Co.*, 10 Iowa 507; *Gilliat v. Pawtucket Mut. Ins. Co.*, 8 R. I. 282.

8. *Combs v. Shrewsbury Mut. Ins. Co.*, 34 N. J. Eq. 403.

9. *Niagara F. Ins. Co. v. Miller*, 1 Pa. St. 504; *Lycoming etc. Ins. Co. v. Schreffler*, 42 Pa. St. 188; *Franklin Ins. Co. v. Updegraff*, 43 Pa. St. 3; *Underhill v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 440; *Priest v. Citizen Mut. F. Ins. Co.*, 3 Allen (Mass.) 60; *Baxter v. Chelsea Mut. Ins. Co.*, 1 Allen (Mass.) 204; *Kernochan v. New York etc. Ins. Co.*, 17 N. Y. 428; *Miller v. Eagle etc. Ins. Co.*, 2 E. Smith (N. Y.) 268; *Turley v. North American Fire Ins. Co.*, 25 Wend. (N. Y.) 374; *Connell v. Milwaukee Mut. F. Ins. Co.*, 18 Wis. 387; *Lewis v. Monmouth Mut. F. Ins. Co.*, 52 Mo. 402; *Bartlett v. Union M. & F. Ins. Co.*, 46 Me. 500; *Noyes v. Washington Co. Mut. Ins. Co.*, 30 Vt. 659; *Farmer Mut. Fire Ins. Co. v. Gargett*, 42 Mich. 289; *Erwin v. Springfield F. & M. Ins. Co.*, 24 Mo. App. 145.

10. *Rathbone v. City F. Ins. Co.*, 10 Conn. 193.

11. *City Planing etc. Co. v. Merchants' etc. Ins. Co.* (Mich.), 40 N. Y.

Where, after proof of loss, an adjuster, knowing of a breach of condition by the assured, continues to recognize

ments after knowledge of loss and facts which would avoid policy.¹

But the right to declare a forfeiture after knowledge of loss therefor and loss, is not necessarily waived by a failure to give immediate notice of such intention, where the delay does not induce the insured to change his condition.²

7. Failure to Cancel Evidence of Waiver.—The fact that the insurers do not cancel the policy under a provision therefor, with knowledge comes to them of its violation, is evidence of an intention to waive such violation.³

8. Waiver in Writing.—Where it is provided that any waiver of a forfeiture under the policy must be in writing, and it becomes subject to forfeiture by reason of a violation of its terms after the transfer of the title during the period specified, and, after expiration, another policy extending the old one is issued, with knowledge of the transfer, it is a waiver in writing which satisfies the provision.⁴

9. Waiver Endorsed on Policy.—It is often provided in insurance policies that anything less than a distinct, specific agreement clearly expressed and endorsed on the policy, shall not be construed as a waiver of any condition or restriction therein; but does not refer to the stipulations that are to be performed in case of loss, but only to those conditions which enter into and form a part of the contract, and are essential to make it binding; and a provision of this sort has been held to be invalid.⁶

the policy as valid, and attempts to adjust the loss, thereby causing the insured expense and trouble, the forfeiture is waived. *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 71 Wis. 454; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Key v. Des Moines Ins. Co.* (Iowa), 41 N. W. Rep. 614; *Pennsylvania F. Ins. Co. v. Kittles*, 39 Mich. 51; *Argall v. Old North State Ins. Co.*, 84 N. Car. 355; *Smith v. St. Paul F. etc. Ins. Co.*, 3 Dak. 80. But see *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa 335; *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150.

1. *Masonic Mut. Ben. Assoc. v. Beck*, 77 Ind. 203; s. c., 40 Am. Rep. 295; *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494; *Schoneman v. Western Horse etc. Co.*, 16 Neb. 404.

2. *McCormick v. Springfield F. etc. Ins. Co.*, 66 Cal. 361.

3. *Teutonia L. Ins. Co. v. Anderson*, 77 Ill. 384; *Mut. Life Ins. Co. v. French*, 30 Ohio St. 240; *Joliffe v. Madison etc. Ins. Co.*, 39 Wis. 111; *Georgia Mut. L. Ins. Co. v. Gibson*, 52 Ga. 640; *Guernsey v. American Ins. Co.*, 17 Minn. 104; *Potter v. Ontario etc. Ins. Co.*, 5 Hill (N. Y.) 147; *Allen v.*

Massasoit Mut. Ins. Co., 99 Mass. 353; *Hamilton v. Home Ins. Co.*, 93 N. Y. 353; *Phoenix Ins. Co. v. Spiers*, 8 S. W. Rep. 453.

4. *Elliott v. Ashland Mut. F. Ins. Co.*, 117 Pa. St. 548; *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415; *pare Bell v. Lycoming F. Ins. Co.*, 19 Hun (N. Y.) 238.

In *Haas v. Montauk F. Ins. Co.*, 19 N. Y. S. Nat. Rep. 895, where the discovery by the company that the building insured was used as a beer saloon, they granted oral permission to make improvements, and the policy denominated such a sale as extra hazardous, and provided that the extra hazardous building should not be insured; it was held that this was a waiver of the forfeiture, although it was provided that the permission should be in writing.

5. *Franklin F. Ins. Co. v. C. Ice Co.*, 36 Md. 102; *New Orleans Ass'n v. Matthews* (Miss.), 4 So. 62.

6. *Lamberton v. Conn. F. Ins. Co.* (Minn.), 39 N. W. Rep. 76. In this case the provision was that "no

Waiver of Provision as to Waiver.—So, too, it has been held that a provision as to mode of waiver may be waived.¹ However it was provided that an alteration or waiver could be made at the head office by an officer of the company, it is held that an agent was powerless to exercise such authority.²

See ACCIDENT, FIRE, LIFE and the other classes of insurance.

REINSURANCE—1. What Is.—Reinsurance is where the insurer insures its risks in another company.³

Obligations of Reinsurer.—The obligations of the reinsurer to the insured are the same as those of the insurer to the insured. If the policy be void as against the insurer, it will also

be "representative" of the company. It is held to be *held* to have waived its objection of the policy unless such objection could be endorsed thereon; and where assigned for the holding was such provision was not a limitation of the authority of any particular class of agents, it was, in an attempted limitation on the part of the corporation for future reference also *Bartlett v. Fireman's Ins. Co. (Iowa)*, 41 N. W. Rep.

Continental Ins. Co., 151; *Whited v. Germania F. Ins. Co.*, 6 N. Y. 415; *American Cent. Ins. Co.*, 8 Lea (Tenn.) 513; *McCrea*, 8 Lea (Tenn.) 513; *Am. Rep.* 647; *Carr v. Roger Ins. Co.*, 60 N. H. 513; *Story Ins. Co.*, 37 La. Ann. 254; *Elshland Mut. F. Ins. Co.*, 117; *Shaffer v. Phoenix Ins. Co.*, 61; *Md. F. Ins. Co. v. Gus-*

also *Globe Mut. L. Ins. Co.*, 5 U. S. 326; *Mich. State Ins. Co.*, 30 Mich. 41; *Carroll v. Oak Ins. Co.*, 1 Abb. Dec. 316; *Day v. Mechanics & F. Ins. Co.*, 88 Mo. 325. And *Mersereau v. Phoenix L. Ins. Co.*, 274; *Catoir v. American Ins. Co.*, 33 N. J. L. 487; *Union Ins. Co. v. Mowry*, 96 U. S. 7. *Universal Mut. F. Ins. Co. v. Pa. St.* 20.

Union v. Universal L. Ins. Co., 1 Repr. 780.

insured is not a party to and concerned in the contract, unless to him, when he may have an interest in it. *Lee v. Fraternal Mut. Ins. Co.*, 62 Mo. 289.

held in *Johannes v. Phoenix Ins. Co.*, 50, where one com-

pany sold its business to another, and the purchaser reinsured the seller's risks, and agreed to pay, satisfy and discharge the losses; that this was more than mere reinsurance, and that there was sufficient privity between a policy holder and the purchaser and reinsurer to enable the former to maintain an action against the latter for the loss.

4. *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. St. 475; *Merchants' Mut. Ins. Co. v. New Orleans Ins. Co.*, 24 La. Ann. 305; *Eagle Ins. Co. v. La Fayette Ins. Co.*, 9 Ind. 443.

Even though a new policy of the reinsurer is substituted for the original, and the new would have been void for a breach of warranty by the insured had the original application on which it is based been made at the same time, but which was true when made. *Cahen v. Continental L. Ins. Co.*, 69 N. Y. 300.

But in *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124, it was *held* that in an action on a contract of reinsurance the reinsurer cannot defend on the ground of a misrepresentation made while obtaining the original policy.

A judgment against the original insurer is binding upon the reinsuring company, who had notice of the suit and an opportunity to defend. *Strong v. American Cent. Ins. Co.*, 4 Mo. App. 7.

Where a company, after having obtained reinsurance of a risk in another company, discharges its liability by the payment of a less sum than that for which the original insurance was effected, the sum so paid by it will be taken as the amount of damage sustained, and the measure of indemnity to be recovered from the reinsuring company, provided such sum is within the amount of the reinsurance policy,

be void as against the reinsurer;¹ and to recover of the reinsurer the insurer must make such proof as the insured is compelled to make to establish his claim.² The reinsured need not show that the loss has been paid, nor that it can or will be paid.³

Where the reinsurance is for only a part of the original insurance, and a partial loss occurs, the reinsurer is responsible for the whole of such loss within the limits of the reinsurance, for a proportionate share of it, where there is no provision to the contrary.⁴ But where there is, liability attaches only for the proportionate part.⁵

Further than stated, the reinsurer is liable to the reinsured for all costs and expenses, *bona fide*, incurred in defending the claim (if a plain one) of the first insurer, with interest on all he has expended.⁶

3. Within Statute of Frauds.—Reinsurance contracts come within the statute of frauds as being promises to pay the debt of another, and cannot be enforced unless in writing.⁷

4. Duty of Insurer in Obtaining Reinsurance.—The insurer, in obtaining reinsurance, must, like the original applicant, make known the facts within his knowledge material to the risk, and otherwise charge the obligations of good faith imposed upon him.

5. Commencement and Termination of Risk.—Where the exact time of commencement and termination of the risk are specified, such specification governs. But where no time has been expressed

and does not exceed the amount of actual loss, and such policy contains no condition for prorating loss or limiting liability. *Commercial Mut. Ins. Co. v. Detroit F. & M. Ins. Co.*, 38 Ohio St. 11.

But where it was agreed between the reinsurer and the reinsured that a certain claim should be fought, the reinsured to control the defence, and the reinsured compromised it without consulting the reinsurer, it was *held* that the reinsurer was not liable for any part of the money paid by way of compromise. *Commercial Union Assur. Co. v. American Cent. Ins. Co.*, 68 Cal. 430.

1. *N. Y. State M. Ins. Co. v. Protection Ins. Co.*, 1 Story (U. S.) 458.

2. *Yonkers etc. Ins. Co. v. Hoffman Ins. Co.*, 6 Rob. (N. Y.) 316. It is however *held* in *Bowery F. Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. (N. Y.) 359, that furnishing the proofs of the original insured is sufficient.

3. *Mut. Safety Ins. Co. v. Hone*, 2 N. Y. 235. *Ex parte Norwood*, 3 Biss. (U. S.) 504; *Cashau v. N.*

W. Nat. Ins. Co., 5 Biss. (U. S.)

The reinsurer is liable although the reinsured is insolvent. *Consolidated Ins. Co. v. Cashow*, 41 Md. 59.

4. See *Commercial Mut. Ins. Co. v. Detroit F. & M. Ins. Co.*, 38 Ohio St. 11; s. c., 43 Am. Rep. 413.

5. *Blackstone v. Alemannia F. Ins. Co.*, 56 N. Y. 104.

And this liability attaches although the reinsured has become insolvent and so cannot pay the other part. *Consolidated F. Ins. Co. v. Cashow*, 41 Md. 59; *Cashau v. N. W. Nat. Ins. Co.*, 5 Biss. (U. S.) 476; *Blackstone v. Alemannia F. Ins. Co.*, 56 N. Y. 104. see *Ill. Mut. F. Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362.

6. *Hastie v. De Peyster*, 3 Cai. (U. S.) 190; *N. Y. State M. Ins. Co. v. Protection Ins. Co.*, 1 Story (U. S.) 458.

This is especially true where the insured has contested the claim without the advice or acquiescence, and for the benefit of, the reinsurer. *Strong v. Phoenix Ins. Co.*, 62 Mo. 289.

7. *Egan v. Firemen's Ins. Co.*, 1 La. Ann. 368.

ed, the circumstances of the case will be considered for the purpose of determining it.¹

Waiver.—The reinsurer may waive any defences against the insured. Thus, if objections be not made to the proofs furnished, they will be deemed to have been waived.²

LOSS AND ITS ADJUSTMENT—See ACCIDENT, FIRE, LIFE and other classes of insurance.

REMEDIES.—The remedies of the parties in case of a breach of their contract are various, and vary according to the facts.

Where the terms of insurance have been agreed on but the policy has not been issued, the insured may compel its issuance in a court of equity, and if a loss has intervened, have a decree for its payment; or he may, in the latter event, have recovery in a court of law.

Where the premium has been paid but the policy had never taken effect the premium may be recovered,⁵ except

Philadelphia L. Ins. Co. v. American Ins. Co., 23 Pa. St. 65.

Case also holds that the reinsurer may be construed to cover a life insured who died prior to the making of the contract.

parte Norwood, 3 Biss. (U. S.) 311.

and v. Royal Ins. Co., 50 N. Y.

odes v. Railway Passengers' Ins. Co., 5 Lans. (N. Y.) 71; Franklin

Ins. Co. v. Hewitt, 3 B. Mon.

Commercial Mut. Ins. Co. v. Ins. Co., 19 How. (U. S.)

St. Joseph F. & M. Ins. Co. v. St. Joseph F. & M. Ins. Co., 371.

must be conclusive proof that the contract was actually made. Suydam v. Columbus Ins. Co., 18 Ohio

St. 371.

contract was actually made. Suydam v. Columbus Ins. Co., 18 Ohio

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St. 371.

part of the amount due by the terms of the policy to one who has not so agreed. Serdall v. Charter Oak L. Ins. Co., 51 Wis. 426.

5. Foster v. U. S. Ins. Co., 11 Pick. (Mass.) 85; Rochester Ins. Co. v. Martin, 13 Minn. 59; Delavigne v. U. S. Ins. Co., 1 John. Cas. (N. Y.) 310; Mut. Ass. Co. v. Mahon, 5 Call. (Va.) 517; Clark v. Mfrs. Ins. Co., 2 Woodb. & M. (U. S.) 472; Mulvey v. Gore Ins. Co., 28 U. C. (Q. B.) 424; Boland v. Whitman, 33 Ind. 64.

As where the policy is void *ab initio* by reason of the assured not truly stating his interest as required by the policy. Waller v. Northern Assur. Co., 64 Iowa 101. Or where statements warranted to be true are not true. Conn. Mut. L. Ins. Co. v. Pyle, 44 Ohio St. 19.

So, if the policy be improperly cancelled. Braswell v. American Ins. Co., 75 N. Car. 8.

Where the agent receives the premium but issues no policy, he is liable to the applicant in an action for the premium money. Collier v. Bedell, 39 Hun (N. Y.) 238.

The premium cannot be recovered if the policy has once attached, without a provision to that effect. Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Leonard v. Washburn, 100 Mass. 251. But see Abell v. Penn. Mut. Life Ins. Co., 18 W. Va. 400. Nor without tendering back the policy. Farrow v. Cochran, 72 Me. 309.

where the policy was procured by fraud,¹ or is unlawful.²

3. Where Policy Wrongfully Forfeited.—So where the policy has been wrongfully declared forfeited, the premium paid may be recovered.³ And in *Abell v. Penn. Mut. Life Ins. Co.*,⁴ it is held that where a policy is forfeited by reason of the nonpayment of the premium when due, the insured may recover the premium paid, with interest, less the actual cost of the insurance during the time the policy was in force.⁵

4. Reformation of Policy, etc.—A policy which does not conform to the agreement of the parties, whether by fraud or mistake, may be reformed in equity, and damages for a loss decreed in the same case.⁶ But such nonconformance must be conclusively proved, and the mistake must be either mutual or made by one by reason of the fraud of the other.⁷

1. *Hoyt v. Gilman*, 8 Mass. 336; *Friesmonth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 587.

2. *Russell v. De Grand*, 15 Mass. 35; *Hawson v. Hancock*, 8 T. R. 575.

3. *Cohen v. N. Y. Mut. L. Ins. Co.*, 50 N. Y. 610; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; *American L. Ins. Co. v. McAden*, 109 Pa. St. 399; *Ala. Gold L. Ins. Co. v. Garmany*, 74 Ga. 51.

It is held by the *Connecticut* court that in such case, where the policy is on a life, that the assured may have one of three remedies, viz: a judgment for its present worth, a tender of the premiums as they fall due, and recovery of the full amount on the death of the insured, or a decree sustaining the policy. *Day v. Conn. Gen. L. Ins. Co.*, 45 Conn. 480. It has also been held in *Illinois* that an action can be maintained in such case to recover the value of the policy at the time of the forfeiture. *Brooklyn Life Ins. Co. v. Weck*, 9 Ill. App. 358. So in *Virginia*, *Clemmitt v. N. Y. Life Ins. Co.*, 76 Va. 355.

And in *Ohio* it has been held that the insured may have a decree sustaining the policy. *National L. Ins. Co. v. Tullidge*, 39 Ohio St. 240.

4. 18 W. Va. 400.

5. It is also decided in this case that the court may take judicial notice of the mortality tables.

6. *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357; *Phoenix Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278; *Phoenix Ins. Co. v. Haftheimer*, 46 Miss. 645; *Stout v. City Fire Ins. Co.*, 12 Iowa 371; *Longhurst v. Star Ins. Co.*, 19 Iowa 364; *Hammel v. Queen Ins. Co.*, 50 Wis. 240; *Oliver v. Mut. etc. Ins. Co.*, 2 Curt. (U. S.) 277; *Perry v. Newcastle etc. Ins. Co.*, 8 U. C. (Q.

B.) 363; *Collett v. Morrison*, 12 E. L. & Eq. 161.

Mistake and Fraud.—Where in a written application for a policy of insurance, the applicant committed a mistake in describing the encumbrance on property, in consequence of the representations of the agent of the company who drew up the application, and property insured was afterwards destroyed by fire, it was held that a court of chancery had power to reform the contract and grant relief. *Harris v. Columbiana Co. Mut. Ins. Co.*, 18 O. 116. Courts of law will also generally allow a mistake or fraud to be shown as an action for a loss. *Gerrish v. C. Man Ins. Co.*, 55 N. H. 335; *Wilson v. Conway Mut. F. Ins. Co.*, 4 R. I. 1. However, see *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175; *Hobbs v. Charlestown Mut. F. Ins. Co.*, Met. (Mass.) 211.

But a court of equity will not entertain such a bill when a suit at law has been previously brought and *Steinbach v. Relief Ins. Co.*, 12 L. (N. Y.) 640; *Washburn v. Great Western Ins. Co.*, 114 Mass. 175. Or where the mistake is the result of the negligence of the insured. *Pindar v. Resolute F. Ins. Co.*, 47 N. Y. 168. *Ryan v. World L. Ins. Co.*, 41 Conn. 168.

7. *Cooper v. Farmers' Mut. F. Ins. Co.*, 50 Pa. St. 299; *Patterson v. Franklin Ins. Co.*, 81 Pa. St. 454; *M. v. Westchester F. Ins. Co.*, 64 N. Y. 453; *Bryce v. Lorillard F. Ins. Co.*, N. Y. 240; *Van Tuyl v. Westchester Ins. Co.*, 55 N. Y. 657; *Nat. F. Ins. v. Crane*, 16 Md. 260; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33; *Herr v. Marine Ins. Co.*, 20 Wall. (U.

Ability Where Company Fails to Keep Required Funds.—When an insurance company fails to keep on hand funds required by its policy, and becomes insolvent, it becomes liable to its policy holders for each of its engagements.¹ In such case the measure of damages is the value of the policy destroyed, according to the tables of life insurance, showing the average expectancy of life.²

Effect of Adjustment.—Ordinarily, where the claim has been made without fraud, the insured cannot reopen the matter by an action for an additional amount.³

Fraud.—But fraud can always be taken advantage of by the insured, whose prejudice it has been practiced. Hence, if fraud is shown on the part of either party to an adjustment of a loss, whether the other party suffered, such party, if the insurer, may recover what he has paid, and, if the insured, what he has not received, by reason of the fraud.⁴

Liability of Officers for False Statements.—The officers of an insurance company are liable in damages in an action at law for false statements concerning its reliability and assets to one who has been induced to insure in it.⁵

Atl. F. Ins. Co., 98 U. S. 85.
Le v. Security L. Ins. etc.,
Y. 114.

Le v. Security L. Ins. etc.,
Y. 114.

case it was held that, in fixing the value of unmatured life policies, the measure annexed to New York Laws § 623, may be used. It was held that, in determining the present value of a single policy, the present value of the holder's health is to be considered. But this being impracticable in the case of numerous policy holders, in receivership the receiver may estimate the present value the excess of the sum paid during the early years of the policy over the sum required to cover the risk for those years, assuming that there has been no change in the health of the life insured, except that due to the efflux of time. It was further held that the value of an annuity paid-up policy is the unexpired premium called the reserve, and is to be computed in the same manner as the value of a policy upon which annual premiums are paid. See this case as to the rights and obligations of the parties to the dissolution and winding up of a solvent life insurance company. See also *People v. Knickerbocker L. Ins. Co.*, 40 Hun (N. Y.) 44.
Le v. Phoenix Ins. Co., 23 N. Y. And see *Ætna Ins. Co. v.*

Reed, 33 Ohio St. 283; *American Ins. Co. v. Crawford*, 7 Ill. App. 29.

But it was said to be no defence that the insured agreed upon a compromise with a person representing himself as authorized to act for the several companies in which the property was insured, but who only had authority to act for a part of them, and whose settlement one of the parties did not act upon. *Luce v. Springfield F. & M. Ins. Co.*, 1 Flap. (U. S.) 281.

4. *Johnson v. Continental Ins. Co.*, 39 Mich. 33; *Harris v. Equitable L. Ins. Co.*, 64 N. Y. 196; *Rohrschneider v. Knickerbocker L. Ins. Co.*, 76 N. Y. 216; *N. W. L. Ins. Co. v. Elliott*, 11 Rep. (C. Ct.) 325; *Godchaux v. Merchants' Mut. Ins. Co.*, 34 La. Ann. 235.

Where an agent of an insurance company makes representations to one having a claim for a loss against the company, the parties standing in antagonistic relations to each other, that the latter had no claim or rights that he could enforce by legal proceedings, such representations are only opinion—representations upon which he had no right to rely; and if he does so rely, it must be at his own risk, because the truth or falsehood of such representations could be ascertained by ordinary diligence. *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283. But compare *McLean v. Equitable L. Assur. Soc.*, 100 Ind. 127; *s. c.*, 50 Am. Rep. 779.

5. *Salmon v. Richardson*, 30 Conn.

9. Remedies Forfeited in Case of Loss by Design.—Where a loss caused by the design of the assured, as where the property insured is burned,¹ or otherwise destroyed,² or the life insured taken for the purpose of obtaining the insurance money,³ remedies on the contract are, of course, forfeited.

10. No Trust Relation.—There is no trust relation between policy holder in a mutual company and the company, and an action on such a theory will not lie.⁴

11. Decree for Redelivery and Cancellation.—The insurers may have a decree for the redelivery and cancellation of a policy obtained by fraud or mistake,⁵ unless after a loss, where the defence can be made to an action on the policy.⁶

12. Right of Insurers to Terminate Policy.—Fire policies always contain a clause giving the insurers the right to terminate the insurance at any time at their option, but this does not give the insurer the right to cancel when loss is imminent.⁷ And whenever exercised, it must be within the strict terms of the policy,⁸ and so as not to prejudice the insured where he has complied with the terms of the insurance.⁹

360. See also *Tebbetts v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.) 569; *Pontifex v. Bignald*, 3 M. & G. 42.

1. But where a policy to A and B contained a provision that the loss should be first payable to A, as his interest might appear, B really having no interest, and B caused the building to be burned without A's knowledge or consent, it was held that this could not affect A's right to recover. *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121.

And burning the property while insane does not affect the remedies of the insured, in the absence of a provision to such effect. *Karow v. Continental Ins. Co.*, 57 Wis. 56; s. c., 46 Am. Rep. 17.

2. *Western Horse etc. Ins. Co. v. O'Neill*, 21 Neb. 548.

3. Where one insures his life with intent to commit suicide, and so provide for his family and creditors, and, while sane, carries out that intent, the policy is void, though it does not stipulate for its avoidance by the insured's suicide. *Smith v. Nat. Ben. Soc.*, 4 N. Y. S. Nat. Rep. 521.

4. *Taylor v. Charter Oak L. Ins. Co.*, 59 How. Pr. (N. Y.) 468.

5. *Commercial Ins. Co. v. McLoon*, 14 Allen (Mass.) 351; *Imperial Ins. Co. v. Gunning*, 81 Ill. 236.

Even after an assignment of the policy for value without notice. *British Eq. Assur. Co. v. Great Western Ry. Co.*, 20 L. T. (N. S.) 422.

It has been held in Canada that an action at law may be restrained.

L. Ins. Co. v. Egan, 20 U. C. (Ch.)

But it is incumbent on the insurer to prove the mistake by clear and convincing evidence. *Blake v. House Co. v. Home Ins. Co.* (Wis.) N. W. Rep. 968.

Judgment against an insurance company in an action to have one of its policies cancelled on the ground that it was obtained by fraud, does not bar the company from setting up after loss a want of insurable interest and a breach of warranty. *Ferguson v. Mass. L. Ins. Co.*, 22 Hun (N. Y.) 320.

All that has been received by way of the policy must be tendered. *Harris v. Equitable L. Ins. Co.*, 6 N. Y. 196.

6. *Phoenix Ins. Co. v. Bailey Wall* (U. S.) 616; *Home Ins. Co. v. Stanchfield*, 2 Abb. (U. S.) 6; *G. etc. Ins. Co. v. Reals*, 50 How. Pr. (N. Y.) 237; *Hoare v. Brembridge*, 8 L. (Ch.) 22.

7. *Home Ins. Co. v. Heck*, 65 Ill.

8. *Chase v. Phoenix etc. Ins. Co.* Mo. 85.

If part of the premium is to be returned, that must be paid or tendered. *Hathorn v. Germania Ins. Co.*, 55 L. (N. Y.) 28.

9. *Peoria F. & M. Ins. Co. v. B.* 47 Ill. 516; *International L. Ins. etc. v. Franklin F. Ins. etc. Co.*, 66 N. Y. 119.

Recovery of Loss Paid.—Where insurers pay a loss in ignorance of facts which vitiate the policy, they may recover the sum paid in such facts come to their knowledge,¹ if they could have known of the same at the time of payment by the use of ordinary diligence.²

Ability of Agent for Failure to Cancel.—Where an agent is authorized by the insurers to cancel a policy under a provision that if he does not do so, and a loss occurs, they may recover damages of such agent. And it will be of no avail in an action for the agent to show that he had directed the broker to cancel the insurance with him to have the policy cancelled.³

Right of Insured to Separate Damaged from Undamaged Goods.—The insured does not lose his remedy on a contract of insurance by a refusal to separate the damaged portion of the goods from that not damaged, and to furnish a detailed statement of damages claimed on each item;⁴ nor by proceeding at once to repair, where that right is reserved to the company, and giving no notice of an intention to avail itself of it.⁵

Limitation of Action.—It is competent for the parties to limit the period within which an action may be brought on the policy to a shorter period than that allowed by the statutes of limitation,⁶

rd Live Stock Ins. Co. v. Walker, 66 Mo. 32; *Keim v. Home etc. Ins. Co.*, 42 Mo. 38; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596; *Fullam v. N. Y. Union Ins. Co.*, 7 Gray (Mass.) 61; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; *N. W. Ins. Co. v. Phoenix Oil etc. Co.*, 31 Pa. St. 449; *Farmers' Mut. F. Ins. Co. v. Barr*, 94 Pa. St. 345; *Waynesboro Mut. F. Ins. Co. v. Conover*, 98 Pa. St. 384; *Wilson v. Aetna Ins. Co.*, 27 Vt. 99; *Williams v. Vermont Mut. Ins. Co.*, 20 Vt. 222; *Higgins v. Windsor Co. Mut. F. Ins. Co.*, 54 Vt. 270; *Carter v. Humboldt F. Ins. Co.*, 12 Iowa 287; *Stout v. City F. Ins. Co.*, 12 Iowa 371; *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; *Brown v. Savannah Mut. Ins. Co.*, 24 Ga. 97; *Ripley v. Aetna Ins. Co.*, 29 Barb. (N. Y.) 552; s. c., 30 N. Y. 136; *Roach v. New York etc. Ins. Co.*, 30 N. Y. 546; *Portage Co. Mut. Ins. Co. v. West*, 6 Ohio St. 599; *Tasker v. Kenton Ins. Co.*, 58 N. H. 469; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Woodbury etc. Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518; *Hickey v. Anchor Assur. Co.*, 18 U. C. (Q. B.) 403; *Suggs v. Travellers' Ins. Co. (Tex.)*, 9 S. W. Rep. 676; *Edson v. Merchants' Mut. Ins. Co.*, 35 La. Ann. 353. But see *Mayor of N. Y. v. Hamilton Ins.*

as a year,¹ or six months;² and it may be specified when right shall accrue, as well as when it shall end.³ Thus, it may and often is, provided that a suit shall not be brought until expiration of a specified time after loss,⁴ or after the loss

Co., 39 N. Y. 46; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

The limitation in case of a mutual company may be in its charter. *Portage Co. Mut. Ins. Co. v. West*, 6 Ohio St. 599.

Such a stipulation is inflexible. Suit cannot be brought after the time has expired, although one begun within the time has been nonsuited, or discontinued, or a judgment obtained arrested. *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 462; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *O'Laughlin v. Union Cent. L. Ins. Co.*, 3 McCrary (U. S.) 543; *Wilson v. Aetna Ins. Co.*, 27 Vt. 99. The case of *Burton v. Buckeye Ins. Co.*, 26 Ohio St. 467, is perhaps more liberal. There the policy contained the provision that no suit or action should be brought thereon unless "commenced" within twelve months next after the loss. A loss having occurred, the assured, within the time limited, filed his petition against the company in due form of law, and caused a summons to be issued and served in due time upon the company. But by mistake the name of another company, instead of that of the defendant, was inserted in the body of the summons, although the endorsement and entitling of the summons were correct, and in conformity with the petition. After service of this defective summons upon the defendant and after the expiration of the twelve months limited for bringing the action, the company voluntarily appeared in court, and moved to strike the plaintiff's petition from the files, but made no motion to quash the writ or return. The plaintiff then, on leave of the court, amended the writ so as to make it conform to the petition. *Held*, that the amendment was authorized by the code and had the effect to make the action one brought within twelve months after the happening of the loss, within the meaning of the policy. And see *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Ketchum v. Protection Ins. Co.*, 1 Allen (N. B.) 136; *United States Ins. Co. v. Ludwig*, 108 Ill. 514.

The stipulation runs during the

minority of the beneficiary, there be no exception in his favor, and the assured having had knowledge that, cause of action should accrue to him, all, it would be during his minority. *Suggs v. Travellers' Ins. Co.* (Tex. S. W. Rep. 676).

Where an action has been brought within the time limited, a bill for reformation of the policy, in aid thereof, not barred though brought after such time, as such bill is not a suit on the policy, within the meaning of the limitation. *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. Rep. 724.

1. *Thompson v. Phoenix Ins. Co.* Fed. Rep. 266.

2. Fire broke out August 23rd, 1885, and was still burning the next day. There was a six months' limitation clause in the policy, and it was held that a suit commenced February 2, 1885, was too late. *Allemania Co. v. Little*, 20 Ill. App. 431. But see *Phœnix Ins. Co. v. Lebcher*, 20 Ill. App. 450.

3. But where there is a general declaration of liability suit may be commenced at once. *Aetna Ins. Co. v. Maguire*, 111 Ill. 342; *Penley v. Beacon Ins. Co.*, 111 Gr. Ch. (U. S.) 130. But see *Hartford v. Provincial Ins. Co.*, 7 U. S. (Ct.) 555.

If no time be mentioned when loss shall be payable, it will be within a reasonable time. *Tooley v. Railroad Passengers Ins. Co.*, 2 Ins. L. J. 275.

Proofs of loss were required to be furnished within thirty days, and loss was to be paid sixty days after receipt of notice and proofs, and disbursements were to be submitted to arbitration. *Held*, that it was not premature to bring an action three days after award, but more than sixty days after proofs of loss were served. *Clover v. Greenwich Ins. Co.*, 101 N. Y. 277.

Where no time is specified in the policy during which it shall run, an action may be maintained for a loss happening fourteen days after it was issued. *Schroeder v. Trade Ins. Co.*, 100 Ill. 157.

4. *Johnson v. Humboldt Ins. Co.* Ill. 92.

It has been held that this refers to

becomes due.¹ In the absence of a stipulation as to the time shall begin to run within which suit must be brought, it is at and from the time the proof of loss is made;² in the absence of other provisions, it is at this time, and this is the time the loss becomes due.³

In the absence of the insurers to insist upon the limitation of the time for bringing suit may be waived.⁴ But it is the general rule that no promise on the part of the insurers to pay the loss, or the expiration of the period to which suit is limited by the policy, will not revive the right;⁵ but it is possible that the right might be limited to such an unreasonably short period as to create a presumption of fraud or imposition on the part of the insurers, which would be raised.⁶ A promise to extend the time within which suit may be brought, made before the expiration of the period limited, is good, and will be enforced. So there may be

where the loss becomes a fixed debt at the time the property is destroyed. *Steen v. Niagara F. Ins. Co.*, 10 W. Pr. (N. Y.) 144; s. c., 89 N. Y. 42; 42 Am. Rep. 297; *Barber v. Merchants' F. Ins. Co.*, 97 N. Y. 42; *Home Mut. Ins. Co. v. Home*, 50 Ill. 120; *Hatton v. Provincial Ins. Co.*, 7 U. C. (C. P.) 555; *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85; 30 Fed. Rep. 668; *Friezen v. F. Ins. Co.*, 30 Fed. Rep.

taken with regard to an appraisal, recovery may be had without. *Commercial Ins. Co. v. Robinson*, 64 Ill. 265.

2. *Barber v. F. etc. Ins. Co.*, 16 W. Va. 658; *Hay v. Star F. Ins. Co.*, 13 Hun (N. Y.) 493; *Ins. Co. v. McDowell*, 50 Ill. 120; *Hatton v. Provincial Ins. Co.*, 7 U. C. (C. P.) 555; *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85.

3. *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85; *Utica Ins. Co. v. American Mut. Ins. Co.*, 16 Barb. (N. Y.) 171.

4. *Horst v. City of London F. Ins. Co. (Tex.)*, 11 S. W. Rep. 148. It is waived, for instance, if the company holds out hopes that the matter may be amicably adjusted until after the expiration of the time limited. *Martin v. State Ins. Co.*, 44 N. J. L. 485. But not by mere negotiations for a settlement. *Allemania Ins. Co. v. Little*, 20 Ill. App. 431.

But where a policy provided that a suit must be brought within six months of the loss, and the amount of the loss was fixed by the company's adjuster, which the company agreed to pay on certain conditions, which failed, and five months before the time elapsed they notified the insured that they would not pay, it was held that they had not waived the provision. *Garretson v. Hawkeye Ins. Co.*, 65 Iowa 468.

A provision that the waiver must be in writing is binding. *Waynesboro Mut. F. Ins. Co. v. Conover*, 98 Pa. St. 384; s. c., 42 Am. Rep. 618.

5. *Williams v. Vermont Mut. Ins. Co.*, 20 Vt. 222.

6. *Brown v. Savannah Mut. Ins. Co.*, 24 Ga. 97.

1. *Barber v. F. & M. Ins. Co.*, 16 W. Va. 658, where the policy provided that an action should be sustained unless commenced within six months after the loss should occur, and no suit could be maintained unless the amount was fixed by the adjusters. It was held that an action commenced within six months after the loss occurred.

2. Where a policy which provided that a suit should be commenced within six months after loss, and that the company should pay sixty days after notice of loss, it was held that the six months should not begin to run until after sixty days. *Ellis v. Council Bluffs F. Ins. Co.*, 507 Iowa 507. See also, to the same effect, *Miller v. Hartford F. Ins. Co.*, 704 N. Y.

3. *Chambers v. Atlas Ins. Co.*, 107 N. Y. 47, where the policy provided that a suit should be commenced within sixty days after proof of loss, and that after a loss should occur, the year was to be reckoned from the day of the fire.

4. Where a loss is made payable by inventory is sent and an appraisal is made, and no steps are

valid excuses for not bringing suit within the time limited. The war intervening and preventing has been held to be a sufficient excuse.¹ So, where there are conditions precedent to payment the performance in good faith of which consume more time than that to which suit is limited, it is held that this constitutes a good excuse for not bringing suit within such time.² Again, if the reason of noncommencement of the action within the limited time be the fault of the insurers themselves, it will be maintainable commenced afterwards;³ as it will where delay by the insured fraudulently induced by the insurers;⁴ or the limitation is waived by them otherwise waived.⁵

17. Limitation as to Forum.—Stipulations limiting actions to certain courts are not binding.⁶

1. *Semmes v. Hartford Ins. Co.*, 13 Wall. (U. S.) 159; *Hillyard v. Mut. Ben. Life Ins. Co.*, 6 Vroom (N. J.) 415; *N. Y. Life Ins. Co. v. Clapton*, 7 Bush. (Ky.) 179. See also *Cohen v. N. Y. Life Ins. Co.*, 50 N. Y. 610; *Sands v. N. Y. Life Ins. Co.*, 50 N. Y. 626.

2. *Martin v. State Ins. Co.*, 44 N. J. L. 485; *Mayor of N. Y. v. Hamilton F. Ins. Co.*, 10 Bosw. (N. Y.) 537; *Stout v. City Fire Ins. Co.*, 12 Iowa 371; *Longhurst v. Star Ins. Co.*, 19 Iowa 364; *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85. And see *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518. But compare *Pennell v. Lamar F. Ins. Co.*, 73 Ill. 303.

3. *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 254; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Day v. Dwelling House Ins. Co. (Me.)*, 16 Atl. Rep. 894; *Curtis v. Home Ins. Co.*, 1 Biss. (U. S.) 485; *Brady v. Western Ins. Co.*, 17 U. C. (C. P.) 597; *Davis v. Canada etc. Ins. Co.*, 39 U. C. (Q. B.) 452.

Thus where proofs of loss are furnished within a reasonable time before the expiration of the time limited for bringing suit, the company cannot defeat the insured by withholding its decision until the time has expired, even though the time allowed for examining the proofs would have consumed it. *Westchester F. Ins. Co. v. Dodge*, 44 Mich. 420.

4. *Grant v. Lexington etc. Ins. Co.*, 5 Ind. 26; *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Fullam v. N. Y. Union Ins. Co.*, 7 Gray (Mass.) 61; *Black v. Winnesheik Ins. Co.*, 31 Wis. 74.

Where the agent of an insurance company, who is authorized to settle a loss, induces the insured to forbear

bringing suit within the six months limited in the policy, the company waives the limitation. *Bish v. Haweye Ins. Co.*, 69 Iowa 184.

Repeated promises to pay the loss may waive the limitation. *Home etc. Ins. Co. v. Myer*, 93 Ill. 271.

5. If the company by its conduct gives the insured reason to believe that the sum found due on an adjustment will be paid without suit, suit may be maintained subsequent to the time specified if the company fails to pay. *St. Paul etc. Ins. Co. v. McGregor*, 63 Tex. 39.

The strictest proof of waiver will not be required, but there must be substantial evidence of this. Mere refusal to pay, though for special reasons, or negotiations looking to a settlement, do not amount to a waiver. *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Blanchard v. Hibernia Ins. Co.*, 36 La. Ann. 55. Nor is mere silence in itself a waiver. *Schroeder v. Keystone Ins. Co.*, 18 Phila. (Pa.) 286. It may, however, be competent to go to the jury as evidence of waiver. *Ripley v. Aetna Ins. Co.*, 29 Barb. (N. Y.) 552.

6. *Reichard v. Manhattan L. Ins. Co.*, 31 Mo. 518; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174; *Hall v. People's Mut. F. Ins. Co.*, 6 Gray (Mass.) 18.

A limitation of this nature in the charter may, however, be binding. *Arnet v. Milwaukee etc. Ins. Co.*, 18 Wis. 516; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238; *Howard v. Kentucky etc. Ins. Co.*, 13 B. Mon. (Ky.) 28. But even then only so far as may be warranted by a strict construction of the charter.

Williams v. Columbian Mut. Ins. Co., 29 Me. 465; *Martin v. Penobscot*

payment, shall be thus referred, will be upheld and enforced,¹ will an agreement to refer all matters where provision is made in the act of incorporation.² And, moreover, although a stipulation in the policy that all matters in dispute shall be submitted to arbitration is voidable as stated, yet a ratification thereof, such an agreement entered into by the parties after a loss has occurred, and a controversy arisen, is valid and binding.³

A provision for arbitration may be waived.⁴

shall be determined by agreement if possible, and if not, by arbitration, apply when the property is wholly destroyed. *Rosenwald v. Phoenix Ins. Co.*, 3 N. Y. S. Nat. Rep. 215. Nor, again, does it apply when no difference exists as to the amount of loss, but the dispute is wholly as to whether defendant is liable for the market value, or only the cost of the goods. *Rosenwald v. Phoenix Ins. Co.*, 3 N. Y. S. Nat. Rep. 215.

When only the question of damages is referred to arbitration, the question of a loss and of the liability of the company must be raised by an action on the policy, not on the award. *Soars v. Home Ins. Co.*, 140 Mass. 343.

1. *Davenport v. Long Island Ins. Co.*, 10 Daly (N. Y.), 535; *Trott v. City Ins. Co.*, 1 Cliff. (U. S.) 439; *Scott v. Avery*, 20 Eng. L. & Eq. 327; 5 H. L. C. 811; *Tredwin v. Holman*, 1 H. & C. 72; *Braunstein v. Accidental Death Assur. Co.*, 1 B. & S. 782; *Lowndes v. Stamford*, 18 Q. B. 425; *Goldstone v. Osborne*, 2 C. & P. 550.

Contra, *German-American Ins. Co. v. Etherton* (Neb.), 41 N. W. Rep. 406.

It is not, however, a condition precedent to suit unless there be a stipulation to such effect. *Canfield v. Watertown F. Ins. Co.*, 55 Wis. 419; *Crossley v. Connecticut F. Ins. Co.*, 27 Fed. Rep. 30. But see *Adams v. South British etc. Ins. Co.*, 70 Cal. 198.

But such a stipulation is legal. *Liverpool etc. Ins. Co. v. Wolff* (N. J.), 14 Atl. Rep. 561. And when inserted is binding. *Scottish Union etc. Ins. Co. v. Clancy* (Tex.), 8 S. W. Rep. 630.

If the provision be that the dispute shall be submitted to arbitration on the written request of either party, a written request is essential. *Wallace v.*

German-American Ins. Co., 1 Cray (U. S.) 335; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *German-American Ins. Co. v. Steiger*, 109 Ill. 254. And, in any event, some request. *Wallace v. German-American Ins. Co.*, 4 McC. (U. S.) 123.

2. *Reeves v. White*, 10 Eng. L. & Eq. 332; *Elliott v. Royal Exchange Ins. Co.*, 2 L. Rep. (Exch.) 237; *C. v. Bunbury*, 8 Bing. 394.

3. *Kill v. Hollister*, 1 Wilson 120. 4. It is waived where the insured refuse to pay any sum whatever. *Western Horse etc. Ins. Co. v. Putnam*, Neb. 331. Or elect to rebuild. *W. Cook v. Niagara F. Ins. Co.*, 91 N. Y. 478; s. c., 43 Am. Rep. 686.

In this last case the court say: "The rights of the parties rested altogether in contract, and the defendant assumed the responsibility of performing it according to its terms, subject to the right of the insured to damages in any breach of performance. The defendant, in case of liability arising against it upon its contract, had the option as to the manner in which it would discharge such liability. The mode looked to the compensation of the insured by the payment of damages for his loss, and the other to the restoration of the subject of insurance to its former condition. It could have been contemplated by the parties that both methods of performance were to be pursued. The selection of the defendant of one of these alternatives necessarily constituted an abandonment of the other. The election of the privilege of restoration involved the rejection not only of the right to discharge its liability by the payment of damages to the insured, but also of those provisions of the contract looking reference to that mode of performance."

INSURED.—See note 1.

INSURGENT.—An insurgent is one who is concerned in an insurrection. He differs from a rebel in that the rebel unjustly opposes the constituted authorities, while an insurgent may be justly opposes the tyranny of constituted authorities.²

person intended by the term "insured" in a mutual fire insurance policy is the person who owns the property, applies for the insurance, pays the premium and signs the deposit receipt, and not another person to whom the benefit is payable in case of loss. Though he may have a lease of the property. *Sanford v. Mechanics' Fire Ins. Co.*, 12 Cush. (Mass.) 182. In the erection of certain buildings under lease of one to whom the insurance money was payable, was held to render the policy void as against a by-law which prohibited the insured from altering the building without the consent of the company, anything to increase the risk. Interpreting a policy of insuring to contain a clause that before the insured pays all sums due to the company, the policy "insured" should be first destroyed. *TRACY, J.*, said: "It appears to me that the insured, in the sense of the policy, must mean not the party who is insured, but the party who is to benefit the insurance is made. The only one can properly be said to be insured; for he is ultimately to pay the premium and to have the benefit of the insurance. I do not say that the primary meaning of the words, 'insured,' should be displaced by showing that the insured to the contract have used the word in a different sense, as the design of the person in whose name the insurance is made. But the language of the policy is very clear in its import and would lead to such a result." *U. S. v. Pac. Ins. Co.*, 2 Sumn. (U.

but are responsible solely to the military law, according to the rules of law. 1 Whar. Cr. L., § 283; *Com. v. Holland*, 1 Duv. (Ky.) 182; *Clark v. State*, 37 Ga. 19; *Hammond v. State*, 3 Cold. (Tenn.) 129.

Acts of Insurgents—When Excused.—Acts done in obedience to an insurgent will be excused by the parent government where such insurgent government had the power of enforcing its orders. 1 Whar. Cr. L., §§ 94, 295; Whar. Cr. Pl. & Pr., §§ 435, 439.

Act of War.—The destruction of cotton under the orders of confederate military authorities, for the purpose of preventing it from falling into the hands of the federal army, was an act of war upon the part of the military forces of the rebellion, for which the person executing such order was relieved from civil responsibility at the suit of the owner, voluntarily residing at the time within the lines of the insurrection. *Ford v. Sargent*, 97 U. S. 594, 24 L. ed. 1018.

Where the armies of the United States were in the enemies' country, the military tribunals under the laws of war, and the authority conferred by statute, had the exclusive jurisdiction to try and punish offences of every kind committed by persons in military service. *Coleman v. State of Tennessee*, 97 U. S. 509 (24 L. ed. 1118).

Subject of Hostile State—Rules of War Govern.—Where the accused is the subject and resident of the state at war with our own, then, in case of his arrest within our borders, the case is one to be determined by the rules of war. Whar. Confl. L., § 909.

An insurgent is treated by the *Lex Julia* as a subject who assailed the integrity of the empire; but he was not a hostis or foreign enemy. He was a rebellious child, he was a child still; and the empire haughtily refused to treat him as in any sense an independent power. 2 Whar. Cr. L., § 1801.

Insurgents as Belligerents.—See *post*, tit. INSURRECTION. Also, Dr. Wharton's article in 33 Alb. L. J. 125-131.

reference to orders sent to carriers to forward goods, it was held in *Black v. North Staffordshire Ry. Co.*, 1 Bl. & El. 979, "The ordinary meaning of 'insured' is that the insurer is to bear the risk, and 'insured,' that the insured is to bear the risk." *Douv. L. Dict.* (15th ed.) 87; *Tracy v. State*, 12 Cush. (Mass.) 182. **Insurrection.**—When insurgents are not recognized as belligerents, their acts done on military duty;

INSURRECTION.

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nary Districts, 365.

I. DEFINITION.—Insurrection is a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or State; a rebellion.¹

II. STATUS OF INSURGENTS.—All the people of each State or district in insurrection must be regarded as enemies until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.² In the late w

1. *Allegheny Co. v. Gibson*, 90 Pa. St. 397; s. c., 35 Am. Rep. 670. Anderson's Law Dict. 59.

Insurrection is a rebellion of citizens or subjects of a country against its government (1 Bouv. Law Dict. 817), a rebellion, revolt, sedition, mutiny. Soule's Dict. of Eng. Synonyms, 226.

Distinguished from Popular Commotion and Sedition.—Publicists distinguish between popular commotion (*emotion populaire*), or tumultuous assemblage, which may be directed against the magistrates or merely against individuals; sedition (*sedition*) applying to a formal disobedience particularly directed against the magistrates or other depositaries of public authority; insurrection (*soulevement*), which extends to great numbers in a city or province, so that even the sovereign is no longer obeyed; and civil war. Wheaton's Intern. Law, 522.

Popular commotion, sedition and insurrection are all state crimes, even though arising from just causes of complaint; every violent measure being interdicted in civil society. These cases are always supposed to be susceptible of being suppressed by the sovereign; and it is usual, in doing so, to grant an amnesty in all but exceptional cases. Lawrence's Wheaton's Intern. Law, 522.

When High Treason.—An insurrection by armed men to prevent, by force and intimidation, the execution of an act of congress, is high treason by levying war. *United States v. Mitchell*, 2 U. S. (2 Dall.) 348; bk. 1, L. ed. 410; *United States v. Vigol*, 2 U. S. (2 Dall.) 346; bk. 1, L. ed. 409.

When Civil War.—When the regular course of justice is interrupted by rebellion, or insurrection, so that courts of justice cannot be kept open, civil war exists; and hostilities may be prosecuted on the same footing as those opposing the government with foreign enemies invading the land. Prize Cases, 67 U. S. (2 Black) 635; bk. 17, L. ed. 459.

It is not the less a civil war because it is an "insurrection." Prize Cases, 67 U. S. (2 Black) 635; bk. 17, L. ed. 459.

Whether the hostile party be a foreign invader or states organized in rebellion, it is none the less a war, although no declaration of it be unilateral. War may exist without declaration on either side. Prize Cases, 67 U. S. (2 Black) 635; bk. 17, L. ed. 459.

To constitute a levying of war, there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose. Enlistment of men to serve against the government is not sufficient. *Ex parte Bollman*, 8 U. S. (4 Cranch) 75; bk. 2, L. ed. 554.

2. *Mrs. Alexander's Cotton*, 69 U. S. (2 Wall.) 404; bk. 17, L. ed. 915.

Persons residing within states in insurrection at any time during the civil war must be considered as enemies without regard to their personal sentiments or disposition. *The Peterhoff*, 5 U. S. (5 Wall.) 28; bk. 18, L. ed. 51.

The principle that the personal character and disposition of an individual inhabitant of enemy territory cannot be inquired into in questions of capture, applies as well in civil as foreign war. Hence, all the people of any district that was in insurrection against the Uni-

rebellion, certain belligerent rights were conceded to the rebels in arms, but the government of the confederacy was not recognized. The intercourse was confined to its military au-

the southern rebellion are to be treated as having been enemies, except as by action of the government that relation may have been changed. *S. Dist. of N. Y. 1861, the Blatchf. Pr. Cas. (U. S.) 1, 16; Clinton, Blatchf. Pr. Cas. 15; Gooch v. United States, 15 U. S. 281.*

Treated as Enemies.—All persons residing within the territory of the United States whose property may be seized to increase the revenue of the war, are liable to be treated as enemies, though not foreigners. *Prize Cases, 12 U. S. (2 Black) 635; bk. 17, L. ed. 409.*

Residents of a district in insurrection against the general government, are liable to be treated as enemies, *4 West. L. Month. 437.*

The apprehension of any loss of property by waste or fire, or even of personal injury to the person, is no excuse for joining an insurrection. *United States v. Vigol, 2 U. S. (2 Dall.) 1, L. ed. 409.*

War with the Confederate States.—The rebels are at the same time enemies and traitors, and subject to the laws of each; while the United States maintain the double character of belligerents and sovereign, and have the same rights as belligerents, unimpaired by the fact that the rebels owe allegiance. *The Sprague (U. S.) 177; The Sprague (U. S.) 123; Monongahela Ins. Co. v. Chesapeake, 18 U. S. (5 Wheat.) 491; Cochran v. Tucker, 18 U. S. (5 Wheat.) 186; s. c., 91 Am. Dec. 334.*

War exists whenever the regular government is interrupted by rebellion, or insurrection, so that the government cannot be kept open; and as the rebels the legitimate governments of the rebels both sovereign and belligerents. See *The Hiawatha, 18 U. S. (5 Wheat.) 1; United States v. W. F. Johnson, 18 Leg.*

War exists when a party State which no longer obeys the government, and is sufficiently strong to maintain itself against him, or when, in

a republic, the nation is divided into two opposite factions, and both sides take up arms. Usage applies the term civil war to every war between members of the same political society. *Lawrence Wheaton's Intern. Law, 523.*

"Enemy Territory."—The district or country declared by the constituted authorities, during the late civil war, to be in insurrection against the government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war, and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments and dispositions. *Ford v. Surget, 97 U. S. (7 Otto) 595; bk. 24, L. ed. 1018.*

Same—Protection of Property.—The federal court has never gone further, in protecting the property of citizens residing in the insurrectionary States, from judicial sale, than to declare that, where such citizen has been driven from his home by a special military order, and forbidden to return, judicial proceedings against him were void. *Washington University of Mo. v. Finch, 85 U. S. (18 Wall.) 106; bk. 21, L. ed. 818.*

Same—Change in Status of Country.—Upon the issuing of General Butler's proclamation, the legal status of New Orleans and its inhabitants with respect to the United States became changed; before that time the former was enemy territory and the latter were enemies in all respects as if the pending strife had been a public war between the United States and a foreign belligerent and the city had been a part of the country of the enemy, although the conflict was in fact only a domestic insurrection of large proportions. *Desmare v. United States, 93 U. S. (3 Otto) 605; bk. 23, L. ed. 559.*

1. Hickman v. Jones, 76 U. S. (9 Wall.) 197; bk. 19, L. ed. 551; Thornton v. Smith, 75 U. S. (8 Wall.) 1; bk. 19, L. ed. 361; United States v. Keebler, 76 U. S. (9 Wall.) 83; bk. 19, L. ed. 574; Thomas v. Richmond, 79 U. S. (12 Wall.) 349; bk. 20, L. ed. 453; White v.

III. MEANS EMPLOYED TO SUPPRESS INSURRECTION.—1. Military Power Employed to Suppress Insurrection.—The paramount law common to all countries is that whatever force is necessary for self-defence is lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and although ordinarily dormant in peace, may be called forth by insurrection or invasion.¹ The State

Hart, 80 U. S. (13 Wall.) 646; bk. 20, L. ed. 685; *Spott v. United States*, 87 U. S. (20 Wall.) 459; bk. 22, L. ed. 371; *Dewing v. Perdicaries*, 96 U. S. (6 Otto) 193; bk. 24, L. ed. 654; *Keith v. Clark*, 97 U. S. (7 Otto) 454; bk. 24, L. ed. 1071; *Stevens v. Griffith*, 111 U. S. 48; bk. 28, L. ed. 348.

Rights of Belligerents.—Until the federal government recognizes a state of war as existing between a foreign government and an insurgent province, the rights of the latter as a belligerent cannot be admitted. A court's action in such case depends entirely on that of the general government. *Dimond v. Petit*, 2 La. Ann. 537; s. c., 46 Am. Dec. 556.

The recognition of rebel belligerency by other governments clothe insurgents with a quasi sovereignty for war purposes, and makes them in the view of courts lawful combatants. Such recognition is the province of the political and executive departments only. Courts must follow, and cannot lead, the executive. Until recognition, the former order of things in foreign states is considered by the courts as continuing; courts have no authority to institute an original inquiry into the conditions of a foreign strife in order to determine whether it should be deemed mere sedition and rebellion or a technical civil war carrying with it belligerent rights in the rebels. *The Ambrose Light*, 25 Fed. Rep. 408.

The confederate government was regarded by the courts as simply the military representative of the insurrection against the authority of the United States. *Ford v. Surget*, 97 U. S. (7 Otto) 594; bk. 24, L. ed. 1018.

By its act of secession and rebellion no rebel State ceased to be a State of the Union. The citizens of any such State did not, by such secession and rebellion, cease to be citizens of the Union. *Ford v. Surget*, 97 U. S. (7 Otto) 594; bk. 24, L. ed. 1018.

To the confederate army was, however, conceded, in the interest of humanity, and to prevent the cruelties of

reprisals and retaliation, such belligerent rights as belonged, under the law of nations, to the armies of independent governments engaged in war against each other—that concession placing soldiers and officers of the rebel army as to all matters directly connected with the mode of prosecuting the war “on the footing of those engaged in lawful war,” and exempting “them from liability for acts of legitimate warfare.” *Ford v. Surget*, 97 U. S. (7 Otto) 594; bk. 24, L. ed. 1018.

1. 2 Hare's Am. Const. Law 924.
Powers of Congress.—Congress, which is confided the power to make war, to suppress insurrection, to lay taxes, to make rules concerning commerce on land and on sea, is not deprived of these powers when the necessity for their exercise is called out by domestic insurrection and internal civil war. *Tyler v. Defrees*, 78 U. S. (10 Wall.) 331; bk. 20, L. ed. 161.

The power of regulating the militia and of commanding its services in time of insurrection and invasion, are (as has been emphatically said they are) natural incidents to the duties of superintending the common defence, and watching over the internal peace of the confederacy.” These powers must be construed as to the modes of their exercise as not to defeat the great end in view. *Martin v. Mott*, 25 U. S. (10 Wheat.) 19; bk. 6, L. ed. 537.

The constitution authorizes martial law proper to be exercised within the limits of the United States in time of invasion or insurrection, or during civil war, within the limits of the States in actual rebellion, when the public danger requires its exercise. It may be called into action by congress, or in case of justifying or excusing peril, by the president, when ordinary law no longer adequately secures public safety and private rights. *Ex parte Milligan*, 71 U. S. (4 Wall. 2); bk. 18, L. ed. 281.

A state may use its military power to put down an armed insurrection that is strong to be controlled by the ci

must determine what degree of force the crisis demands.¹
Confiscation of Property.—Confiscation of property is a means
 of suppressing insurrection. The acts of congress authorizing

Luther v. Borden, 48 U. S. 1; bk. 12, L. ed. 581.

By the President.—The act of congress of February 28th, 1795, authorizes the president to call out the militia to suppress an insurrection against a state on application of the legislative executive of the state. *Luther et al.*, 48 U. S. (7 How.) 1; L. ed. 581.

On the 2nd of May, 1792, the president almost verbatim by the act of February 28th, 1795, the president of the United States, in case of invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrection, call forth such number of militia of the states most convenient to the scene of action as he may deem necessary, and to issue his orders for that purpose to such officers of the militia as he shall think proper. *L. v. Moore*, 18 U. S. (5 Wheat.) L. ed. 22.

The authority to decide whether the insurrection contemplated in the constitution of the United States and the act of 1795, ch. 101, in which the president has the authority to call forth the militia, have arisen, is exclusively of the president, and his decision is binding upon all other persons. *Mott*, 25 U. S. (12 Wheat.) L. ed. 537. *McCall's Case*, 5 U. S. (259).

L. v. Borden, 48 U. S. (7 How.) bk. 12, L. ed. 581.

By the President.—There are many instances in which martial law has been declared and enforced in case of rebellion and insurrection, not only in the United States and British colonial possessions, but also in England and Ireland. *Ex parte Gould*, 2 H. Black 98; *Commentaries*, vol. 2, p. 602; *Parl. Deb.*, N. S., vol. 11, 3rd ser. 115; 1 Bl. Com. 136; *Bowling's Universal Pub. Law* 424; *Hallock's Law and Laws of War*, 375.

By the President.—Under the provisions of the act of July 13th, 1862, providing that the president by proclamation might declare the inhabitants of a State, or any section or part thereof to be in a state of insurrection

against the United States, the people of such parts of the insurgent states as came under national occupation and control were treated as if their relations to the national government had not been interrupted; and vessels belonging to citizens residing within such excepted districts, or neutrals residing there and not affected by any attempts to run the blockade, or by any act of hostility against the United States, after the publication of the proclamation, must be regarded as protected by its terms. *Cook v. United States*, 69 U. S. (2 Wall.) 218; bk. 17, L. ed. 866.

The government had the same power and rights in territory held by it by conquest in the insurrectionary states as if the territory had belonged to a foreign country, and had been subjected in a foreign war. *New Orleans v. N. Y. Mail Steamship Co.*, 87 U. S. (20 Wall.) 387; bk. 22, L. ed. 354.

After martial law is declared by a State in suppressing an insurrection, a military officer may arrest anyone who he has reasonable cause to believe was engaged in the insurrection, or order a house to be forcibly entered; but no more force can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of oppression, or an injury wilfully done to person or property, the person by whom or by whose order it is committed is answerable. *Luther v. Borden*, 48 U. S. (7 How.) 1; bk. 12, L. ed. 581.

A commanding officer in the ordinary course of a campaign owes no account, save to his own conscience, for denying quarter to a flying enemy. The rule holds good when insurgents take the field against the government, and they may be dealt with in any way which the laws of war permit in the case of a foreign enemy. There is, and from the nature of the case can be, no distinction in this regard between an intestine and a foreign war, because the government would otherwise be at a disadvantage in dealing with rebellion. But the rule is confined to the forces arrayed on either side, and does not extend to the citizens who take no part in the military operations, although they may sympathize with the insurgents. 2 *Hare's Am. Const. Law*, 922.

confiscation were a legitimate exercise of the war power, and constitutional.¹

1. *Miller v. United States*, 78 U. S. (11 Wall.) 268; bk. 20, L. ed. 135; *United States v. Republican Banner Office*, 11 Pittsb. Leg. J. (Pa.) 153.

Sentence of confiscation, if duly rendered, rises superior to all liens and equities. (*W. Dist of Pa.*, 1862). *United States v. The Isaac Hammett*, 2 Pittsb. (Pa.) 358.

Confiscation—Constitutionality of Law.—The act of July 13th, 1861, providing for the seizure and confiscation of vessels belonging to the citizens of States in insurrection, is within the legislative competency of congress. *The Ned, Blatchf. Pr. Cas.* (U. S.) 119.

The act of congress of August 6th, 1861, authorizes proceedings in the circuit court for condemnation of property used in aid of rebellion; and where a manufactory of arms for the use of insurgents was established on ground leased with the knowledge and consent of the lessor, the land became lawfully subject to prize and capture. *Union Ins. Co. v. United States*, 73 U. S. (6 Wall.) 759; bk. 18, L. ed. 879.

A vessel and her cargo owned by residents in an insurrectionary State in the war of 1861-65 are enemy's property, and are subject in the federal courts to condemnation as prize of war. *The Sally Magee, Blatchf. Pr. Cas.* (U. S.) 382; *affd.* 70 U. S. (3 Wall.) 451; bk. 18, L. ed. 197; *The Crenshaw, Blatchf. Pr. Cas.* (U. S.) 2.

The cotton of a citizen of a district in insurrection, taken as maritime prize should be delivered over to or its proceeds paid into the treasury of the United States in order that the claimant may have the opportunity hereafter to assert a claim to it. *Mrs. Alexander's Cotton*, 69 U. S. (2 Wall.) 404; bk. 17, L. ed. 915.

"Prize and Capture"—Statutory Construction.—The employment of the phrase "prize and capture," in the act of August 6th 1861 (12 St. 319, now Rev. St., § 5308), declaring private property used in promoting insurrection to be "lawful subject of prize and capture wherever found,"—does not limit the operation of the act to property taken at sea. Property found on shore, or even land itself, may be condemned under the act. *N. Dist. of Ga.*, 1868, *United States v. The Athens Armory*, 2 Abb. (U. S.) 129.

Confiscation of Property—Inform.—After a proceeding has been instituted, under the act of August 6th, 1861, ch. 68, § 3 (12 St. 319, now Rev. St., § 5311), to confiscate property used for insurrectionary purposes by the attorney general alone, wholly for the benefit of the United States, and after issue has been joined and proofs furnished by both parties, no person can come in asserting himself to have been the informant and so share the benefit of the proceeding. *Supreme Ct.*, 1866, *Francis v. United States*, 72 U. S. (5 Wall.) 372; bk. 18, L. ed. 603.

Same—Condemnation of Vessel.—Where a vessel liable to condemnation under the act of July 13th, 1861, in restricting trade with districts in insurrection, was actually condemned under the principle of international law, the court is not bound to apply the statute as though she had been condemned in a proceeding under it. *The Hampshire*, 72 U. S. (5 Wall.) 372; bk. 18, L. ed. 659.

The acceptance by a vessel of a claimance under the confederate states during fore open hostilities were set on foot by the insurgent states, will be regarded in a prize court as taking place previous to the recognition by the government of an existing state of civil war between the insurgent portion of the country and the government. *Hannah M. Johnson, Blatchf. Pr. Cas.* (U. S.) 97.

Same—Consent of Owner to Employment.—The statute of August 6th, 1861, regarded the consent of the owner to the employment of his property in rebellion as an offence, and inflicted forfeiture as a penalty, and the general pardon of the owner relieved him from much of the penalty as accrued to him under the act. *Armstrong's Foundry*, 73 U. S. (6 Wall.) 766; bk. 18, L. ed. 882.

Giving Aid and Comfort to Rebellion.—It is not giving aid and comfort to the rebellion for an alien, residing abroad, to purchase the products of insurrectionary districts for ordinary business purposes through a commercial house within the rebel lines, and accept and pay drafts abroad drawn for the purchase price of the products. Nor does such a transaction violate any statute of the United States.

Restraint of Commercial Intercourse.—Restraint of commercial intercourse is a means of suppressing insurrection. In the late rebellion, commercial intercourse between the inhabitants of territory in insurrection and those of territory not in insurrection, except under the license of the president, and according to regulations prescribed by the secretary of the treasury, was not lawfully prohibited.¹ Where intercourse between the inhabitants of two belligerent sections is prohibited by proclamation of the president as provided by the statute, a contract of sale with the inhabitants of such sections is void, and a suit cannot be maintained thereon for the benefit of the vendee.²

public law. Ct. of Claims, *Johnson v. United States*, 6 Ct. Cl. 533.

Act of July 13th, 1861, which provides for forfeiture of goods upon violation of trade between the territories and interdicted ports, to wit: the vessel or vehicle containing the same,—goods forming the cargo of a vessel proceeding to a point in an insurrectionary State are liable for seizure only while in transit, and not only while the contraband is on board. Dist. of Md., 1864, *United States v. Hatch*, 4 Am. L. Reg.

Special informer in proceedings for confiscation of property of those in insurrection against the United States is liable for costs and damages. *United States v. Francis*, 5 Wall. 338; bk. 18, L. ed.

Penbury v. United States (Schuta Cotton"), 73 U. S. (6 Wall.) 18, L. ed. 935; *Hamilton v. United States*, 21 U. S. (21 Wall.) 73; bk. 22,

of congress of July 13th, 1861, prohibiting of commercial intercourse with insurrectionary districts as a temporary act, nor provision limiting the restrictions therein established in relation of hostilities give it effect. The Reform, 70 U. S. (17 Wall.) 17; bk. 18, L. ed. 105.

Not until the proclamation of July, 1861, that commercial intercourse in general between the States was in insurrection and those States became unlawful. *Sumner v. Matthews*, 1875, *Matthews v. McSteen*, 1875, *Otto* 7; bk. 23, L. ed. 188. **The Confederate States.**—It is regarded as settled that the

late war between the so called Confederate States and the United States was a public war, and a war not only between the respective governments, but between all the inhabitants of the one territory on the one side, and all the inhabitants of the other territory on the other side, so that all the people of each must be regarded as having been enemies of all the people of the other during the continuance of the war. And not only on general principles did the existence of such war import a prohibition of all unlicensed commercial or business intercourse and correspondence between persons domiciled in the one territory and persons domiciled in the other, but by the express provision of the act of July 13th, 1861, and of the proclamation of the president of August 1861, issued in pursuance thereof, all commercial intercourse between the territory that was in a state of insurrection against the United States, and the citizens of the rest of the United States, became unlawful during the continuance of such condition of hostility. *Kanawha Coal Co. v. Kanawha etc. Coal Co.*, 7 Blatchf. (U. S.) 391.

2. Cutner v. United States, 84 U. S. (17 Wall.) 517; bk. 21, L. ed. 656.

Trading with Enemy—The doctrines of international or public law and express legislative declaration avoid a contract unlicensed or unauthorized by government, made during the rebellion, between a resident of an insurrectionary State and a State which was loyal to the Union; and after the war has terminated the defendant, in an action founded upon such a contract, may plead the illegality thereof as a defence. 8th Circ. (Iowa), 1871, *Phillips v. Hatch*, 1 Dill. (U. S.) 571; 3 Am. L. T. (U. S.) 191.

Where a citizen of New Orleans, af-

ter its subjugation by the federal forces in the late war, went within the rebel lines and engaged actively in the services of the rebel government, and while so engaged acquired the ownership of cotton, his contracts for the cotton were clearly illegal and void and gave him no title. *Desmare v. United States*, 93 U. S. (3 Otto) 605; bk. 23, L. ed. 559.

A purchase of cotton made by a citizen of New Orleans of the agent of the treasury department of the Confederate States within the Confederate lines was illegal; such purchase is not protected by a license in conformity with treasury regulations issued under the act of July 13th, 1861, to trade generally within the insurgent territory. *McKee v. United States*, 75 U. S. (8 Wall.) 163; bk. 19, L. ed. 329.

The act of July 17th, 1863, so far restricts the provisions of the act of July 13th, 1861, as to render void all purchases made of those holding official relation to the government of the Confederate States, even by those having a license to trade in the insurgent territory, issued under the provisions of the act of 1861. *S. Dist. of Ill., 1864; United States v. 137 Bales of Cotton*, Int. Rev. Cas. (U. S.) 70.

Under the act of July 13th, 1861, the president alone could license and permit commercial intercourse with any State or section in a state of insurrection. *The Sea Lion v. United States* ("The Sea Lion"), 72 U. S. (5 Wall.) 630; bk. 18, L. ed. 618. *United States v. The Reform* ("The Reform"), 70 U. S. (3 Wall.) 617; bk. 18, L. ed. 105.

A treasury license to trade generally within the insurgent territory would not authorize a purchase from an important official of the Confederate States. Such property was liable to seizure at the place of purchase, and to condemnation. *McKee v. United States*, 75 U. S. (8 Wall.) 163; bk. 19, L. ed. 329.

Licenses given by the military authorities were nullities, and conferred no rights whatever. *Whitenbury v. United States* ("The Ouachita Cotton"), 73 U. S. (6 Wall.) 521; bk. 18, L. ed. 935.

Conditions Imposed by Government.—The United States government had power to impose a condition requiring the payment of four cents per pound for a permit to purchase cotton in and

transported from the insurrectionary States during the late civil war. *Hilton v. Dillin*, 88 U. S. (21 Wall.) bk. 22, L. ed. 528.

Under the acts of congress and proclamation of the president declaring commercial intercourse between inhabitants of the States in rebellion and other citizens of the United States unlawful, unless a special licence obtained, a purchase of cotton by a citizen of Ohio from an inhabitant of an insurrectionary district passed no title. Such cotton is liable to seizure and condemnation. *S. Dist. of Ill., 1864; United States v. 910 Bales of Cotton*, Int. Rev. Cas. (U. S.) 66; *s. p.* *S. Dist. of Mo., 1863; United States v. 269½ Bales of Cotton*, Int. Rev. Cas. (U. S.) 2, 64; *S. Dist. of New York, 1862; The John Gilpin*, Blatchf. Cas. (U. S.) 291.

Section 8 of the act of congress of July 2nd, 1864, authorizing agents to purchase for the United States any products of States declared to be in insurrection, conferred no power to license trading within the military lines of an enemy. *United States v. Lane*, 75 U. S. (8 Wall.) 185; bk. 19, L. ed. 445.

Under the proclamation of the president of March 31st, 1863, the whole insurrectionary States were placed on the same footing as to intercourse with the loyal States, but trade, in conformity with a license granted by the president through the secretary of the treasury, and the regulations prescribed, was lawful in whatsoever part of an insurrectionary country it was carried on, and a contract to carry on trade in conformity thereto was lawful. *Cham v. Merrill*, 5 Coldw. (Tenn.) 1.

A purchasing agent of the United States had no authority to purchase products of insurrectionary States, except from the party who either owned or controlled them, or to purchase within the rebel lines. Neither the regulations nor the regulations through which was administered will protect a speculation wherein the products contracted to be sold were to be procured by a contractor within the rebel lines at the contract was made. *Maddox v. United States*, 82 U. S. (15 Wall.) bk. 21, L. ed. 61.

An order, excepting a person from the provisions of the Nonintercourse Act for the delivery and sale to the United States of products of the insurrectionary States, which he claims to own in which he has arrangements with par-

employed to suppress. *INSURRECTION.* Denial of Courts of Justice.

Denial of Courts of Justice to Insurgents.—A citizen of a State in insurrection has, legally, no standing in a court of the United States.

not give him authority to make future purchases. *United States*, 106 U. S. 113; bk. 27, L. ed. 266.

of July 2nd, 1864, recognized the regulations of the treasury on the sub-commercial intercourse with a insurrection. *United States v. ...*, 76 U. S. (9 Wall.) 72; bk. 27.

Treasury regulation No. 22, forbidding transportation of coin or any State or section declared insurrection's proclamation to be valid and was by the act of May 20th, 1862. *United States v. ...*, 80 U. S. (13 Wall.) 358; bk. 27, L. ed. 606.

Land under a power in a deed executed before the late civil war—the payment of promises, held valid, notwithstanding the place during the war and the persons therein were citizens and one of the States declared insurrection at the time of the property of such citizens. A loyal State is liable to seizure for debts contracted before the outbreak of the war, as in the case of nonresidents. *Supreme Ct., ... v. Finch*, 85 U. S. (18 Wall.) 21; bk. 21, L. ed. 818. *Comandez v. United States*, 7 Ct.

that a mortgage was made on a citizen's territory to a loyal citizen of the United States does not necessarily render the intercourse between the parties contrary to the proclamation of the president, of the August 16th, 1861, 12 Stat., 1262. The authority of the act of July 13th, 1861, ch. 3, § 5; *United States v. ...*, 103 U. S. (13 Otto) 595; bk. 26, L. ed. 4. Contract made in 1862, between subjects residing in France, of French birth, and persons residing within the limits of the insurrectionary States of the United States, of the other, was not a contract between enemies forbidden by the act of nations, the president's proclamation, or the acts of congress. *Marx*, 19 La. Ann. 491.

act of the Appropriation act

was that it authorized the secretary of the interior to expend the sum appropriated in purchase of cotton seed in the places indicated in the act, and to cause the same to be transported here for general distribution. He had no power whatever to authorize the agent to transport merchandise to any state or district declared to be in a state of insurrection, under the provision of a prior act. *United States v. The Reform ("The Reform")*, 70 U. S. (3 Wall.) 617; bk. 18, L. ed. 105.

The Appropriation act of February 13th, 1862, is not repugnant to the provision of the prior act prohibiting commercial intercourse between States or districts in insurrection and the rest of the United States. *United States v. The Reform ("The Reform")*, 70 U. S. (3 Wall.) 617; bk. 18, L. ed. 105.

The act of congress July 13th, 1861, prescribes that the president shall license trade with districts in insurrection. *The Sea Lion v. United States*, 72 U. S. (5 Wall.) 630; bk. 18, L. ed. 619.

A license from a special agent of the treasury department to carry on such commercial intercourse was a nullity and gave to the vessel and cargo no protection. They were as much liable to capture and condemnation as any other vessel or cargo leaving a blockaded port and coming within reach of a blockading vessel. *The Sea Lion v. United States ("The Sea Lion")*, 72 U. S. (5 Wall.) 630; bk. 18 L. ed. 618.

1. S. Dist. of N. Y. 1863, *The D. Sargeant, Blatchf. Pr. Cas.* 576.

From and after the act of July 13th, 1861, and the president's proclamation of August 16th, 1861, pursuant thereto, declaring the inhabitants of Arkansas to be in a state of insurrection against the United States, and until the determination of such insurrection, an inhabitant of Arkansas could not maintain an action in the courts within the State of Oregon against an inhabitant of the latter State; and therefore the period during which such insurrection existed is not to be counted as a part of the time limited for the commencement of such an action. 9th Circ. (Oreg.) 1870, *Chappelle v. Olney*, 1 Sawyer (17 S.) 401; 4 Am. L. T. (U. S.) 30.

The act of July 13th, 1861, impliedly

5. Legislative Acts of Insurgents Held Void.—An act of an insurgent State legislature, intended to aid rebellion, can be given no effect by the courts.¹

authorized the president, so long as congress did not otherwise provide, to declare by proclamation that the insurrection before declared by him to exist had ceased as to the inhabitants of any State or section thereof. And the president having declared the inhabitants of Arkansas in a state of insurrection, the court does not judicially know that any portion of them, then or afterward, were within the exception in the proclamation, because they in fact maintained a loyal adhesion to the Union, or inhabited a portion of the State occupied and controlled by the forces of the United States. 9th Circ. (Oreg.) 1870, *Chappelle v. Olney*, 1 Sawy. (U. S.) 401; 4 Am. L. T. (U. S.) 30.

Ordinarily, acts done by persons in arms against the government are tainted with the illegality of the end in view, and punishable by the criminal law, or they are a ground for the recovery of damages under the civil law; but when an insurrection assumes the proportions of a civil war, the relations of the insurgents among themselves are the same as if they were the subjects of an alien and hostile power, and no one of them can maintain an action against another for the consequences of a state of things to which they all impliedly agreed. 2 Hare's Am. Const. Law. 764.

1. *Texas v. White*, 74 U. S. (7 Wall.) 700; bk. 19, L. ed. 227.

The rebellion was only an insurrection; there was no rebel government *de facto*, so as to give any legal efficacy to its acts. *Hickman v. Jones*, 76 U. S. (9 Wall.) 197; bk. 19, L. ed. 551.

The legislature of any State in insurrection cannot be regarded in the courts of the United States as a lawful legislature, or its acts as lawful acts. Nevertheless, the rebel government in any such State was its only actual government, which, having displaced the regular and lawful authority and established itself in the customary seats of power and in the exercise of the ordinary functions of administration, constituted a *de facto* government, whose acts during its existence as such would be effectual, and, in many respects, valid. The acts of such a *de facto* though unlawful government, which

must be regarded as valid, are those that are necessary to peace and good order among citizens; such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to persons and estate, and other similar acts. The acts of such a government which must be regarded as invalid and void are those that were in furtherance or support of rebellion against the United States or intended to defeat the just rights of citizens, and other acts of like nature. *Texas v. White*, 74 U. S. (7 Wall.) 700; bk. 19, L. ed. 227; *Sprott v. United States*, 8 Ct. of Cl. (U. S.) 499.

Enactments of De Facto Legislatures of Confederate States.—All the enactments of the *de facto* legislatures in the insurrectionary States during the war which were not hostile to the Union or the authority of the general government, and which were not in conflict with the constitution of the United States or of the States, have the same validity as if they had been enactments of legitimate legislatures. *United States v. Home Ins. Co.*, 89 U. S. (22 Wall.) 99; bk. 22, L. ed. 816.

Whatever act of the legislature of a rebel State did not tend to further or support the rebellion or to defeat the just rights of citizens, but related merely to the domestic affairs of the people of the State as a community, aside from the connection of that people with the rebellion, is a valid act by a *de facto* though unlawful government, which will be sustained in the courts of the United States. Ct. of Claims, 1872, *Home Ins. Co. v. United States*, 8 Ct. of Cl. (U. S.) 449; aff'd, 89 U. S. (22 Wall.) 99; bk. 22, L. ed. 816.

Acts done under the authority of an insurgent body actually organized as a government within a large extent of territory, not merely in hostility to the regular and lawful government, but in complete exclusion of it from the whole territory subject to insurgent control, when in hostility to the regular government, cannot be recognized as lawful. 4th Circ. (Va.) 1868, *Keppel v. Pittsburgh R. Co.*, Chase Dec. (U. S.) 167.

There was no legislation of the Con-

INTEMPERANCE—INTEMPERATE—INTEND.

MEANS EMPLOYED TO PROTECT AND ENFORCE RIGHTS IN INSURRECTIONARY DISTRICTS.—The power to carry on war or suppress insurrection is not limited to victories in the field and the dispersal of insurgent forces. It authorizes measures to prevent the continuance of the conflict, and to remedy the evils which have resulted from its rise and progress.¹

INTEMPERANCE—(See DRUNKENNESS; HABIT; HABITUAL; MODERATION).—The use of anything beyond moderation. But does not necessarily imply drunkenness.² An occasional use of strong liquors is not to be deemed intemperance, but there is an indulgence to such an extent as would be considered an

INTEMPERATE.—See HABIT; HABITUAL.

INTEND.—See INTENT.⁴

Congress which the Supreme Court recognize as having any authority against the United States, or against any of its citizens who, pending the insurrection, resided outside of the declared insurrectionary districts. *Surget*, 97 U. S. (7 Otto) 41, L. ed. 1018.

Ex parte Ct. 1870, *Stewart v. U. S.* (11 Wall.) 493, 505; bk. 176.

Courts.—Trial of Civil Causes. The institution did not prohibit the trial by military authority, of the trial of civil causes during war in conquered portions of the insurgent States. *Mechanics' etc. Union Bank*, 89 U. S. (22 Wall.) 5; bk. 22, L. ed. 871.

It was within the constitutional authority of the president, as commander in chief, to establish provisional courts, in insurgent territory, to be held by national forces, for the trial of causes under State or Federal laws, and to establish the Federal court for the State of Texas. *The Grapeshot v. Waller* (the *Grapeshot*), 76 U. S. (9 Otto) 19; bk. 19, L. ed. 651.

Declaration of pardon and amnesty. President Johnson's Declaration of Pardon, 1868, was limited to persons who participated in the late insurrection and to the offence of rebellion against the United States or to their enemies during the war. *Gay's Gold*, 80 U. S. (10 Otto) 358; 20, bk. L. ed. 606.

Ex parte v. The People, 76 Ill.

Ex parte v. Home L. Ins. Co., 9 R.

4. In a patent for lands the words "intended for public uses" were held equivalent to "dedicated to public use." *Com. v. Alburger*, 1 Whart. (Pa.) 480.

Where a statute orders the forfeiture of liquors, "intended for sale contrary to law," the forfeiture will take place if any person has an intent to sell them unlawfully. But where the offence is keeping them "with intent" to sell, the intention on the part of the particular person charged must be proved. *State v. Learned*, 47 Me. 426.

A letter with a fictitious address, which cannot be delivered, is not "intended to be conveyed by mail," within the meaning of a statute prohibiting the embezzlement of such a letter. *United States v. Denicke*, 35 Fed. Rep. 407. Nor is a decoy letter placed in a receptacle for unmailable matter. *U. S. v. Rapp*, 30 Fed. Rep. 818.

The words "intended to be recorded" used in a deed in reference to a power of attorney, under which the deed purports to have been made, imply a covenant on the part of the grantor to procure the power to be recorded within a reasonable time. *Penn. v. Preston*, 2 Rawle (Pa.) 14; s. c., 4 Wheel. Am. C. L. 9.

Where in order to arrest on *mesne* process a plaintiff is required to make affidavit that "he has reason to believe that the defendant is likely to remove beyond the jurisdiction of the court," an affidavit that "he has reason to believe that the defendant intends to leave the State," was held insufficient. "A person may intend to do what there is no likelihood that he will do. And one person may safely swear that he has reason to believe that another in-

INTENT.—(See ALTERATION OF INSTRUMENTS; AMBIGUOUS CONTRACTS; CRIMINAL LAW; DOMICILE; FIXTURES; INTERPRETATION; STATUTES; WILLS).

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| 1. Definition, 366. | 6. Intention of Testator, 372. |
| 2. Legislative Intent, 366. [368. | 7. Intention as to Fixtures Between Landlord and Tenant, 376. |
| 3. Intention of Parties to a Contract, | 8. Proof of Intent, 376. |
| 4. Criminal Intent, 372. | 9. Presumption of Intent, 377. |
| 5. Animus Manendi in Questions of Domicile, 372. | |

1. **Definition**.—Intention is a design, purpose, resolve or determination of the mind.¹

2. **Legislative Intent**.—In the construction of a statute, the legislative intent is to be deduced from a view of every part of the statute taken and compared together.² If the words³ are

tends to do an act which he has no reason to believe it is likely that the other will do." *Wood v. Melins*, 8 Allen (Mass.) 434.

A covenant for the free use of the "newly intended road whenever the same may be made," will not apply to a road which, when the parties contracted, was intended to be made, but was executed and complete before the sealing of the covenant. *Crisp v. Price*, 5 Taunt. 548.

1. Referred to an act, it denotes the state of mind with which the act is done. *State v. Tom*, 2 Jones' Law (N. Car.) 416.

* It is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, and with such knowledge and with full liberty of action willing and electing to do it. *Smith v. State*, 2 Lea (Tenn.) 619.

2. *Crawfordsville etc. Turnpike Co. v. Fletcher*, 104 Ind. 97; *Holl v. Deshler*, 71 Pa. St. 299; *Davy v. Burlington etc. R. R. Co.*, 31 Iowa 553; *Berry v. Clary*, 77 Me. 482; *Catlin v. Hull*, 21 Vt. 152; *Lincoln College Case*, 3 Rep. 596.

3. *Co. Litt.* 381; 1 Blackstone's Com. 59. Where a word has a clear and settled meaning at common law, it ought to have the same meaning in construing a statute in which it is used. *Adams v. Turrentine*, 8 Ired. (N. Car.) 147; *Snell v. Bridgewater Co.*, 24 Pick. (Mass.) 296; *Belfast v. Folger*, 71 Me. 403; *Daily v. Burke*, 28 Ala. 328; *Gordon v. State*, 4 Kan. 489; *Coxe v. Martin*, 44 Pa. St. 322.

"**Person**."—The word "person" in a statute embraces not only natural but

artificial persons or corporations unless the language indicates that it is used in a more limited sense. *U. S. v. Ammedy*, 11 Wheat. (U. S.) 421; *Chase v. Steamboat Co.*, 10 R. I. 43; *Cincinnati Gas etc. Co. v. Avon*, 43 Ohio St. 257; *Oak Ridge Coal Lim. v. Rogers*, 108 Pa. St. 147. See **FRANCHISES**, 8 Am. & Eng. Ency. Law, pp. 625-627.

"**May**."—The word "may" is construed to mean "shall" or "must," where public interests are concerned. *M. v. Bank*, 1 Peters (U. S.) 64; *Mouth v. Leeds*, 76 Me. 28; *Stein v. Franklin Co.*, 48 Mo. 167; *Kenned v. Sacramento*, 10 Sawyer (C. C. U. S.) 29; *Healy v. Dettra* (Pa.), 7 C. Rep. 168.

"**And**"—"Or."—"And" may be construed in some cases to mean "or" or "or" to mean "and." *Bark Esty*, 19 Vt. 131; *McConky v. Medina County Superior Court*, 56 Mo. 83; *Com. v. Griffin*, 105 Mass. 185.

Elimination of Words.—Words introduced by mistake may be omitted if they changed to their obvious meaning. Thus, a statute conferring jurisdiction on courts, wherein the word "not" appears clearly by mistake in such a way as to nullify the intention of the legislature, will be read as though the word had been omitted. *Chapman v. State*, 16 Fed. App. 76. In *Palms v. S. wano County*, 61 Wis. 211, the word "south" was read "north." *Hicks v. Jamison*, 10 Mo. App. 11; *Haney v. State*, 34 Ark. 263; *Pe v. Hoffman*, 97 Ill. 234.

Punctuation.—Punctuation may be disregarded. *Martin v. Gleason*, 101 Mass. 183; *Albright v. Tayne*, 101

the intention is to be collected from the contract, from the provision and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be pre-ferred in accordance with what is consonant with reason and good

construction of statutes,² the courts seek to ascertain the legislative intent and to give it full effect. It will never be imputed to the legislature in enacting a law intended to violate the provisions of the constitution, since such an implication involves absurdity that the legislature intended to enact a nullity. Courts will, therefore, give a statute such a construction as will make it, if possible, to have effect.³ Where a portion of a

Hammock v. Loan Co., 105 Pa. St. 311; *Gyger's Est.*, 65 Pa. St. 311; *v. Bayne*, 44 Cal. 366. But *Mad v. Gerry*, 55 Vt. 174, there was a construction of a statute provided that "no lien on real personal property sold and passing into the hands of an additional purchaser shall be lost by not attaching creditors or without notice." The court held the act should read as though a comma after "purchasers," had been inserted in the act, though not in the original.

of the legislature creating a county, instead of a decimal between figures describing the sign of a degree was between figures would have been unless the sign were taken as a point; and it was held that should be so taken. *Brown v. Lea* (Tenn.) 732.

r.—No mere misnomer in the name of a natural person or corporation fatal to the validity of an act of a person or corporation in which the name is collected from the words. *v. Sprague*, 3 Sumner (U. S.) 10; *Frankel v. United States*, 19 U. S. 195; *State v. Timme*, 56 Wis. 45; *Corporations*, 4 Am. & Eng. Ency. 3, etc.

sufficient authority to warrant a construction from the words of a statute to follow them would be an absurd conclusion. *Perry v. Jefferson County*, 94 Ill. 100; *State v. Brewster*, 42 N. J.

in construing a statute, punctuation should rarely be disregarded. In *Albion v. Payne*, 43 Ohio 8, a comma was inserted after a word to

before it, to effectuate the obvious intent.

1. The evil consequences to the public, which will arise from a statute, will be considered when its meaning is doubtful, in order to give it a more beneficial construction, but when the legislative intent is clearly expressed, they cannot be considered. *Hines v. Wilmington etc. R. R. Co.*, 95 N. C. 434. See also *Middleton v. Greeson* (Ind.), 3 West. Rep. 908.

2. See also INTERPRETATION.

3. "Every presumption is in favor of the validity of a legislative act." *Northampton v. County Commissioners*, 145 Mass. 108; *Crowley v. State*, 111 Oreg. 512; *Alexander v. People*, 7 Colo. 155.

Where the language of a statute will bear two constructions equally obvious, that which makes it constitutional is to be preferred to that which makes it unconstitutional. *Grenada County Supervisors v. Brogden*, 112 U. S. 261. See also *Simmons v. California Powder Works*, 7 Colo. 285.

Constitutionality of Statutes Always the Preferred Construction.—*Reed v. Morton*, 119 Ill. 118; *St. Louis v. St. Louis R. R. Co.*, 14 Mo. App. 221; *People v. Kenney*, 96 N. Y. 294; *Franklin County and Nashville, Chattanooga & Ry. Co.*, 12 Lea (Tenn.) 521; *Morrison v. State*, 40 Ark. 448; *Re Metropolitan Gas Light Co.*, 85 N. Y. 526; *Dewhurst v. Allegheny City*, 95 Pa. 437; *South & North Ala. R. R. Co. v. Morris*, 65 Ala. 193; *State v. Exnicios*, 33 La. An. 253; *State v. Crowley*, 33 La. An. 782; *Tillman v. Cocke*, 9 Baxter (Tenn.) 429; *Turner v. Woodson County Commrs.*, 27 Kan. 314; *State v. Tuttle*, 53 Wis. 45; *Florida Central R. R. Co. v. Schutte*, 103 U. S. 118; *Ex parte Frazer*, 54 Cal.

statute conflicts with the constitution, it must be treated as a lity; if the remaining part is so dependent upon the unconstitutional sections that it cannot stand alone without a manifest version of the legislative intent, the whole statute is void.¹ however, the remaining part is not dependent upon that which is unconstitutional, and is complete in itself and capable being executed, it will be sustained.²

The courts will construe a statute of another State in accordance with the construction put upon it in that State.³

3. Intention of Parties to a Contract.—In ascertaining the intent of contracting parties the agreement is to be interpreted as a whole,⁴ and the subject matter and surrounding circumstances

94; *Berry v. Baltimore etc. R. R. Co.*, 41 Md. 446; *Isom v. Mississippi etc. R. R. Co.*, 36 Miss 300; *State v. Wheeler*, 25 Conn. 290; *Santo v. State*, 2 Iowa 165; *Myers v. People*, 67 Ill. 503; *Rood v. McCargar*, 49 Cal. 117; *State v. Snow*, 3 R. I. 64; *State v. Copeland*, 3 R. I. 33.

The practice of the legislature is entitled to weight in passing upon the constitutionality of a statute. *Howell v. State*, 71 Ga. 224. But the verbal opinions of a few members of the legislature afford no rule for construing a statute. *Cumberland County v. Boyd*, 113 Pa. 52; *District of Columbia v. Washington Market Co.*, 3 MacArthur (D. C.) 559. The journals of the legislature may be examined. *Edgar v. Randolph County Commrs.*, 70 Ind. 331. In *Bank of Pennsylvania v. Com.*, 19 Pa. St. 144, it was held that in construing a charter the court would not look into what occurred during its passage. But the same court held that when the object was identification of a statute, they would look into the legislative journal. *Southwark Bk. v. Com.*, 26 Pa. St. 450. See also *Miles v. Stevens*, 3 Pa. St. 42. The contemporaneous construction given by the executive department is entitled to great weight. *U. S. v. Philbrick*, 120 U. S. 52; *U. S. v. Hill*, 120 U. S. 169; *Westbrook v. Miller*, 56 Mich. 148.

Louisiana Code.—In construing the provisions of the Louisiana code, the French text may be looked to in clearing up obscurities or ambiguities in the English text. *Viterbo v. Friedlander*, 120 U. S. 707; *Lafourche Parish v. Terrebonne Parish*, 34 La. An. 1230.

1. *Jones v. Jones*, 104 N. Y. 234; *Re Groff*, 21 Neb. 647; *Burkholtz v. State*, 16 Lea (Tenn.) 71; *Harris v. Niagara Co. Supervisors*, 33 Hun (N. Y.) 279;

Tripp v. Overocker, 7 Colo. 72; *Garrison County Commissioners v. O.*, 7 Colo. 467; *People v. Jobs*, 7 Colo. 467; *Allen v. Louisiana*, 103 U. S. 80; *Garrison v. Racine*, 13 Wis. 398; *Allen v. Commissioners*, 22 Ind. 491; *Eck v. State*, 5 W. Va. 515; *Warren Mayor etc. of Charlestown*, 2 (Mass.) 84.

Although a proviso is ineffectual because unconstitutional, it cannot be regarded when the intention of the legislature is in question. *Conover v. Potts*, 79 Pa. St. 164.

2. Thus the *Maine* acts, 1873, ch. 10, authorizing the location of a public highway in Portland, is not unconstitutional because a clause separable from the rest of the act purports to authorize the city to lease land taken and not sold. It was held that if such clause authorized that which was unlawful, it must be eliminated. *Cole v. Cumberland Co. Commrs.*, 78 Me. 532. But where it is improbable that provisions standing alone, would have been enacted alone, the whole act must fall. *State v. Potts*, 43 Ohio St. 98.

In *New Jersey* a statute requiring the secretary of state to furnish copies of the laws to certain newspapers was rendered unconstitutional *in toto* because an unconstitutional provision reducing compensation to be paid to the secretary, for furnishing such copies, was what it was when he took the office. *State v. Kelsey*, 44 N. J. L. 1.

3. Thus the Ohio statute of limitations was construed by a New York court in accordance with the Ohio provisions, although a similar New York statute had received a contrary construction. *Howe v. Welch*, 17 (N. Y.) N. Cas. 397.

4. *Moneyppenny v. Moneyppenny*

considered.¹ Latent ambiguities may be cured by parol.² A writing is signed by the parties, it is presumed, until contrary be proved, to embody their final determination, abating preliminary negotiations.³ Contracts should be expounded as the intent was at the time the contract was made.⁴ The parties should ordinarily receive their usual and obvious mean-

Interpretation. 572; *Tate v. Tate*, 75 Va. 572; *Vorse*, 52 Iowa 417; *Alford*, 77 Pa. 221; *Talbot v. Mass.* 139; *Herbst v. Lowe*, 139; *St. Louis, Iron Mountain & Pacific R. Co. v. Beidler*, 45 Ark. 17; *Bentley v. Mo. App.* 481; *McConnel v. Orleans*, 35 La. An. 273; *Baltimore & Ohio R. Co.*, 60 Md. 300; *Garner*, 70 Ala. 443; *Busburn*, 64 Ga. 271.

Montgomery R. Co. v. U. S. 584; *Berry's Estate*, 14 N. D. 319; *Wilson v. Roots*, 8 N. D. 67. Thus, whether an instrument is a conveyance, a mortgage or a conditional sale (its language being to be determined by the intention of the parties, as shown by the transaction and attending circumstances. *Rockwell v. Humphrey*, 139; *Browne v. Hickie*, 68 Iowa 319; *Flood v. Mich.*, 6 N. D. 175; *Field v. Leiter* (Ill.), 139; *Lyon v. Hersey* (N. D.), 319; *Baltimore & Ohio v. Brydon* (Md.), 3 Cent.

defendants contracted to transfer certain stock vested in them to a third person and it appeared that no stock was in fact transferred in them, but the petitioners, the defendants, admitted a liability to deliver the stock, and the case was tried on the basis of the obligation of delivery. *Transfer of such subscriptions*; that the plaintiffs were entitled to recover upon the intent of the parties rather than its language. *Wiley*, 70 Iowa 110.

Wiley v. Humphrey, 57 Wis. 110; *Wiley v. Tucker*, 70 Ill. 527; *Iron Works v. Cottrell*, 31 Ill. 54; *Jennings v. Whitehead*, 138 Mass. 594.

parol testimony, introduced by the defendant to show that the contract was intended to be expressed in a writing, is equally balanced, must rely wholly upon the writing to direct in its construction. *C. of L.*—24

Interpretation. *Wilson Sewing Machine Co. v. Rutledge*, 60 Iowa 39.

3. Where a contract is reduced to writing, the language of the instrument is the best evidence of the intention of the parties. *Broughton v. Mitchell*, 64 Ala. 210; *Dwight v. Germania L. Ins. Co.* (N. Y.), 4 Cent. 532; *Jeffrey v. Grant*, 37 Me. 236; *Robb v. Bancroft*, 13 Kan. 123; *Walker v. Tucker*, 70 Ill. 527; *Dent v. North American Steamship Co.*, 49 N. Y. 390; *McConnell v. New Orleans*, 35 La. Ann. 273.

If a contract, however inartificially drawn, embraces every matter which the parties had definitely agreed to, it will be regarded as a completed contract, and not merely an agreement to agree. *Bean v. Clark*, 30 Fed. Rep. 225.

In *Methudy v. Ross*, 81 Mo. 481, an agreement was to be reduced to writing, and there was no evidence from which its exact terms could be inferred. The court held that there was a presumption that the parties understood that there was to be no contract until the terms were reduced to writing.

If parties make a writing, regarding it at the time as only provisional, but afterwards adopt it as a written contract, its language properly interpreted will control. *Higgins v. Missouri etc. R. Co.*, 73 Mo. 598. A prior verbal contract will be merged in a subsequent written one. *Carr v. Hays* (Ind.), 9 West. Rep. 183.

4. The practical interpretation put upon a contract by the parties is entitled to great if not controlling influence. *Topliff v. Topliff*, 122 U. S. 121; *Matthews v. Donahy*, 26 Mo. App. 660; *Butler v. Moses*, 43 Ohio 166; *Jennings v. Whitehead etc. Co.*, 138 Mass. 594; *Lyles v. Leshner* (Ind.), 7 West. Rep. 51. But the fact that a party to a contract for three years paid interest which, on a proper and obvious construction of the contract, he did not owe, should have no weight in the interpretation of the contract. *Garard v. Monongahela College*, 114 Pa. St. 337; *Ins. Co. v. Doll*, 35 Md. 89; *Railroad*

ing.¹ Ambiguous words are to be construed most strongly ag

Co. v. Trimble, 10 Wall. (U. S.) 367.

In *Canada Shipping Co. v. Acer*, 26 Fed. Rep. 874, a contract required the defendant to ship cattle on each of the steamers of a certain line, the "contract to include all steamers of the line intended to load this season." At the time the contract was signed the defendant was shown a list of the steamers. It was *held* that the defendant was not required to load an additional steamer which the company afterwards decided to put on.

See also *Gass's Appeal*, 73 Pa. St. 39; *Slater v. Cave*, 3 Ohio 80; *Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 23; *Adams v. Frothingham*, 3 Mass. 360; *Metcalf v. Taylor*, 36 Me. 28; *Hurley v. Brown*, 98 Mass. 545; *Union Pacific R. Co. v. Clopper*, 26 U. S. Sup. Ct. Rep. 243.

1. *Cincinnati, Sandusky etc. R. Co. v. Indiana, Bloomington etc. R. Co.*, 44 Ohio 287.

Plastering.—In *Mellen v. Ford*, 28 Fed. Rep. 639, the specifications of a building contract contained a general heading or title called "plastering," under which were subtitles, called "deafening," "lathing" and "plastering;" the whole title was described, and a contractor undertook "to do the plastering and stucco work" according to the specifications. It was *held* that there was no ambiguity raised by the double use of the word "plastering," and it was construed to mean all included under the general title, and not that alone described under the subtitle "plastering."

Support.—The word "support" includes tending and nursing in sickness. *Wall v. Williams*, 93 N. C. 327.

Corn.—In the United States, the word "corn" means, ordinarily, Indian corn, and not the cereal grains generally. *Kerrick v. Van Dusen*, 32 Minn. 317.

Each.—In a clause in a contract pertaining to the use of certain patent rights "during the terms for which said letters patent and each of them have been granted," it was *held* that "each" meant "every." *Potter v. Berthelet*, 20 Fed. Rep. 240.

Sound Order.—The words "sound order," in a contract relating to tobacco to be delivered to a manufacturer, were *held* to mean such order as would, with ordinary care, insure the sound condition of the tobacco for a reasonable

time after its arrival until it could be used in the course of manufacture. *Reynolds v. Palmer*, 21 Fed. Rep. 100. See also *Walton v. Black*, 5 De.

Required.—Under a contract to furnish stone to the government "at certain times and in such quantities as may be required," the word "required" must be construed to refer to the wants of the service. *Mueller v. United States*, 10 Ct. of Cl. 581.

Raise.—In *Bates College v. Trustees*, 135 Mass. 487, the defendant offered to give a certain sum of money to the college on condition that it could "raise a similar sum. The court *held* that the college was not bound to give because the college had been promised such a sum on certain conditions. The word "raise" was construed as equivalent to "collect."

Miscellaneous Instances.—*Cattle* construed to include *hogs*, in *De Bank v. St. Louis Bank*, 21 Wall. (U. S.) 204; *timber* to include *railroad ties*, in *Kollock v. Parcher*, 52 Wis. 400; and *patterns* to include *ties*, in *Mellwell v. Westchester Ins. Co.*, 101 Mass. 418.

In *Coquard v. Kansas City Bank*, 10 Mo. App. 261, there was an agreement to take certain bonds "at ninety per cent principal and past due interest;" it was *held* to mean not accrued interest to date of contract, but interest which had matured.

In construing a contract, the court sometimes construe *or* to mean *and*, and *vice versa*, in order to carry out the evident intent of the parties. *Mont v. U. S.*, 98 N. Y. 142.

Where words in any written instrument are free from any ambiguity, the parties themselves, or where external circumstances do not create any doubt, it is no difficulty as to the proper application of these words to claimants under the instrument or to the subject matter which the instrument relates, such application is always to be construed according to the strict, plain and common meaning of the words themselves, and evidence *dehors* the instrument for the purpose of explaining it according to the alleged or surmised intention of the parties, is inadmissible. *Dwig v. Germania L. Ins. Co.* (N. Y.), 4 Fed. Rep. 532; *Kyle v. Bellenger*, 79 Fed. Rep. 516. See also *Rubey v. Mo. C. & N. Min. Co.* (Mo. App.), 3 West. Rep. 100; *Gove v. Downer* (Vt.), 3 N. E. Rep.

introducing them.¹ Where a word is plainly omitted in a written contract by inadvertence, or is mistakenly used, it may be supplied or corrected, to accomplish justice, by enforcing the intention of the parties.²

If an instrument is partly written and partly printed, more weight is to be attached to the written than to the printed part, and they must, if possible, be reconciled.³ Contemporaneous writings between the same parties upon the same subject are to be read and construed as one paper.⁴

A construction which will make a contract legal is preferred to one which will make it illegal.⁵ Contracts should be supported unless they can be defeated.⁶

UNIFORMITY OF INSTRUMENTS;

Yates v. United States, 15 Ct. of Cl. 120.

4. Wenner v. Hoyt, 66 Wis. 227; St. Louis, Iron Mountain etc. R. Co. v. Beidler, 45 Ark. 17; Knowles v. Toone, 96 N. Y. 534; Hill v. Parker, 10 Ill. App. 323; Makepeace v. Harvard College, 10 Pick. (Mass.) 298; Hill v. Huntress, 43 N. H. 480; Longdale v. People, 100 Ill. 263; Wilson v. Roots (Ill.), 8 West. Rep. 71; Cincinnati etc. R. Co. v. Indiana etc. R. Co. (Ohio), 3 West. Rep. 606.

39. v. Mitchell, 77 Ind. 388.

Instrument shows upon its face that a word was used by mistake.

tsman, as, for example, the word *annually* in a mortgage instrument is to be read as if it had intended had been used.

Woodward, 26 Minn. 347.

will presume from mere inference that where words give a reasonable and repugnant to the intention they were inserted by mistake.

State v. McElhaney (Mo. 1884), 10 Mo. 608.

in Russell v. Bondie, 51 N. Y. 100.

an order on a dealer containing a printed agreement to pay a certain sum in notes. On the agreement, "It is understood that the note to be given on this sale, is a *Michigan mortgage*;" and that the force of the printed words was destroyed, and that the liability was not a personal one, but was enforced only through the mortgage.

Bolman v. Lohman, 79 Ala. 100.

an Express Co. v. Pinckney, 100 N. Y. 100.

Woodruff v. Commercial Union, 2 Hilt. (N. Y.) 122; Har- v. York City Ins. Co., 22 N. Y. 100.

ark v. Woodruff, 83 N. Y. 100.

ey v. Guion, 83 N. Y. 518; etc. R. Co. v. Gourley, 99 N. Y. 100.

Miller v. Hannibal etc. R. Co., 100 N. Y. 430.

contracts, which are pre- scribed by the government on printed forms, are so important that the unchangeable portion should receive a

uniform and unvarying construction.

Yates v. United States, 15 Ct. of Cl. 120.

4. Wenner v. Hoyt, 66 Wis. 227; St. Louis, Iron Mountain etc. R. Co. v. Beidler, 45 Ark. 17; Knowles v. Toone, 96 N. Y. 534; Hill v. Parker, 10 Ill. App. 323; Makepeace v. Harvard College, 10 Pick. (Mass.) 298; Hill v. Huntress, 43 N. H. 480; Longdale v. People, 100 Ill. 263; Wilson v. Roots (Ill.), 8 West. Rep. 71; Cincinnati etc. R. Co. v. Indiana etc. R. Co. (Ohio), 3 West. Rep. 606.

Where one instrument makes reference to another, the latter may be read to explain the former.

Bradley v. Marshall, 54 Ill. 173; Wilson v. Randall, 67 N. Y. 338; Babbitt v. Globe Ins. Co., 66 N. Car. 71; Herbst v. Lowe, 65 Wis. 316.

5. Standard Oil Co. v. Scofield, 16 Abb. (N. Y.) N. Cas. 372; Hamden v. Merwin (Conn.), 3 N. E. 534; Field v. Leiter (Ill.), 6 West. Rep. 54.

6. Findley v. Armstrong, 23 W. Va. 113; Greffey v. New York Cent. Ins. Co., 100 N. Y. 417.

But the minds of the parties must be met thus under partnership articles providing for dissolution on an offer in writing to buy or sell. One partner had sold the other an interest which was not wholly paid for, and subsequently offered to buy out that partner's share at the estimated value of its proportion to the whole business, which offer was accepted. It was held that as the offerer must have intended to have a deduction for the unpaid interest, and the other party did not so understand it, the minds of the parties had never met, and the agreement would not be enforced. Braentigam v. Edwards, 38 N. J. Eq. 542. See also Brunhild v. Freeman, 77 N. Car. 128.

4. Criminal Intent.—Where an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offence. See CRIMINAL LAW.

5. Animus Manendi in Questions of Domicil.—The *animus manendi* in questions of domicil, is the present intention of residing permanently or for an indefinite period in a given country.¹

6. Intention of Testator.²—The general rule for the construction of a will is that the intention of the testator is to be collected not from any particular or detached clause of the will, but from the whole taken together.³

The object of the court is to ascertain not merely the intention but the *expressed* intention, of the testator, that is, the meaning

In *Moulton v. Kershaw*, 59 Wis. 316, A wrote to B that he was able to offer salt in full car loads at a certain price per barrel, and should be pleased to receive an order. B at once telegraphed to A to ship him 2,000 barrels at that price. The court held that there was no contract; that A's letter was in the nature of an advertisement.

See also *Siebold v. Davis*, 67 Iowa 560; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45; *Moyer's Appeal*, 112 Pa. 290; *Sawyer v. Hebard*, 58 Vt. 375; *Minneapolis etc. R. R. Co. v. Columbus Rolling Mill*, 119 U. S. 148; *State v. O'Neil* (Vt.), 1 N. E. Rep. 781; *Patton v. Taft* (Mass.), 3 N. E. Rep. 693.

1. This subject is fully treated under DOMICIL, 5 Am. & Eng. Encyc. of Law, 864.

2. See generally, CODICILS, WILLS.

3. *Hinton v. Wilburn*, 23 W. Va. 166; *Brown v. Bartlett*, 58 N. H. 511; *Phillips v. Davis*, 92 N. Y. 199; *White v. Allen*, 81 Ind. 224; *Mather v. Mather*, 103 Ill. 607; *Welsch v. Belleville Savings Bank*, 94 Ill. 191; *Banks v. Jones*, 60 Ala. 605; *Nemmons v. Westfall*, 33 Ohio 213. In *Metcalf v. Framingham Parish*, 128 Mass. 374. GRAY, C. J., said: "The decision of this question doubtless depends upon the intention of the testator, as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect as far as possible the intention which it is of opinion that he has

on the whole will sufficiently declared." *Citing Ferson v. Dodge*, 23 (Mass.) 287; *Towns v. Wentworth*, Moore P. C. 256; *Abbott v. Midden*, 7 H. L. Cas. 68; *Greenwood v. Greenwood*, 5 Ch. D. 954.

In *Hancock's Appeal*, 112 Pa. 532, it was said that the question was what the testator meant, but what the meaning of his words, and a bequest to A, "son of my sister B, only sixths of such portion as the law will give to said B, and the remaining sixths to be divided among my sisters and brothers or their heirs," contains no bequest except as to interest; A accordingly gets his share in the other parts of the estate, and the intestate law.

In *Phelps v. Bates*, 54 Conn. 1, the testator gave a certain estate to his son, with a gift over if he should die during minority or without issue. It was held upon a construction of the whole will that the word *or* should be read *and*, and that the son's estate bequeathed was indefeasible on his attaining his majority.

A will is not to be so construed as to require an immediate division of its whole scheme supports the theory of a postponement of the division. Precatory words are to be looked upon as determining the intent. *McCartney v. Osburn*, 118 Ill. 403.

One item of a will gave the testator's lands to his wife for life, *in fee simple*. A later item gave certain of these lands to a son, and the rest to a daughter. It was held that the wife took the estate with a remainder to the son and daughter. *Vaughn v. Howard*, 7 N. D. 285.

Inconsistent Clauses.—Where the clauses of a will are inconsistent with one another, if enough can be gathered

3. **Heirs at Law.**—A devise to the “heirs at law” of the testator’s wife, in the event of the death of a certain person, was *held* not to enure to the benefit

that they are always used in the same sense, unless the context appears;¹ and where words are obviously miswritten, they be corrected.²

It will be presumed that a testator intended to dispose of

of a child adopted by the widow after her husband's death, there being nephews and nieces of the testator and his wife then living. *Wyeth v. Stone*, 144 Mass. 441. See ADOPTION OF CHILDREN, 1 Am. & Eng. Ency. of Law, 205, etc.

Legal Heirs.—A testator left property to his "legal heirs." His nearest relatives surviving him were brothers and sisters, nephews and nieces and a grand nephew. It was held that as the grand nephew would have taken nothing had the testator died intestate, he took nothing under the will. *Woodward v. James*, 44 Hun (N. Y.) 95.

Next of Kin.—A testator provided that if any of his legatees should die before his decease, their "next of kin" should take; it was decided that a brother of a deceased legatee should take to the exclusion of nephews. See also *Re Sinzheimer*, 5 Dem. (N. Y.) 321; *Weeks v. Cornwell*, 104 N. Y. 325; *Fontaine v. Thompson*, 80 Va. 229. A husband is not an heir or next of kin of his wife. *Ivin's Appeal*, 106 Pa. St. 176. See also *Tillman v. Davis*, 95 N. Y. 17.

Heirs.—The term "heirs" in a devise of a contingent remainder is, *prima facie*, used in its technical sense. *Irvine v. Newlin*, 63 Miss. 192; *Fabens v. Fabens*, 141 Mass. 395; *Kelley v. Vigas*, 112 Ill. 242. But it will be construed to mean "children" when such construction is necessary to effectuate the apparent intention of the testator. *McCartney v. Osburn*, 118 Ill. 403; *McKelvey v. McKelvey*, 43 Ohio 213; *De Laurencel v. De Boom*, 67 Cal. 362; *Huntress v. Place*, 137 Mass. 409; *Haverstick's App.*, 103 Pa. 394; *Henton v. Milburn*, 23 W. Va. 166.

Children.—When one gives property by will to his children and has children, his grandchildren are not meant. *Pugh v. Pugh*, 105 Ind. 552; *Re Cashman*, 3 Demarest (N. Y.) 242. But where consistent with the intention indicated by the will, the term "children" may include grandchildren. *Re Paton*, 41 Hun (N. Y.) 497. Compare CHILD, 3 Am. & Eng. Encyc. of Law 231.

Family.—The word "family" in a devise may be construed to include the

devisee's children and his wife so long as she continues to live with or is entitled to a support from him. *Lee v. Andrews*, 137 Mass. 50. FAMILY, 7 Am. & Eng. Ency. of Law 803.

Dower.—In *Barry's Estate*, 13 Pa. (Pa.) 310, it was held that where it is apparent that the testator used the word "dower" in its popular, not its technical sense, meaning the interest in real estate to a widow by the statutes of Pennsylvania, the will is to be construed accordingly.

"Bequest," "Devise."—Where a testator uses the words "bequest" and "devise" as synonymous, his intention will control. *Thompson v. Garfield*, 1 Lea (Tenn.) 310; *Evans v. Price*, 6 West. Rep. 492.

1. In *Sibley v. Perry*, 7 Vesey 311, the testator made certain bequests to several persons, if living at his death; and if not, he directed that their legal issue should take the shares which their respective parents, if living, would have taken; and he made other bequests to the lawful issue, living at certain periods, of other persons. *LORD DON* held that as to the former children were intended, and that there was a ground for giving to the "issue" the same construction in all the other bequests. See *Heasman v. Peck*, 1 L. R., 7 Ch. 275. See ISSUE.

2. A testator by will directed the payment of the income of his estate to his widow, until she should die or remarry. Should she remarry, she was still to have an annual income for life. A subsequent clause of the will contained a direction for the division of the estate among the testator's children upon the death or remarriage of the widow. It was held that the word "marriage" in the last clause was to be construed through inadvertence and should be rejected. *Lottimer v. Blumenthal*, 10 How. (N. Y.) Pr. 360. See also *Smart v. Hays*, 89 Ill. 11.

In describing land devised, it is apparent that the testator meant to devise the south half of the "south quarter of section 10, which he owned" and not the south half of the "south quarter, which he did not own, it

state, unless the contrary appears in clear and unmistakable terms;¹ and where the intention cannot operate to the full anticipated by the testator, the courts will carry it into effect as far as possible.

Circumstances under which the testator made his will are controlling in determining his intention;² but extrinsic evidence is admissible to alter, detract from, or add to the terms of the

will. The court would make the construction and construe the description according to the intent. *Severson v. Severson*, 68 Iowa 656.

Hard v. Kennard (N. H.), 2 N. H. 38; *Clarkson v. Clarkson*, 8 N. H. 655; *Byers v. Byers*, 6 N. H. 313; *Ferry's Appeal*, 102 Pa. 7; *Hancock's Appeal*, 112 Pa. 17; *Miller v. Pugh* (Pa.), 5 Cent. Rep. 402.

Where a will contained no residuary clause, and it was manifestly the testator's intention to dispose of all his property, the words "all my property after paying all my just debts," were held to pass deposits in a savings bank and railroad stock, not specifically mentioned. *Jenkins v. Fowler*, 63 N. H. 63.

See also *Harkness v. Harkness*, 105 N. C. 195; *Randenbach's Appeal*, 51 Pa. St. 51; *Irwin v. Zane*, 15 N. H. 6.

It is held that a testator must be presumed by the will to dispose of his whole estate, applies to a will in which the bequests are to one person and the other one being "also all the property on and around the homestead consisting of one cow, two hogs, a lot of wood, and all other property of every kind," although the testator also bequeathed a lot, chattels, and notes specifically bequeathed. *Taubenanz v. Taubenanz*, 20 Ill. App. 262.

In determining whether a testator had the power to sell the whole or part of her estate was a life estate it was held that surrounding circumstances, such as the state and condition of the property and of the testator, are to be considered to ascertain the intention. *Kaufman v. Breckinridge*, 7 Ill. 305. See also *Worth v. Worth*, 95 N. C. 239; *Byrnes v. Stillman*, 5 Cent. Rep. 402.

Where land is described by a description which includes land which the testator owned, it entitles the devisee to all the land owned by the testator within the description. *Bradley v. Rees*, 100 N. H. 1. Compare *Severson v. Severson*, 68 Iowa 656.

Where there was a bequest to the "Home Mission Society," it was construed to be the "American Missionary Society," upon proof of facts, outside the will, showing that the society must have been the one intended, and there being no society of the former name. *Beardsley v. American Home Missionary Society*, 45 Conn. 327. In *Gilmer v. Stone*, 120 U. S. 586, it was held that a bequest "to be equally divided between the board of foreign and the board of home missions," might be shown by parol to have been intended for the Presbyterian boards thus named, there being similar boards controlled by other denominations. See also *Webster v. Morris*, 66 Wis. 366; *Powers v. McEachem*, 7 S. C. 293; *Tuxbury v. French*, 41 Mich. 7; *Black v. Hill*, 32 Ohio 313; *Burthe v. Denis*, 31 La. An. 568; *Dunham v. Averill*, 45 Conn. 61; *Woodruff v. Migeon*, 46 Conn. 236; *Jenkins v. Merritt*, 17 Fla. 304; *Gillespie v. Schuman*, 62 Ga. 252; *Vermont Baptist State Convention v. Ladd*, 59 Vt. 5; *American Dramatic Fund Ass'n v. Lett*, 42 N. J. Eq. 43; *Re Mussig*, 3 Demarest (N. Y.) 225.

Extrinsic parol evidence is admissible to show that the omission of a child by the testator was intentional. *Peters v. Siders*, 126 Mass. 135.

Persons designated in a will by their nicknames may take legacies on sufficient evidence of identity. *Beatty v. Cong. Universalist Society*, 39 N. J. Eq. 452.

And a legatee need not be named if he is so described that he may be identified. *Cheney v. Selman*, 71 Ga. 384. See also *Acton v. Lloyd*, 37 N. J. Eq. 5, where the name of a legatee was erroneously stated in a will, but the bequest was not thereby avoided.

3. "It would be a dangerous doctrine to establish, and one without precedent, that where the language of the will is plain, and the residuary clause, in terms, disposes of the whole estate, and there are no qualifying words in any part of the will, you may introduce extrinsic

The heir at law cannot be excluded without an express declaration or necessary implication; and such implication imports, not moral necessity, but so strong a probability that an intention to the contrary cannot be supposed.¹

The testator's intention is to be gathered from a later clause in a will rather than from an earlier one.²

7. Intent as to Fixtures Between Landlord and Tenant.—Where personal property affixed by a tenant to the freehold is converted into realty is, in great measure, a question of intention. The common law criterion of physical attachment seems to have been generally set aside. This whole subject will be found fully considered under another title, and need not be here repeated.³

8. Proof of Intent.—Intention is a fact to be proved, as any other fact.⁴ All the attendant facts and circumstances tending directly or indirectly to throw light on the intention may be given in evidence, unless excluded by some other paramount rule of evidence.⁵

evidence to show that the testator did not know that certain property which he owned actually belonged to him, for the purpose of restricting the natural meaning and operation of the will." *Stannard v. Barnum*, 51 Md. 440. See also *Thomas v. Thomas* (Ind.), 7 West. Rep. 67; *Campbell v. Crater*, 95 N. Car. 156; *Re Huntington* (N. Y.), 6 Cent. Rep. 217; *Robinson v. Randolph*, 21 Fla. 629.

1. Where a will is capable of two interpretations, that one should be adopted which prefers those of the blood of the testator to strangers. *Wood v. Mitcham*, 92 N. Y. 375. See *Gelston v. Shields*, 78 N. Y. 275; *Irwin v. Zane*, 15 W. Va. 646.

But in *Powers v. McEachern*, 7 S. Car. 290, a devise to testator's wife and all his then living children was held to carry the estate to a woman with whom he was living in adultery, and her children, to the exclusion of his lawful wife and her children.

2. *Woodbury v. Woodbury*, 74 Me. 413; *Temple v. Sammis*, 48 N. Y. Super. Ct. 324; *Murfitt v. Jessop*, 94 Ill. 158; *Hemphill v. Moody*, 62 Ala. 510; *McNeill v. Caruthers*, 4 Bradwell (Ill.) 552; *Bromfield v. Wilson*, 78 Ill. 467; *Re Manice*, 31 Hun (N. Y.) 119.

But in the absence of any indication from the whole will of an intention to the contrary, a gift by words of general description is not to be limited by a subsequent attempt at a particular description. Thus where there was a devise of "all the real estate I may die possessed of, which property is situated

on the north side of N street," it was held that this passed the title also to a parcel of land on the south side of N street, whereof the testator died seised in fee. *Martin v. Smith*, 124 Mass. 111. See also *Jones v. Robinson*, 78 N. Car. 156; *Terry v. Smith*, 42 N. J. Eq. 504.

Where, however, there is an enumeration of particulars purporting on their face to be designed as qualifications of a preceding general description, words of general devise will yield. *Griscom v. Evens*, 40 N. J. 402.

In *Hendershot v. Shields*, 42 N. J. Eq. 317, where there were three repugnant and irreconcilable provisions in a will, it was held that the last should prevail.

In *Merkel's Appeal*, 109 Pa. 21, a bequest to testator's widow "of my remaining personal property," followed by pecuniary bequests, was read though written at the end of the will. See also *Ferry's Appeal*, 102 Pa. 21.

Where a devise gives the area of a tract of land and also describes its boundary, the latter description controls. *Lyon v. Lyon*, 96 N. Car. 439.

3. See **FIXTURES**, 8 Am. & Encyc. of Law, 48; and the present subject generally.

4. "It may be different to prove the state of a man's mind at a particular time, but if it can be ascertained it is as much a fact as anything else." *Huntington v. Fitzmaurice*, 55 Law Rep. Chanc. 650.

5. "Where there is a question whether an act was accidental or intentional

son cannot testify to another's motive or intent;¹ but parties are made competent witnesses, they may testify as to their own intentions.²

Presumption of Intent.—Where a person does an act, he is presumed to have intended that the natural and ordinary results of the act should follow.³

Each act formed part of a series of circumstances, in each of which the person doing the act was considered to be relevant." *Digest of Evidence* (May's Com. v. Titus, 116 Mass. 42; *Thurston*, 87 Ind. 437; Com. v. , 141 Mass. 590; *Thomas v. State*, 419; *Archer v. State*, 5; *Padgett v. State*, 103 Ind. 1; *State*, 32 Ohio 456; *Archer v. State* (Ind.), 4 West. Rep. 728. Where the intention of parties to a written contract is in issue, the contract is to be read in the light of the surrounding circumstances. *West*, 68 Ind. 548; *Mobile & Gulf R. Co. v. Jurey*, 111 U.

In the trial of an indictment for procuring an abortion by inducing a pregnant woman with a drug for that purpose, any declaration by the defendant before or after the performance of the act mentioned in the indictment, showing his purpose and intention, is admissible. *Lamb v. State*, 100 Ind. 100. West. Rep. 747.

Where one accused of passing counterfeit money, at the time of passing it, is shown as tending to conceal his knowledge and intent. *State*, 22 Ala. 43. But see *Littleham (Iowa)*, 17 N. W.

Statements made by a party to a contract after its execution, are admissible in showing the state of his mind at the time. *McRae v. Malloy*, 154.

Curton v. Cureton, 36 Ala. 120; *Lehr*, 117 Ill. 643; *Manufacturers' Bank v. Koch*, 105

Blano v. Goodwin, 48 N. H. 101. J., said: "Before the statute making parties competent witnesses by ordinary way to prove their understanding was by circumstance. But now that the party himself is admitted to testify, the reason for confining his testimony to a variety of circumstances

tending to show his purpose or understanding, when he knows and can testify directly what that purpose or understanding was. Accordingly . . . where the intention or good faith of a party to a suit becomes material, it may be shown directly as well as from the circumstances, and the party himself, if a competent witness, may testify directly to his intention or understanding, unless prevented by some other principle of law applicable to the particular case." See also *Evidence of Intent*, by W. F. Elliott, in 22 Cent. Law Jour. 271.

Parties have been permitted to testify as to their intent in questions of dedication of land to public uses. *Bidinger v. Bishop*, 76 Ind. 245. In questions of domicile. *Kennedy v. Ryall*, 67 N. Y. 380. As to the character of assignments for benefit of creditors. *Seymour v. Wilson*, 14 N. Y. 567; *Watkins v. Wallace*, 19 Mich. 57. As to intent in giving credit to another. *Danforth v. Carter*, 4 Iowa 230. And as to the intent of a payment. *Stearns v. Gosse*, 58 Vt. 38.

In *Coke v. Pottsville Bank*, 116 Pa. St. 264, a party to a contract was not permitted to testify to thoughts and purposes on his part undisclosed at the time of making the contract, in order to affect its legal import. See also *Browne v. Hickie*, 68 Iowa 330; *Thomas v. Loose*, 114 Pa. St. 35; *McCormick v. Joseph*, 77 Ala. 236.

In *Indiana*, where the intent with which an act is done becomes material, it is proper to ask what the intent was. *Over v. Scheffling*, 102 Ind. 191; *Heap v. Parrish*, 104 Ind. 36.

3. *People v. Petheram* (Mich.), 7 West. Rep. 596.

A married woman who resided in Massachusetts went to Maine, and immediately applied for and obtained a divorce for causes not a ground for divorce in Massachusetts. The presumption arose that her purpose in removing to Maine was to obtain a divorce. *Chase v. Chase*, 5 Gray (Mass.) 157.

Where a married man enters a house of prostitution and remains there all

INTENTION—INTENTIONALLY.

A criminal intent is presumed from the commission of an act which is criminal *per se*; ¹ but when a specific intent is necessary to make an act an offence, the commission of the act does not create a presumption that it was done with the specific intent. ²

INTENTION.—See INTENT. ³

INTENTIONALLY.—See INTENT. ⁴

night, the presumption is that he committed adultery while there. *Evans v. Evans*, 41 Cal. 103.

The exposing of oleomargarine unmarked, with pure butter or groceries, upon the shelves or counter of a store-room is an act from which an intent to sell may be inferred in the absence of rebutting evidence. *State v. Dunbar*, 13 Oreg. 591.

1. "When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offence, and no one who violates the law, which he is conclusively presumed to know, can be heard to say that he had no criminal intent in doing the forbidden act." *State v. Smith*, 93 N. Car. 516; *State v. King*, 86 N. Car. 603; *State v. Voight*, 90 N. Car. 741.

Thus where a person is proved to have been stabbed with a dirk knife by the defendant, from which wound he instantly died, the defendant is presumed to have intended to kill the deceased. *Com. v. York*, 9 Metc. (Mass.) 93. See also *Murphy v. People*, 37 Ill. 447; *McKibbin v. State*, 40 Ark. 480; *United States v. Adams*, 2 Dak. 305.

2. "When acts are equivocal and become criminal only by reason of the intent with which they are done, both must unite to constitute the offence, and both facts must be proved in order to a conviction." *State v. King*, 86 N. Car. 603; *State v. Smith*, 93 N. Car. 516. Thus where a statute makes a wilful, deliberate and premeditated killing murder in the first degree, and A kills B, there is no presumption that the killing was deliberate and premeditated. *Commonwealth v. Dunn*, 58 Pa. St. 9; *Hamby v. State*, 36 Tex. 523; *People v. Plath* (N. Y.), 1 Cent. Rep. 772.

Where a statute makes indictable an act which is merely *malum prohibitum*, when done "wilfully and maliciously," the existence of an evil mind in doing the forbidden act is, as a general rule, a constituent part of the offence. Thus where a defendant was indicted under an act prohibiting the wilful and malicious

tearing down of a sheriff's advertisement, it was held that he had the intent to show that he tore down such advertisements without any evil design. *Folwell v. State* (N. J.), 5 Cent. Rep. 355.

3. An indictment charging that an assault was made with an "intention to ravish, instead of "intent," is defective. *State v. Tom*, 2 Jones L. (N. Car.) 100. "In Walker's Dictionary the two principal definitions of these words are the 'intent to wil', 'design', 'purpose.' Can the court say then that a charge of a felonious assault made with the 'intention' to commit a rape, i. e., with the 'design or purpose to commit a rape' different from a charge of an assault made with the 'intent' to commit a rape, i. e., with a design or purpose to commit a rape? The bare statement of the proposition shows its absurdity."

In construing the clause in an insurance policy—"in case of the death of the insured by his or her own act or intention," etc., the court said: "To mind the use of the word 'intention' in the policy before us, does not essentially vary or strengthen the legal meaning of the sentence from that of the word 'act' in the Bigelow case. The word 'act' necessarily implies intention, and it seems to me the policy in this case refers in no material import from that already decided by this court: that is to say, you get just as strong a sentence and it means practically just as much as if it said that the company shall not be liable if the assured comes to his death by his own act, sane or insane, as if you said that the company shall not be liable if the assured comes to his death by his act and intention, sane or insane." *Chapman v. Rep. L. Ins. Co.*, 6 (U. S.) 240.

4. A statute provided that where the directors of certain corporations "intentionally neglect" to file annual reports they shall be liable for debts contracted during the period of neglect. In an action brought against the directors of a corporation below found *inter alia* that they had no active intention to violate the law," but reached the conclusion of

INTERCOURSE—INTERDICTION—INTEREST.

INTERCOURSE.—"Sexual intercourse," in the proper meaning of the term, is ordinary and complete intercourse; it does not include partial and imperfect intercourse: yet not every degree of intercourse would deprive it of its essential character. There are degrees difficult to deal with; but if so imperfect as to be unnatural, it would, legally speaking, be no intercourse. These words in a statute are equivalent to "carnal knowl-

INTERDICTION.—An interdiction or suspension of commercial intercourse means, *ex vi termini*, an entire cessation for the time being of all trade whatever.³

INTEREST.

DEFINITION. 379.
GENERAL PRINCIPLES. 379.
CONTRACTS FOR INTEREST. 380.
 (a) *Express Contracts.* 380.
 (b) *Implied Contracts.* 381.
INTEREST AS DAMAGES FOR DEFAULT IN PAYMENT OF A DEBT. 383
 (a) *On Accounts.* 384.
 (b) *On Rents.* 387.
 (c) *On Legacies, Annuities, etc.,* 387.
 (d) *On Taxes, Orders and Warrants of Municipalities.* 388.
 (e) *On Purchase Money.* 389.
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V. AS DAMAGES FOR THE USE OR BENEFIT OF ANOTHER'S MONEY. 395.
 (a) *On Loans and Advances.* [395].
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VI. COMPUTATION. 402.
 (a) *Time During Which Interest Accrues.* 402.
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VII. RATE. 411.
 (a) *In General.* 411.
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DEFINITION.—A compensation usually reckoned by percent on the loan, use, or forbearance of money.

GENERAL PRINCIPLES.—At common law, interest was not allowed in any case. The term was synonymous with usury, and a punishable offence.⁴ In this country it is sanctioned by the

statute the neglect or omission is an intentional one." This was held by the supreme court in *Division of the statute . . . construed as though the word "intentionally" was omitted and yet such was the construction given it in the conclusion arrived at in* *Breitung v. Lindauer*, 37

and executed in the heat of passion upon sudden provocation or in sudden combat, the case falls within the meaning of a statute that speaks of killing "intentionally but without premeditation." *State v. Hoyt*, 13 Minn. 134.

1. *Doe v. A—g*, 1 Rob. Ecc. Cas. 298.

2. *Noble v. State*, 22 O. S. C. 545.

3. *The Edward*, 1 Wheat. (U. S.) 272.

4. *Abbott's Law Dict.*

2 Blk. Comm. 454; *Viner's Abridgment*, title Interest (c), § 7; *Chitty on Contracts*, § 3, 5. *Harmanson v. Wilson*, 1 Hugh (U. S.) 207; *Pekin v. Reynolds*, 31 Ill. 529; s. c., 83 Am. Dec. 244; *Houghton v. Page*, 2 N. H. 42; s. c., 9 Am. Dec. 30.

statutes of all of the States, and has been held to be entire creature of statute, and only allowed where so authorized.¹ generally allowed by law on two grounds, namely, on contract express or implied, or by way of damages,² either for a default in the payment of a debt, or for a use or benefit derived from the money of another.³ Where it is imposed to punish tortious, negligent or fraudulent conduct, it is a question within the discretion of the jury.⁴

In a case where interest as a general thing is due, as in the case of an account stated, the fact that there may be no statute in that place where the account is settled and the transaction takes place does not prevent the recovery of interest. In such a case interest at a reasonable rate, and conforming to the customs which obtain in the community in dealings of the same character, may be allowed by way of damages for unreasonably withholding an overdue account.⁵

III. CONTRACTS FOR INTEREST—(a) Express Contracts.—Interest is allowed in all cases where there is an express contract to pay

1. Ill. Cent. R. Co. v. Cobb, 72 Ill. 148; Pekin v. Reynolds, 31 Ill. 529; s. c., 83 Am. Rep. 244; Chicago v. Allcock, 86 Ill. 385; South Park Comm. v. Dunlevy, 91 Ill. 54; Hamer v. Kirkwood, 25 Miss. 95; Clay Co. Supervisors v. Chickasaw Co. Supervisors, 64 Miss. 534; Warren Co. v. Klein, 51 Miss. 807; State v. Farrier, 47 N. J. L. 383; Randall v. Greenwood, 3 Mont. 506; Denver etc. R. Co. v. Conway, 8 Colo. 1; Reece v. Knott, 3 Utah 451.

In Dunne v. Mastick, 50 Cal. 244, it was held that the legislature had power to impose on all debtors interest from the date of the adoption of the code, by way of compensation for the delay in the payment of money already due. Such a statute is not retrospective, since it operates only on the future rights of the parties. A fresh demand and refusal would be a new assertion of right and would impose a new liability.

On Claim Against County.—Where a claim against a county arises from a statute and not *ex contractu*, and such statute makes no provision for interest, it is error for a court to adjudge interest thereon. The general statute, in this State, on the subject of interest does not embrace such claims against counties. Warren County v. Klein, 51 Miss. 807, cited; Clay Co. Supervisors v. Chickasaw Co. Supervisors, 64 Miss. 534.

A State law abating interest does not impair the contract. Harmanson v. Wilson, 1 Hugh. (U. S.) 207.

2. Harmanson v. Wilson, 1 Hugh. (U. S.) 207; Selleck v. French, 1 Conn.

32; s. c., 6 Am. Dec. 185; Rensselaer Glass Factory, 3 Conn. Y.) 393; Foote v. Blanchard, 6 (Mass.) 221; s. c., 83 Am. Dec. 62.

3. Harmanson v. Wilson, 1 Hugh. (U. S.) 207; Selleck v. French, 1 Conn. 32; s. c., 6 Am. Dec. 188.

4. Sedgwick on Damages, 374; v. Fiedler, 12 N. Y. 40; Vandervoort v. Gould, 36 N. Y. 639; Fasholt v. 16 Serg. & R. (Pa.) 266; Hinckley v. Beckwith, 13 Wis. 31; Buford v. 1 Bay (S. Car.) 273; s. c., 1 Dec. 615; Wolfe v. Lacy, 30 Tex.

5. Young v. Godbe, 15 Wall. (U. S.) 562.

6. Selleck v. French, 1 Conn. c., 6 Am. Dec. 185; Fake v. A. Exr., 15 Wend. (N. Y.) 76; Stearns v. Brown et ux., 1 Pick. (Mass.) 1; Edgerton v. Aspinwall, 3 Conn. Bannister v. Roberts, 35 Me. 76; Harmanson v. Wilson, 1 Hugh. (U. S.) 207; Radford v. Life Ins. Co., 12 (Ky.) 434; Redfield v. Ystalifer & Co., 110 U. S. 174.

Interest cannot be given in a judgment by default on an obligation to the day it falls due, containing a condition that on several conditions it shall bear interest from a previous date, unless the declaration shows that the conditions were fulfilled. V. Moore, 1 T. B. Mon. (Ky.) 213.

Where a bond providing for the payment of interest annually was secured by a deed of trust, and afterwards several years, when the interest was due and payable, interest notes were

of course, by the laws against usury.¹ A special contract to pay interest gives a right of action to recover the interest, although the principal is not due when the interest becomes payable,² but when it is not specially contracted for, interest cannot be recovered in a separate action after payment of principal.³

Implied Contracts.—The law will imply a contract to pay interest where such has been the usage of trade, or the course of dealing between the parties, or the special custom of one party, and acceded to by the other.⁴

When the same rate of interest is provided by a legal bond, as between the parties to a deed of trust will secure the interest on these new interest-bearing contracts such interest cannot avail subsequent creditors or purchasers. *Barbour v. Tompkins* (W. Va. Rep. 1).

Mississippi conventional interest is not allowed upon a contract unless specially stipulated. *Stephens v. La. Ann.* 145.

Where the defendants agreed that the defendants' money should receive a bonus of 10 per cent. on their advances before interest. *Held*, 1. That, in the absence of a special promise by plaintiff, interest could be recovered on the bonus; 2. That where interest was paid on the bonus, without any agreement on the part of plaintiff, he could not recover it back, nor be allowed to set it in the accounting. *Church v. Thomp. & C.* (N. Y.) 454; *in* (N. Y.) 254.

Where money due by parties is in their hands, for which they are to pay interest, they must bring the money into court to exonerate themselves from payment of interest. *Butcher, 3 J. J. Marsh.* (Ky.) 443. The claim of a party for loss on an alleged failure of the United States to perform its contracts with him, and the manner of payment, is a political act of congress, referred to the courts of claims "to investigate the merits, to ascertain, determine and the amount equitably due, if such loss and damage," the law is applicable to the adjudication by that court in the exercise of its general jurisdiction must not include interest, not having been provided for in the contracts, cannot be recovered thereon. *Tillson v. United States* (U. S.) 43.

A contract to pay interest on interest yet due is inequitable, and

will not be enforced, although if the interest is due it may be added to the principal, and a contract to pay interest on such new principal will be upheld. *Mason v. Callender*, 2 Minn. 350; s. c., 72 Am. Dec. 102.

In an action on a bill single, payable at a future day certain, "with interest from date if not punctually paid," the interest, being a penalty, is not recoverable. *Dinsmore v. Hand, Minor* (Ala.) 126; *Billingsly v. Cahoon*, 7 Ind. 184.

Contra, *Rumsey v. Matthews*, 1 Bibb. (Ky.) 242; *Gully v. Remy*, 1 Blackf. (Ind.) 69; *Parvin v. Hoopes*, 1 Morr. (Iowa) 294.

2. *Fake v. Addy*, 15 Wend. (N. Y.) 76; *Edgerton v. Aspinwall*, 3 Conn. 445; *Stearns v. Brown*, 1 Pick. (Mass.) 530; *Radford v. Southern Life Ins. Co.*, 12 Bush (Ky.) 434; *Sessions v. Richmond*, 1 R. I. 298.

3. *American Bible Society v. Wells*, 68 Me. 572; *Howe v. Bradley*, 19 Me. 31; *Succession of Anderson*, 12 La. Ann. 95; *Southern etc. R. Co. v. Moravia*, 61 Barb. (N. Y.) 180; *Tenth Nat. Bank v. Mayor*, 4 Hun (N. Y.) 429; *American Bible Society v. Wells*, 68 Me. 572.

The plaintiff was the holder of city bonds. Each had coupons attached and conditions that "if the interest is not so paid this bond becomes due and payable to the holder." Upon maturity of certain of the coupons they were presented for payment, which was refused. An action was brought to recover both principal and interest. Pending the suit, the treasurer tendered payment of the interest and costs, which the plaintiff accepted. *Held*, that in the absence of any agreement to that effect the plaintiff did not, by his acceptance, waive his right to prosecute the suit then commenced for the recovery of the principal. *Moore v. Jefferson*, 45 Mo. 202.

4. *Selleck v. French*, 1 Conn. 32; s.

Where it is the custom of the creditor known and acquiesced in by the debtor, to charge interest on accounts after a certain time, or where such is the uniform usage of the trade, such facts, if proven to the satisfaction of the jury, are evidence of an agreement, and interest will be allowed.¹

c., 6 Am. Dec. 185; *Williams v. Craig*, 1 Dall. (U. S.) 313; *Koons v. Miller*, 3 W. & S. (Pa.) 271; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Ayers v. Metcalf*, 39 Ill. 307.

1. *Veiths v. Haggie*, 8 Iowa 163; *Knox v. Jones*, 1 Dall. (U. S.) 193; *Rayburn v. Day*, 27 Ill. 46; *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Esterey v. Cole*, 1 Barb. (N. Y.) 235; *Ayers v. Metcalf*, 39 Ill. 307; *Barclay v. Kennedy*, 3 Wash. (U. S.) 350.

When parties themselves settle their accounts (at regular intervals) without charging each other with interest, it is not in accordance with law or equity to go behind such settlements for the purpose of allowing interest in favor of one party against the other. Such settlements are considered conclusive, unless impeachable for mistake or fraud; and transactions anterior to them are not interest bearing. *Chandler v. People's Savings Bank et al.*, 61 Cal. 401.

The rule that a custom to be binding must be uniform, long established, generally acquiesced in and well known, applies to the usage of merchants in paying interest. *Turner v. Dawson*, 50 Ill. 85.

If usage has fixed a specific time after which book accounts bear interest, such interest need not be demanded in the copy of the claim filed; but if the bargain be for interest at an earlier period than usage would give it, or, if a special contract be relied on, it must be set forth in the claim. *Adams v. Palmer*, 30 Pa. St. 346.

It is not error for the court to instruct the jury that "interest cannot be claimed on an open and running mutual account, except by an agreement of the parties." *Williams v. Hersey*, 17 Kan. 18.

In so far as the right to interest is dependent on implication of law or discretion of juries, a State law allowing an abatement of interest does not impair the obligation of contracts. *Harmanson v. Wilson*, 1 Hugh. (U. S.) 207.

If a contract is silent on the subject of interest, and does not by implication exclude it on money due and payable

under the contract, the law implies that interest is to be paid from the time the debt becomes payable. *Vermont etc. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1.

Where the only evidence that interest was to be allowed on an open account, there being no proof of any custom to pay interest or of any agreement to that effect, arose from the testimony of a witness who had inferred from a conversation with the defendant that he did not dispute his liability to pay interest from the expiration of a year. *Held*, that the evidence was not sufficient. *Johnson v. Bennett*, 1 Spears (S. Car.) 209.

In assumpsit interest on the principal sum may be made a subject of charge as one of the items of an account annexed, and may be recovered upon proof of circumstances which would entitle the plaintiff to charge it. *Chadbourn v. Hanscom*, 56 Me. 554.

A purchaser of goods, who is made an agent for their sale, and given a right to exchange them, is not chargeable with interest in the absence of an agreement to that effect. *Chase v. Union Stone Co.*, 11 Daly (N. Y.) 107.

In *Texas* an agreement to pay interest cannot be implied from the fact that the defendant has previously paid interest on similar accounts. *Adriance v. Brooks*, 13 Tex. 279.

Interest is not allowed in a partnership accounting upon moneys owing between the firm and either of the partners, or between each other, in partnership transactions before dissolution, unless by virtue of some understanding or usage, or some equity implying an agreement to pay it. *Sweeney v. Neeley*, 53 Mich. 421.

The *lex loci* where a debt is contracted should govern the question whether interest is allowable on a merchant's account. *Cocke v. Conigmaker*, 1 A. K. Marsh. (Ky.) 254; *Crawford v. Simonton*, 7 Port. (Ala.) 110; *Porter v. Munger*, 22 Vt. 191.

Interest on a balance of account held discretionary with the jury. *Killingly v. Taylor*, 1 Cranch (C. C.) 99.

assumption to pay a substituted obligation from which interest implies the payment of such interest although not *eo nomine*.¹

INTEREST AS DAMAGES FOR DEFAULT IN THE PAYMENT OF A interest is allowable as damages for default in the performance of a contract to pay money.² Whenever a debtor

account current between a merchant in Philadelphia and a partner in the country, interchangeable upon the amount of the account after six months from the date of delivery. *Koons v. Watts & S.* (Pa.) 271.
v. Brown, 13 La. Ann.

v. Godbe, 15 Wall. (U. S.) 1.
v. Snell, 25 N. H. (5

should be allowed in all cases where it is the duty of the debtor to pay money without a previous demand by the creditor. A *bona fide* tender of the amount of the indebtedness prior to the accruing of interest upon a tender of payment falls from the account. Sum found to be due at the time of tender, interest runs on the balance. *West Republic etc. Co. v. State*, 55 Mo. St. 55.

A party's right to compensation for breach of contract is doubtful, and is not supported on reasonable grounds, and where the law requires to be delayed in suit, interest will not be allowed for the time preceding such delay. *Shipman v. State*, 44

interest is claimed as damages, and where it is disallowed it is within the discretion of the court, and it will not be allowed if the plaintiff has been negligent in prosecuting his claim. Where a verdict against the defendant is obtained in the States in the court below, and the opinion of the court in a higher court is made and then rested nearly wholly upon the facts before entry of judgment, and under these circumstances interest should run only from the date of the judgment. *Redfield v. State*, 110 U. S. 174.

Interest is not allowable generally on a loan, except from the time the debtor is in default. *Fredenberger*, 37 Mich. 402; *North v. Co.* *v. Booraem*, 28 N. J. 1.
d v. Duncan, 1 La. Ann. 1.
North v. Hart, 22 Ala. 343; *Frederick v. Hub*, 54 Me. 477; *Hubbard v. Brown etc. R. Co.*, 11 Metc.

(Mass.) 124; *Nat. Laniers v. Lovering*, 30 N. H. 511; *Beardslee v. Horton*, 3 Mich. 560.

In an action for nondelivery of goods according to a contract, the difference between the contract price and the actual price on the day fixed for the delivery furnishes the true rule of damages on that day, and the plaintiff is entitled to interest on that amount from that day as a separate item of damage. *Dana v. Fiedler*, 12 N. Y. (2 Kerr) 40; *Driggers v. Bell*, 94 Ill. 223.

In a Texas case, where a common carrier fails to transport produce destined for market and received by him in the condition in which he received it and without unnecessary delay, the owner was held to be entitled, among other elements of damage, by way of indemnity, to eight per cent. interest on the value of the commodity from the time it should have been delivered at its market destination by the carrier. *Houston etc. R. Co. v. Jackson*, 62 Tex. 209.

A contractor with a county is entitled to interest on a payment deferred after the performance of the contract, if there was a stipulation that payment should be made as soon as the work contracted for should be completed. *Risley v. Andrew County*, 46 Mo. 382.

Subscriptions.—An allowance of interest on a subscription in aid of a railroad from the date of the completion of the road, when the promise was to pay one year after its completion and nothing is expressed about interest, is error. *Steevens v. Corbitt*, 33 Mich. 458.

If subscribed for and agreed to take five shares of the stock of a land and loan company, and to pay \$400 per share therefor, in weekly instalments of \$1 on each share until paid in full; and his name as such subscriber by his direction was entered by the company's secretary on its stock ledger about the 16th of February, 1871, on which day he made his first payment and continued to pay until the 4th of June, 1874, and had the payments entered in his book and received his dividends,

knows what he is to pay and when he is to pay it, he is charged with interest if he neglects or refuses to pay it,¹ or if he delays the payment after it is due.²

(a) *On Accounts*.—In general, interest is not allowed upon liquidated accounts in the absence of an agreement expressly implied to pay it.³

On a suit by the receivers of the company brought the 18th of March, 1879, to recover the instalments, which he had failed to pay for more than 150 weeks last past, it was *held* that this subscription was not within the class of contracts on which interest is recoverable as of right.

1. *Curtis v. Innerarity*, 6 How. (U. S.) 146; *Swett v. Hooper*, 62 Me. 54; *Hitt v. Allen*, 13 Ill. 592; *People v. New York Co.*, 5 Cow. (N. Y.) 331; *Dodge v. Perkins*, 9 Pick. (Mass.) 369.

2. *London v. Taxing District of Shelby Co.*, 104 U. S. 771; *Chicago v. Tibbetts*, 104 U. S. 120; *Merritt v. Pearson*, 76 Ind. 44; *United States v. Hills*, 4 Cliff. (U. S.) 618.

Interest is recoverable on a balance of an unsettled account from a reasonable time after the account accrued. *Bates v. Starr*, 2 Vt. 536; *Willis v. Brown*, 3 N. J. L. (2 Pa.) 548.

Unreasonable and Vexatious Delay of Payment.—Mere delay to make payment of money due on an account, or appearing and defending suit for its recovery, will not authorize a recovery of interest under the clause of the statute giving interest "on money withheld by an unreasonable and vexatious delay of payment."

The delay of payment must be both unreasonable and vexatious, and to make it such the debtor must, in some way, have thrown obstacles in the way of collection of the demand, or by some management have induced the creditor to prolong taking proceedings to collect the debt longer than he would otherwise have done. *West Chicago Alcohol Works v. Sheer*, 104 Ill. 586; *Devine v. Edwards*, 101 Ill. 138.

A person guilty of unreasonable and vexatious delay in making payment of a just claim cannot be relieved by offering to pay interest from the time when the delay began to be unreasonable and vexatious; he is chargeable with interest from the time it became due. *Chicago v. Tebbetts*, 104 U. S. 120.

A delay for ten years of payment of an account evidenced by the entries in a depositor's bank book, although de-

mand was repeatedly made, *held* to be vexatious and unreasonable, and interest allowed on the account.

v. Horn, 64 Ill. 379.

Where in an action on account interest nor general relief is demanded nor any unreasonable delay in payment shown, interest should not be allowed. *Marsteller v. Crapp*, 52 Ind. 359.

Plaintiff had stolen from him a certificate of deposit. Defendant compelled plaintiff—who had obtained payment stopped—to bring suit at a certain judgment before it would pay amount, endorsements having been placed on the certificate after it had been stolen. *Held*, that plaintiff was entitled to interest on the value of the certificate from the time of deposit made. *Sleppy v. Commerce Bank*, 17 Sawy. (U. S.) 17; s. c., *Fed. Rep.*

3. *McConnico v. Curzen*, 2 Va. 358; *Brady v. Wilcoxson*, 4 Va. 239; *Temple v. Belding*, 1 Root (Ct.) 314; *Crosby v. Mason*, 32 Conn. 133; *Myers v. Walker*, 24 Ill. 133; *Mick v. Elston*, 16 Ill. 204; *Allden v. Dunham*, 16 Ill. 403; *Shewell v. Blackf.* (Ind.) 312; *South v. Hard* (Ky.) 527; *Neal v. Keel*, 4 Mon. (Ky.) 162; *Harrison v. Bibb* (Ky.) 443; *Palmer v. Stoen*, 9 Gray (Mass.) 237; *Sweeney v. Ledyard*, 53 Mich. 421; *Bull*, 3 S. 37; *Flannery v. Anderson*, 437; *Graham v. Williams*, 16 S. R. (Pa.) 257; *McClintock's App.* Pa. St. 360; *Henry v. Rish*, 1 (Pa.) 265; *Williams v. Craig*, 1 (Pa.) 313; *Skirving v. Hobb*, 1 (S. Car.) 233; *Neyle v. Chis*, 1 Harp. (S. Car.) 274; *Holmes v. Treadw.* (S. Car.) 21; *Waggoner*, 2 Hen. & M. (Va.) 603; *Fraser*, 37 Wis. 149. *Contra*, *Wenger v. Randolph*, 1 Miss. (Walker) 51; *Houston v. Crutcher*, 31 Miss. 51.

Interest is not payable upon balances between partners except by some agreement or understanding. *Gage v. melee*, 87 Ill. 329; *Gyger's App.*, 1 St. 73.

Upon accounting between partners interest is chargeable against one

open mutual cash accounts bear interest.¹

an account is liquidated and there is a delay in the payment interest is allowed after there has been a demand, or after correctness of the account has been acknowledged.²

the goods are sold for cash, the account bears interest from delivery of the goods.³ In mutual merchandise accounts, interest to be cast upon the annual balances.⁴

When he has actually collected the sum, from the date of receipt; to sums which he has not received, though he may have been responsible in event of non-payment. *Shepard v. Penn.* Ch. 627.

When by a partner for advances the firm is not an account on an account which by custom is due from the end of the year. Interest due cannot be ascertained if accounting is had between the parties. *Prentice v. Elliott*, 72 Ga.

Van v. Vaughan, 44 Wis. 646; *W. Rensselaer Glass Factory v. N. Y.* 393; 5 Cow. (N. Y.) 256; *Lio-Graves*, 3 Cai. (N. Y.) 226; *Griswold*, 6 Johns. (N. Y.) 226; *Smith*, 12 Johns. (N. Y.) 226; *Van v. Sherburne*, 15 Johns.

99; *Van Beuren v. Van Gaas-berg*, (N. Y.) 496; *Tucker v. W. (N. Y.)* 193; *Consequa v. Johns*, (N. Y.) Ch. 587; *Es-ple*, 3 N. Y. (3 Const.) 502; *W. Dunlop*, 4 Barb. (N. Y.) 36; *etc. Co. v. Mann*, 4 Rob. (N.

Knigh v. Mitchell, 3 Brev. (S. C.) 668; *Treadw. (S. Car.)*, Const. 668; *Kennedy*, *Riley* (S. Car.) 218; *W. v. McVeagh*, 69 Ill. 624; *W. Osborne*, 75 Ill. 615; *Cooper*, 21 Wall. (U. S.) 105; *Hen-otton Mfg. Co. v. Lowell* Shops (Ky.), 7 S. W. Rep. *W. Wells* (Kan.), 18 Pac.

W. Brown, 1 McCord (S. Car.) 218; *W. Minott*, 2 McCord (S. Car.) 218; *W. Thomas*, *Dudley* (Ga.) 218; *W. Finney*, 16 Vt. 297.

Interest is never allowed where the result of the failure of the debtor to press the collection of his debt and where the principal cause is an unliquidated account, interest or damages are claimed in mitigation, no judgment will be rendered for either. *Adams Express Co. v. Bush* (Ky.) 49.

1 C. of L.—25

In Indiana interest on an open account may be allowed in a proper case, commencing twelve months after the date of the last item. *Young v. Dickey*, 63 Ind. 31.

Where an account is unliquidated the objection to the allowance of interest is much stronger where no sum has been named by either party as the amount to be charged until after a controversy has arisen. *Clark v. Clark*, 46 Conn. 586.

An agreement that one-fifth part of a crop is to be paid to the plaintiff when it is made, constitutes a liquidated demand that will bear interest. *Bartel v. Andrews*, 18 Ga. 407.

Tenants in common used iron ore from the common property without requiring each other to account. *Held*, that interest could not be charged until a balance was struck. *Grubbs' App.*, 66 Pa. St. 117.

Where the government has made up five statements of account against a collector, and has only charged interest on the last, and all these accounts are too large in the judgment of the court, and the collector has overpaid the government before the last account, no interest is chargeable on the balance in his hands when the suit was brought on the first account. *United States v. Collier*, 3 Blatchf. (U. S.) 525.

3. *Smith v. Shaffer*, 50 Md. 132; *Foot v. Blanchard*, 6 Allen (Mass.) 221; s. c., 83 Am. Dec. 624; *Maltman v. Williamson*, 69 Ill. 423.

An account showing the delivery of goods at a time stated *prima facie* shows payment due at that time, and the creditor is entitled to recover interest. *Wyandotte etc. Gas Co. v. Schliefer*, 22 Kan. 468.

Interest was allowed on the price of logs delivered under a contract although there was a dispute between the parties as to the quantity and quality of the logs delivered. *Vaughan v. Howe*, 20 Wis. 497.

4. *Davis v. Smith*, 48 Vt. 53.

Where parties are engaged in con-

Interest is not allowed on unliquidated accounts for work, labor and services,¹ especially where an account was not rendered before suit was brought.² When the amount is ascertained, interest is recoverable³ after a demand of payment made at the expiration of a reasonable time.⁴ If an amount is capable of being ascertained, the account is so far liquidated as to bear interest.⁵

Continuous dealings the presentation of bills at various times, stating parts of the account, does not raise the presumption of liquidation under which interest is thereafter chargeable upon the balances shown to be due. *Raymond v. Williams*, 40 Iowa 117.

The plaintiff supplied the defendants with wood for which they were in the habit of settling from time to time. He omitted at one of these settlements to present his claim for a certain quantity of wood, and the omission was not discovered until a long time after. *Held*, that he could not recover interest on this claim. *Brainerds v. Champlain Trans. Co.*, 29 Vt. 154.

1. *Murrell v. Ware*, 1 Bibb. (Ky.) 325.

2. *Doyle v. St. James Church*, 7 Wend. (N. Y.) 178; *Pursell v. Fry*, 19 Hun (N. Y.) 595.

3. *Carpenter v. Brand*, 40 N. Y. Super. Ct. 551.

In an action upon *quantum meruit*, the court found that on a specified day a certain sum was due the plaintiff. *Held*, that he was entitled to interest from said day. *Mix v. Miller*, 57 Cal. 356; *Parker v. Parker*, 33 Ala. 459.

Interest is allowed on liquidated demands in admiralty the same as in law, and on seaman's wages from the time they are due. *Steamboat Swallow*, Ala. Adm. 334.

Interest for a vexatious delay of payment for work is allowable by *Indiana* statute. *McKinney v. Springer*, 3 Ind. 59.

Interest is not recoverable in *South Carolina*, on a verbal contract in which the defendant agreed to pay the plaintiff a sum certain for rendering service. *Farr v. Farr*, 1 Hill (S. Car.) 393.

Interest on Sum Due Attorney for Services. Where, in an action by an attorney for professional services, the complaint, which was verified, asked judgment for a sum specified as the value of the services with interest, and the defendants made default, *held*, that the clerk properly computed and included interest in the judgment; that

if error existed in allowing interest was a judicial error, and one of substance which could not be corrected by motion; and that an order striking the interest was error. *Bullard v. Sherwood*, 85 N. Y. 253.

On a claim for services, interest is to be allowed without proof of demand, when the debtor by leaving the State and having no fixed abode, prevented the creditor from making demand. *Graham v. Chrystal*, 2 (N. Y.) App. Dec. 263.

4. *Ford v. Tirrell*, 9 Gray (Mass.) 401.

5. *Graham v. Chrystal*, 1 Abb. (N. Y.) Pr., N. S. 121.

Interest can be charged upon an account only from the time such account is rendered and is not allowable on the various items, from the date of each. *Wood v. Belden*, 59 Barb. (N. Y.) 549.

A consigner is entitled to interest on the balance due him on account. *Porter v. Patterson*, 15 Pa. St. 229.

Interest is chargeable on factor's accounts for advances or purchases. *Walters v. McGirt*, 8 Rich. (S. Car.) 287.

The rule in regard to interest on accounts against towns does not differ from that governing accounts against individuals. *Langdon v. Castleton*, Vt. 285.

Interest cannot be recovered on the value of goods contracted by an agreement not in writing, to be sold on credit from the expiration of the contract. *Gummage v. Alexander*, 14 (Mass.) 414.

Interest may be recovered on a balance due on an account, and especially so where the parties have agreed that interest should be paid on such balance. *Tootle v. Wells* (Kan.), 18 Kan. Rep. 692.

Where a party receives notes, property and cash for which he agrees to execute his promissory note in a certain sum, this will make the account on a liquidated one, and interest is recoverable thereon. *Clark v. Dutton*, Ill. 521.

On Rents.—Rent in arrears due under a written lease bears interest on each instalment.¹ In covenant to recover a ground rent is recoverable, except there be special reasons for withholding it.² Where there is a sum certain due for rent, it bears interest³ if recovered in a personal action.⁴ Where rent is recovered by distress, interest cannot be distrained.⁵

On Legacies, Annuities, etc.—A specific legacy carries interest from the death of the testator. A general legacy bears interest from the time it is payable, unless otherwise controlled by statute.⁶

St. Chicago Alcohol Works v. Ill. App. 367.

A lease of cars by the receiver of a road is valid until disaffirmed by a court, it is not such an "instrument in writing" as entitles the lessor to sue on the rent due under Rev. Stat. 1885, p. 1356. *Thomas v. C. R. Co.*, 36 Fed. Rep. 808. An action to recover rent due on premises, when the defendant is in breach of the lease, and the time should commence was to be determined by arbitrators, *held*, that defendant was liable for interest on the rent found due only from the date of decision. *Binsse v. Wood*, (N.Y.) 624.

In Common.—It is proper to charge interest upon estimated rents where the land is occupied by the tenant of the owner, or where the land is in common holds and enjoys the land by the consent of his tenant. *Vance v. Evans*, 11 W.

Lee v. Ingersoll, 7 Pa. St.

Tham v. Best, 10 B. Mon. 17. *Compare* *Cooke v. Wise*, 1 M. (Va.) 463; *Clark v. Barlow*, 4 Johns. (N.Y.) 183; *Van Rensselaer v. Jones*, 2 N.Y. 135; *Crane v. D. Smith* (N.Y.) 448. An agreement to pay rent on a lease, interest is recoverable from the date of decision. *Elkin v. Moore*, 6 B. Mon. 17; *Honore v. Murray*, 3 Dana 17; *Clark v. Barlow*, 4 Johns. 183; *Van Rensselaer v. Jones*, 2 N.Y. 135; *Crane v. Hard*, 4 D. Smith (N.Y.) 448.

Clark v. Barlow, 4 Johns. (N.Y.) 183; *Van Rensselaer v. Jones*, 2 Barb. 644; *Obermeyer v. Nichols*, 6 Pa. 159; *Buck v. Fisher*, 4 Pa. 516; *Newman v. Keffer*, 11 St. 442; *Guthrie v. Stockton's*

Admrs., 5 Harr. (Del.) 123; *Honore v. Murray*, 3 Dana (Ky.) 31; *Elkin v. Moore*, 6 B. Mon. (Ky.) 462.

5. *Lansing v. Rattrone*, 6 Johns. (N.Y.) 43; *Longwell v. Ridinger*, 1 Gill (Md.) 57. *Compare* *Albright v. Pickle*, 4 Yeates (Pa.) 264. In *Virginia* a statute gives the right to distrain for rent with interest. *Brooks v. Wilcox*, 11 Gratt. (Va.) 419.

6. *Keech v. Speakman*, 1 Pa. Law Jour. Rep. 72; *Vermont State Baptist Convention v. Ladd Exr.*, 58 Vt. 95; *Devlin's Estate*, 1 Tuck (N.Y.) Surr. 460; *Geoman v. Geoman*, 7 Coldw. (Tenn.) 180.

The rule that a general legacy in favor of a child, when given for its maintenance, will draw interest from the testator's death, does not apply to a legacy to adults, nor where the maintenance of the child is otherwise provided for, either by the will or in any other mode. *Hennion v. Jacobus*, 27 N.J. Eq. 28.

The rule that a legacy shall carry interest only after one year from the death of the testator, applies to the case of the bequest of an annuity. *Jones v. Stockett*, 2 Bland (Md.) 409.

Interest should be allowed on all advancements of money from the death of testator, where the money value is charged against the legatee in the will. *Williams v. Williams*, 15 Lea (Tenn.) 438.

Interest is not allowed upon money arising from the proceeds of real estate, and inherited by the testator's heirs, because legacies had lapsed. *Betts v. Betts*, 4 Abb. (N.Y.) N. Cas. 317.

Accord and Satisfaction.—When there is a dispute between an executor and a legatee as to the amount of interest due on a legacy, on account of the expense and delay caused by a long litigation carried on for the protection of the estate, an acceptance by the legatee of a sum less than the one due on the legacy

Interest is not, in general, recoverable on the arrears of an annuity bequeathed by will.¹ An annuity in lieu of dower carries interest.²

(d) *On Taxes, Orders, Warranties, etc., of Municipalities*
Interest is not chargeable, in general, upon taxes,³ nor upon

liability upon the State to pay interest from the date of such presentation. *Whitney v. State*, 52 Miss. 732.

But the State is entitled to interest on the amount of taxes due from a collector from the time they should have been paid over. *Dean v. State*, 54 Vt. 313.

Where the State sues a county for taxes interest is not recoverable. *State v. Multnomah Co.*, 13 Oreg. 287.

Where less authorized by statute. *Western Union Telegraph Co. v. State*, 55 Tex. 314.

But in *New York* interest runs on the arrears of taxes owing by a county to the State, to begin after thirty days from the time when the account current is rendered by the controller to the county treasurer pursuant to the New York statute. *People v. County of New York*, 5 Cow. (N. Y.) 331.

An assessment upon a county for road improvements being authorized to be raised by taxation, interest upon the assessment cannot be collected. *Paterson Ave. etc. Commrs. v. Hudson County Freeholders*, 44 N. J. 570.

An illegal assessment was valid if by act of congress providing that successive assessments might be reduced by certain commissioners, "and where certificates of assessment have been issued they shall issue to the holder of such certificate a drawback certificate for the amount of such erroneous or excessive charges," which should be received in payment of special improvement assessments or redeemed by district in a certain manner. *Hart*, that, although the original certificate bore interest, the drawback certificate should not. *United States v. Denney*, Mackey (D. C.) 463.

In a suit to recover back the amount of taxes paid without protest on an illegal assessment, the plaintiff is entitled to interest thereon from the time of demanding repayment, or from the date of the writ where no previous demand is made; but where such taxes are paid under protest, the plaintiff is entitled to interest thereon from the time of payment. *Boston etc. Gas*

is an accord and satisfaction, if the payment is made upon the express condition that it shall be in full for the balance due, and the money accepted without protest against such condition. *Vermont State Baptist Convention v. Ladd*, 58 Vt. 95.

1. *Isenhardt v. Brown*, 2 Edw. (N. Y.) 341; *Adams Admr. v. Adams Admr.*, 10 Leigh (Va.) 527.

Contra, *Stephenson v. Arson*, 1 Bailey (S. Car.) Ch. 274.

It has been held in *South Carolina* and in *Tennessee* that it lies in the discretion of the court to allow interest on an annuity under a will. *Irby v. McCrae*, 4 Dessau. (S. Car.) 422; *Laura Jane v. Hagen*, 10 Humph. (Tenn.) 332.

Interest will not be allowed on the arrears of an annuity which was to be paid in agricultural products at a particular place, the value of which was to be ascertained by testimony, and in the absence of any proof of a demand at the place where it was to be paid, or of an agreement to dispense with such demand and to convert the same into money. *Philips v. Williams*, 5 Gratt. (Va.) 259.

2. *Beeson v. Beeson*, 1 Harr. (Del.) 106; *Houston v. Jamison*, 4 Harr. (Del.) 330; *Irby v. McCrae*, 4 Dessau. (S. Car.) 422.

Whether a widow is entitled to interest upon a sum secured to her by a recognizance in a proceeding in partition, depends upon the circumstances of the case, and is a question to be determined by a jury. *Smyser v. Smyser*, 3 W. & S. (Pa.) 437.

3. *Danforth v. Williams*, 9 Mass. 324; *Louisville etc. R. Co. v. Hopkins Co.* (Ky.), 9 S. W. Rep. 497.

warrants, nor upon orders payable out of taxes after a and nonpayment for want of funds.¹

Purchase Money.—The general rule in ordinary contracts sale of land which contain no stipulation for interest, and specify any day for completion, is that the purchaser is interest on the purchase money from the time he takes on, especially if he has received rents and profits.²

ston, 4 Metc. (Mass.) 181.
on v. Juniata County, 50 Pa.
yer v. Covington Township,
t. 200; Jacks v. Turner, 36

warrants issued on claims al-
the county commissioners'
ch, under the statute, can be
in the order of their registra-
ding to their class, which are
o interest, and specify no time
it, do not bear interest. Ashe
of Harris, 55 Tex. 49.

North Carolina interest is al-
upon the amount recoverable
der upon a county treasurer,
the chairman of the board of
ommissioners from the time of
and refusal. Yellowly v.
oners of Pitt, 73 N. Car. 164.
der of an interest-bearing ob-
the city of New York must
sentation thereof when due
le, and if he fails to do so,
d the city liable for interest
Paul v. New York, 7 Daly

4.
ouri a town warrant will not
est till presentment is made
suror, and endorsement made
me cannot be paid for want
(Wagn. Mo. St. 1,325, §
the interest from that date
only six per cent. State v.
tc. 61 Mo. 155. And county
do not draw interest until
for payment. Skinner v.
nty, 22 Mo. 437; Robbins v.
o., 3 Mo. 57.

ued by a city as currency
to bear interest. Smith v.
ans, 27 La. Ann. 187.

rod v. Wheeling etc. R. Co.,
1.

y such case the vendee seeks
the payment of interest on
f default of the vendor, he
ally set aside the purchase
and appropriate it for the
d notify him that the money
e. Steenrod v. Wheeling etc.
W. Va. 1.

But under special circumstances a
jury is justified in refusing it. Fasholt
v. Reed, 16 S. & R. (Pa.) 266; McCor-
mick v. Crall, 6 Watts (Pa.) 207; Kes-
ter v. Rockel, 2 W. & S. (Pa.) 365.

A grantee retaining, by agreement
with the grantor, purchase money after
due, to indemnify himself from loss by
reason of an incumbrance, holds the
same as trustee of the grantor; and if
he uses it for his own benefit, he is
chargeable with interest from the time
it becomes due until paid. McCrea v.
Matien, 32 Ohio St. 38.

A contract for the sale of lands pro-
vided that, of the purchase money, \$100
should be paid in cash at the time the
agreement was made, and the remain-
ing \$600 in monthly instalments of \$10
each, no stipulation as to interest being
inserted. The vendee entered and con-
tinued in possession at the time of filing
his bill for specific performance. *Held*,
that he should pay interest on the in-
stalments as they came due. Lang v.
Moole, 31 N. J. Eq. 413.

Where a bond is given for the pur-
chase money of land sold under execu-
tion, conditioned for the payment
thereof, according to the decree of the
court, it does not bear interest until a
decree is made. Beetim v. Buchanan,
4 Watts (Pa.) 59; Gardner v. Kline-
felter, 9 W. & S. (Pa.) 59.

Where a purchaser is ready and will-
ing to perform a contract for the pur-
chase of real estate, and the delay is on
the part of the vendor, the former is
entitled to the rents and profits from
the time when, according to the terms
of the contract, possession should have
been delivered; or if the vendor has re-
mained in possession he is chargeable
with the value of the use and occupa-
tion from the same period, and the pur-
chaser is chargeable with interest on so
much of the purchase money as has
remained in his hands unappropriated.
Where, however, the purchase money
has been appropriated and notice there-
of given to the vendor, and the pur-
chaser has received no interest thereon,

A purchaser at a sheriff's sale who neglects to make payment according to his contract must pay interest on the amount of his bid, or as much of it as is applicable to judgments not his own.

(f) *On Obligations in Writing.*—Wherever there is a written contract for a sum of money payable upon demand, or upon a day certain, interest is payable if payment of the principal sum is not made on demand, or at the time agreed upon.²

Where a note is payable in annual instalments, interest is payable on the instalments as they become due, and not annually on the whole sum.³

he is not liable to pay interest to the vendor. *Bostwick v. Beach*, 103 N. Y. 414.

A vendee who has been evicted under a prior encumbrance (not under paramount title) in an action to recover back the purchase money is entitled to interest from the time of eviction. *Culp v. Fisher*, 1 Watts (Pa.) 494.

In an action on a covenant of warranty by a grantee who had never paid *mesne* profits nor been damnified by an assertion of a claim to them (his evictor's right to them having been cut off by statute prior to the covenant suit), *held*, that the defendant could only be charged with interest from the date of the evictor's deed to the party from whom the plaintiff had purchased the evicting title, the plaintiff having enjoyed possession and profits up to that time. *Wead v. Larkin*, 49 Ill. 99.

Although the purchaser of land under a covenant of warranty of title, formerly on eviction, only recovered the purchase money paid without interest, yet since the introduction of the action for *mesne* profits, which takes from him the profits of the land, the rule is established that he may recover interest so long as he is liable for *mesne* profits, even from the time of a recovery on the covenant back to five years before the eviction. *Wood v. Kingston Coal Co.*, 48 Ill. 356. See also *King v. Kerr*, 5 Ohio 154.

1. *Atkinson v. Richardson*, 15 Wis. 594; *Arnold v. House*, 12 S. Car. 600.

Purchasers at a judicial sale of property mortgaged to secure a large number of notes, and sold in proceedings for the collection of one of such notes only, retained in their hands the balance of the purchase money beyond the amount required to be paid upon such sale, having also the possession and enjoyment of the property purchased. They announced to the court their readiness

to deposit the money in bank or otherwise, and kept on deposit in bank in their own name, to the credit of a general account, on which they were drawing from time to time for various sums, retaining at all times a sufficient amount to pay the sum due; but did not keep a special fund on deposit for that purpose. *Held*, that there was no such deposit nor offer to deposit contemplated by the *Louisiana* Code (art. 2553, 2559), whereby a depositor might exonerate themselves from paying interest. *Morris v. Cain*, 39 Ann. 712.

2. *Jacobs v. Adams Exr.*, 1 Pa. 52.

In actions on obligations and promissory notes, containing no stipulation as to interest, it need not be demanded in the declaration nor its payment mentioned in the assignment of breach. *Chinn v. Hamilton*, Hempst. (U. S.) 438.

Interest is not allowable upon a sum named in an agreement not as a penalty, but as liquidated damages recoverable, not as the representation of an actual debt, or as a measure of actual compensation, but as the damage fixed by the parties to be recovered in case of a breach. The verdict must be for a precise sum. *Hoagland v. Segura*, N. J. L. 230.

Contracts in writing to pay specified rates of interest are no exception to the rule of construction of contracts in writing, the manifest intention of the parties controlling the legal effect, and where the intention is doubtful the contract is construed most strongly against the promisor. *Brewster v. Wakefield*, Minn. 352; s. c., 69 Am. Dec. 343.

3. *Bander v. Bander*, 7 Barb. (N. Y.) 560; *Stumps v. Cooper*, 59 Tenn.

A bond payable "in three equal annual instalments from this date, interest payable annually until

erty must pay interest after demand.¹ Where a bond or instrument of writing for the payment of money does not specify on its face that interest is to be paid, interest is in the nature of damages, and the payment of the principal money will bar an action for the interest; but where interest is stated in the contract itself, it becomes a part of the debt and may be recovered, although the principal sum has been paid. To add to the principal interest thereon at an agreed law rate, and give a written obligation for the aggregate, without stating the rate itself, is a sufficient compliance with a statute which tolerates a limited conventional rate of interest on condition that the contract therefor being in writing.³

On Verdicts, Awards, Judgments and Decrees.—Interest is recoverable on a judgment, but by the common law it cannot be recovered in the execution, but must be recovered by a separate action.⁴ In most States the right is given by statute to in-

paid—that is, one-third November 10th, 1866; one-third with the next November 10th, 1867; and one-third with the interest November 10th, 1868,—draws annual interest on the several instalments after as well as before. *Watkins v. Bank of the South*, 17 S. Car. 13.

Washington Bank v. Shurtleff, 4 Mass. 30; *Carter v. Carter*, 4 Mass. 30; *Lewis v. Dwight*, 10 Mass. 30; *United States v. Arnold*, 1 S. 348; s. c., 9 Cranch (U. S.) 252; *Wallis*, 2 Dall. (Pa.) 252; *Probate v. Heydock*, 8 N. H.

action for money paid by a bond is recoverable from the payment, without proof of a default of repayment. *Ilseley v. Jewett*, 168 (Mass.); *Knight v. Ga.* Dec. 22; *Winder v. Dillard*, 2 Bland (Md.) 166.

Phillips, 95 N. Car. 245; *Nixon*, 69 N. Car. 80; *Robinson*, 32 Ind. 28.

action on a treasurer's bond to pay the amount of deficits, such as being ascertainable by computation, interest may properly be allowed. *School District v. Dreutzer*, 51 Mich. 49.

defendant gave the plaintiff promissory notes, in renewal of earlier ones on which the interest was overpaid, new notes did not include the interest not received in satisfaction of the old interest; but the question was understood by the parties to remain an open one, the defend-

ant saying that he would make it all right, acknowledging that he was legally liable, and urging certain reasons why the claim ought not to be pressed. The old notes were left, together with the new ones, in the defendant's possession, where they had been before, but crumpled up, and not for safe keeping. *Held*, that these facts would warrant a finding for the plaintiff in an action for the overdue interest. *Eames v. Cushman*, 135 Mass. 573.

Bond for Reconveyance of Real Estate on Conditions—Construction of.—Defendant conveyed to plaintiff certain lands in payment of a debt, and plaintiff entered into a bond to reconvey the land, provided defendant would repay him a certain sum with interest, defendant meantime to have possession of the land. *Held*, that defendant did not become plaintiff's debtor for principal or interest, and that, after forfeiture of the possession of the land and of the right to have it reconveyed to him, he was not liable in an action for the interest which had accrued while he was in possession. *Huston v. Kline*, 64 Iowa 376; *Alston v. Wilson*, 44 Iowa 130; *Stroup v. Haycock*, 56 Iowa 732.

3. *Tribble v. Anderson*, 63 Ga. 31.

4. *Sayre v. Austin*, 3 Wend. (N. Y.) 496; *Hodgdon v. Hodgdon*, 2 N. H. 169; *Watson v. Fuller*, 6 Johns. (N. Y.) 283; *Solen v. Virginia etc. R. Co.*, 14 Nev. 405; *Winch v. Mutual Benefit Ice Co.*, 86 N. Y. 618.

An audited claim against a county does not bear interest until judgment recovered thereon. *Wheeler v. Newberry Co.*, 18 S. Car. 132. Claim in

judgment allowed against receiver's fund not entitled to interest. *Ex parte Brown*, 18 S. Car. 87.

In *Louisiana* interest cannot be collected on a judgment for money which, by its own terms, is silent as to interest. *Anderson's Succession*, 33 La. An. 581.

Without express legislation, neither contracts, judgments nor decrees would bear interest. *Hamer v. Kirkwood*, 25 Miss. 95; *Reece v. Knott*, 3 Utah, 451.

In *New York*, under the provision of the act of 1870 (ch. 78, laws of 1870) in reference to compensation for causing death by negligence, which provides that the amount of damages recovered shall draw interest from the time of the death, "which interest shall be added to the verdict," the jury have nothing to do with the question of interest; that is to be added to the damages inserted in the entry of judgment by the clerk; and this although the jury, in making up damages, awarded, in fact included the interest. *Manning Admr. v. Port Henry etc. Co.*, 91 N. Y. 664.

Interest cannot be allowed on the amount of damages assessed by the jury in an action on the case where trespass might have been brought. *Ormsby v. Johnson*, 1 B. Mon. (Ky.) 80; *Holmes v. Misroon*, 3 Brev. (S. Car.) 209.

In an action under the railroad stock law of 1874, for the value of an animal killed by the railroad company in the operation of its railroad, *held*, that the plaintiff can recover only what the statute permits him to recover, and cannot recover interest on the value of the animal killed prior to the day of trial. *Atchison etc. R. Co. v. Gabbert*, 34 Kan. 132.

A recovery of damages for simple negligence of a party to whom no benefit could accrue by reason of the injury inflicted, does not include interest. *Kenney v. Hannibal etc. R. R. Co.*, 63 Mo. 98; *Marshall v. Schrick*, 63 Mo. 308; *Atkinson v. A. & P. R. Co.*, 63 Mo. 367; *Western & A. R. Co. v. Young* (Ga.), 7 S. E. Rep. 912.

Interest may be recovered upon the amount of an award, after the same is due and after demand, under the common courts, although the declaration contains no counts for interest. *Tucker v. Page*, 69 Ill. 179.

Interest on Amount of Excessive Damages Remitted.—A judgment for

plaintiff having been reversed because the damages were excessive, and the court having ordered that if plaintiff should remit from the verdict all damages except \$5,000, she should judgment, "on the verdict and submission," for \$5,000 and costs, *held* that she was entitled to include such judgment interest on the \$5,000 from the date of the verdict. *McAns v. City of Lancaster*, 65 Pa. 240.

A judgment against a city for condemnation, etc., for a street, bears interest at six per cent. from the date of possession is taken by the public. *Cicago v. Palmer*, 93 Ill. 125.

Where one, entitled to an award of damages by reason of the widening of Broadway in the city of New York, made in proceedings under the act of 1869 (ch. 890, laws of 1869), accepted the sum awarded, and gave a receipt acknowledging payment in full of the amount, *held*, that the right to interest was thereby waived, and an action to recover the same could not thereupon be maintained against the city. This, although the claimant demanded payment of interest at the time he protested against the refusal of the comptroller to pay the same. *C. et al. v. Mayor etc. of New York*, N. Y. 166.

Interest Upon Compensation Awarded.—Where possession has been acquired of land for a public park, or other public use, and payment of the compensation awarded is withheld, it is proper to require the payment of interest thereon from the time possession is taken. *Phillips v. South Park Commission*, 119 Ill. 626.

License to use a certain wharf, long to a city was granted to it upon the payment of a stipulated monthly sum for wharfage. The city subsequently passed an ordinance authorizing a railroad company to lay tracks along the wharf, and later to widen said tracks. While thus engaged the railroad company removed certain posts from the wharf, theretofore used for the mooring of vessels, and laid a pile of stones and debris deposited thereon. A notified the city to remove the posts and remove the debris, which it neglected to do, and upon a sunrise in the river, certain rafts belonging to A and attached to the wharf by ropes away and were lost. A brought an action against the city for the damages occasioned, and asked the court

interest on the judgment in the execution issued thereon.¹

That if the jury believed the
s under the exclusive control
y, that the city derived a rev-
n it; that A. had paid wharf-
s use to the city, and that the
guilty of negligence in allow-
s and rubbish to remain on
after notice, in consequence
neglect A. suffered loss, then
titled to recover therefor from
The court having affirmed
s, the jury found for the
Held, that A. was entitled to
n his claim as part of his dam-
leghteny v. W. Campbell et
a. St. 530; s. c., 52 Am. Rep.

on entitled by law to damages
nt of a street being opened
is property is not allowed in-
the award so long as he re-
rents and issues of the prop-
cond Street, 66 Pa. St. 132.
action for the value of two
\$1,000 each, bearing 6 per
est, which were to have been
to the plaintiff as part pay-
ertain land, where defendants
e value of the two to be only
interest to be collected there-
interest on \$2,000 from a given
per cent. per year. Held,
tiff is entitled by this judg-
interest on \$2,000 from the
n up to the date of the judg-
; and that the words "no in-
e collected thereon" refer to
not future interest. Stewart
an's Admr. (Ky.), 7 S. W.

is not allowed upon damages
upon a protested bill of ex-
Murphy v. Andrews, 13 Ala.
land v. Hoover, 3 Miss. (2
9.
EMAN on Judgments, §. 411.
v. Saunders, 13 Gratt. (Va.)

ct that judgments of other
ar any interest whatever is a
proof, and cannot be noticed
urt, and in the absence of
ere the judgment does not
interest, it will be presumed,
law of that State, no interest
l. Cavender v. Guild, 4 Cal.
son v. Daily, 13 Ala. 722.

ds—**Condemnation of Right
Appeal; Interest on Award;
adjudication.**—Where a rail-

road company condemns right of way,
and pays the award of the commission-
ers to the sheriff, but stops the money
in his hands by taking an appeal, and
takes possession of the right of way,
the land owner is entitled to interest on
the money at six per cent per annum
from the time possession of the land is
taken to the time the money is finally
paid to him. But the question of in-
terest is one which could and should
be raised on the trial of the appeal,
where the facts entitling the claimant
thereto should be determined; and, if
not so raised, and the company pays
the amount awarded against it on the
appeal, the land owner cannot after-
wards maintain a separate action, ask-
ing that the amount of his interest be
ascertained, and praying for an injunc-
tion to restrain the company from us-
ing the right of way until such interest
is paid. To such a case the rule ap-
plies, that "an adjudication is final and
conclusive, not only as to the matter
actually determined, but as to every
other matter which the parties might
have litigated and had determined."
Hayes v. Chicago etc. R. Co., 64 Iowa
753. See Stodghill v. C. B. & Q. R.
Co., 53 Iowa 345.

An injunction restraining a railroad
company from obstructing the com-
plainant's lane was dissolved upon the
payment into court, as security, of the
amount of damages, and thereupon the
company obstructed the lane. Held,
that upon the final decree, interest at
the legal rate should be allowed to the
complainants, upon the amount, from
the time of the dissolution of the in-
junction, although but four per cent
had been received on the fund depos-
ited. Carpenter v. Easton etc. R. Co.,
28 N. J. Eq. 390.

Interest on Costs.—In *New York*, in-
terest is not taxable with costs where
the plaintiff is delayed by a case made
by the defendant, except in actions
on contract. Henning v. Van Tyre,
19 Wend. (N. Y.) 101.

In an action by a sheriff to recover
the costs due to him for services, inter-
est will not be allowed on the amount
thereof. Galbraith et al. v. Walker,
95 Pa. St. 481.

In an action to recover the amount of
a judgment theretofore rendered, the
plaintiff is entitled to recover interest
upon the costs adjudged to him, from

Equity follows the law in allowing interest on decrees.¹

Interest is allowed upon a foreign judgment when a recovery had upon it in another State.²

A tribunal assessing damages has power in its discretion to add interest to the sums which it finds to represent the loss of the plaintiff in the action.³

When an action is brought upon an interest-bearing claim, there is a verdict for the plaintiff, and the defendant delays giving of judgment by a motion for a new trial, or otherwise, the plaintiff is entitled to legal interest on the verdict.⁴

the date of the original judgment to the time of recovery. *Emmett v. Brophy*, 42 Ohio St. 82.

1. *McAlexander v. Lee*, 3 A. K. Marsh. (Ky.) 483; *Samuel v. Winter*, 3 A. K. Marsh. (Ky.) 480; *Crocker v. Clements*, 23 Ala. 296; *Moore v. Pendirgrast*, 6 J. J. Marsh. (Ky.) 534; *Lair v. Jelf*, 3 Dana (Ky.) 181.

Upon demands bearing interest at law, the courts of equity will allow interest, but where the demand does not bear interest at law, equity will or will not allow interest according to the equity of the case. *Hunt v. Smith*, 3 Rich. (S. Car.) Eq. 465.

In respect to interest, a decree has the same force as a judgment, when it contests with other liens or claims for money. But this refers to a decree *in personam*, binding all the property of the debtor, and rendered against the defendant, without reference to the sale of particular property and the distribution of the fund arising therefrom. Where a decree provided for the sale of certain property, and a division of the proceeds according to certain fixed priorities, naming amounts to be paid to claimants, and there was not enough to pay principal and interest of all the debts, the decree will not be construed as giving interest to one to the exclusion of others. If the property out of which the fund arose had been productive in the hands of a receiver, the net increase would be divided proportionately. *National Bank of Augusta v. Heard et al.*, 65 Ga. 189.

After the noninterest bearing claim against the estate of an intestate has been passed upon in the final settlement of the administrator's account, and ordered paid in due course of distribution, it bears interest. *Estate of Olivera*, 70 Cal. 184.

2. *Mahurin v. Bickford*, 6 N. H. 567; *Barringer v. King*, 5 Gray (Mass.)

9; *Nelson v. Felder*, 7 Rich. (S. Car.) Eq. 395; *Schell v. Stetson*, 12 Pa. 187.

Foreclosure—Interest, Whether Note or Judgment Thereon.—Where a debtor, whose debt was secured by deed of trust, on an accounting settlement six months before the debt was due, gave his note, payable six months after date without interest, the sum found to be due, including interest on the original debt till maturity, and upon which judgment was immediately confessed, it was held that, on bill to foreclose the trust, it was error to compute interest on the judgment from its date, and that it should have been computed on the note, which bore no interest till maturity. *Darst v. Bates*, 95 Ill. 493.

3. *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126.

Where the jury find for the plaintiff in the sum of \$1,161.64, with interest at seven per cent. per annum from January 17th, 1877, to date, the court in rendering judgment ought to take into consideration such interest, as the damages assessed can be computed from the face of the verdict without mathematical certainty. *Citizens Bank v. Bowen*, 25 Kan. 117.

An action of ejectment for the recovery of a term was referred to an assessor, who found that the fair value of the lease to the plaintiff was a certain sum for each year while he was in possession. *Held*, that the plaintiff was entitled to interest on each year's sum of the amount named, from the time when it might have been received by him if he had not been ejected, and that the plaintiff was not entitled to have the interest computed by monthly quarterly rests, although by the terms of the lease the rent was payable quarterly. *Hodgkins v. Price*, 141 Mass.

4. *Dowell v. Griswold*, 5 Sawy.

DAMAGES FOR THE USE OR BENEFIT OF ANOTHER'S MONEY

On Loans and Advances.—Where one receives an advantage from the use of the money of another, he is chargeable with interest.¹ Interest is always recoverable in this country on a loan.² Whenever money has been received by a party *ex æquo et bono* he ought to refund, interest follows as a matter of course.³

Hibson v. Cincinnati Enquirer, 10 U. S. 88.

It is not, as a rule, allowed that a judgment has been prevented or delayed by the order of a court of another jurisdiction to await the result of controversy among servants. *Bowman v. Wilson*, 2 U. S. 294.

A district court awarded to the plaintiff a sum of money as salvage. The plaintiff appealed to the circuit court which awarded to the libellant the same sum. *Held*, that the libellant was not entitled to interest on such sum from the date of the decree of the district court. *The Rebecca Clyde*, 12 U. S. 403.

On commencement of an action, the defendants to interplead were held by the plaintiffs and by both of them, plaintiffs' money into court, and judgments rendered in their favor, was subsequently, on appeal by the defendants, reversed by the defective pleadings of the plaintiff.

The other defendant was at all times ready and willing to receive the money. *Held*, that the plaintiff was entitled to interest from the time it became due, if it extended plaintiff's liability for the actual amount due from the accumulation of interest caused by their defective pleadings. *Pfister v. Wade*, 69 Cal. 133. A correct amount of compensation for property taken for street purposes has been ascertained, but the owner's receiving payment incurred through a defect in the proceedings, he should be allowed interest. *Gest v. Cincinnati*, 26 Ohio

—A year after a suit was brought against a collector to recover taxes, the plaintiff recovered a judgment and a reference was ordered in the amount due. Twenty days occurred in bringing on the reference before the referee, but not the plaintiff's fault. *Held*,

that he was entitled to interest. *Bartels v. Redfield*, 23 Blatchf. 486; s. c., 27 Fed. Rep. 286.

An action against a customs collector to recover excessive duties remained in court twenty-three years, the plaintiff finally prevailing. *Held*, that if the delay in terminating the suit was attributable to the plaintiff's laches, he was not entitled to interest. *Stewart v. Schell*, 31 Fed. Rep. 65.

1. *Lewis v. Bradford*, 8 Ala. 632; *Miller v. Bank of Orleans*, 5 Whart. (Pa.) 503; *Sims v. Willing et al.*, 8 S. & R. (Pa.) 103; *Killian v. Eigenmann*, 57 Ind. 480; *Curtis v. Adkins*, 1 Houst. (Del.) 382; s. c., 68 Am. Dec. 422; *Succession of Mann*, 4 La. Ann. 42.

Whenever a debtor is prevented, through the act of his creditor or of the law, from paying his debt at and after maturity, interest should be abated during the time he is so prevented. But as it is the duty of the debtor to seek his creditor and pay his debt, he must show that the failure to pay was not the result of his neglect. *Pillow v. Brown*, 26 Ark. 240.

Where money is held by one as a mere bailee or on deposit, interest is not chargeable. *Haswell v. Farmers' etc. Bank*, 26 Vt. 100; *Duncan v. Mockett*, 25 Tex. 245.

As a matter of law, a receipt for money does not charge the receiptor with interest, but it is discretionary with the court or jury to allow it or not. *Bell v. Logan*, 7 J. J. Marsh. (Ky.) 593.

2. *Rapalie v. Emory*, 1 Dall. (Pa.) 349; *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488.

Where money received in partition proceedings and loaned to the administrator is by the terms of the bond taken from the administrator to be accounted for "upon a final settlement of the estate," interest begins to run only from that time, and not from the date of the bond. *McIVER, J.*, dissenting; *Kinard v. Glenn* (S. Car.), 8 S. E. Rep. 203.

3. *Barr v. Haseldon*, 10 Rich. (S. Car.) Eq. 53.

Where money is paid for the account, or to the use or benefit of another, interest is allowed from the time of such payment.¹ Money advanced by one's agent or factor is not to bear interest from the time it is paid.² This is the rule when money is paid or lent forms matter of account as well as when the transactions are detached.³ But advancements by a parent to children do not bear interest,⁴ except from the time the property is divided among them.⁵

A partnership may be liable for interest to one partner who makes advances for or to the firm, when there is a special contract to that effect, or where it may be implied from the circumstances that the firm was to pay interest for such advances; otherwise

Interest may be recovered in an action for money had and received. *Pease v. Barber*, 3 Cai. (N. Y.) 266; *Goddard v. Bulow*, 1 Nott & M. (S. Car.) 45; *Black v. Goodman*, 1 Bailey (S. Car.) 201; *Porter v. Nash*, 1 Ala. 452; *Martin v. McRae*, 1 Cheeves (S. Car.) 61.

Defendant's testator having loaned a sum of plaintiff's money, she being his wife, including it with his own funds in a mortgage taken for such loan, collected a portion of the mortgage debt, and the interest annually during his lifetime, after which defendants continued to collect such interest, both testator and defendants denying plaintiff's right to any portion of the mortgage debt. *Held*, in an action to establish her claim to said fund, and to recover the same, that she was entitled to interest upon the interest so collected, though she had made no demand for such interest when received. *Price v. Holman*, 2 N. Y. S. 184.

1. *Weeks v. Hasty*, 13 Mass. 218; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Ilsley v. Jewett*, 2 Metc. (Mass.) 168; *Milne v. Remplicam*, 3 Yeates (Pa.) 102; *Sims v. Willing et al.*, 8 S. & R. (Pa.) 103; *Hastie v. De Peyster*, 3 Cai. (N. Y.) 190; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457; *Breckinridge v. Taylor*, 5 Dana (Ky.) 110; *Goodloe v. Clay*, 6 B. Mon. (Ky.) 236; *Thompson v. Stevens*, 2 Nott & M. (S. Car.) 494; *Buckmaster v. Grundy et al.*, 3 Gilman (Ill.) 626; *Aikin v. Peay*, 5 Strobb. (S. Car.) 15.

If a surety pays the debt of his principal in depreciated bank notes, he is entitled to interest on the specie value of the notes at the time of his payment. *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457.

A father conveyed his farm to his

son conditioned for the support of himself and his then wife, the mother of the grantee during each of their lives. After the death of the grantee's mother the father married again, and upon the son's objecting to support the stepwife under the contract, the father refused him to bring his claim for her support against the father's estate, after his death, whereupon the son did sue her until his father's death. That as a matter of law the son was entitled to recover interest upon his claim against his father's estate. *Sprague v. Sprague*, 30 Vt. 483.

2. *Cheesborough v. Hunter*, 1 (S. Car.) 400; *Smetz v. Kennerly*, 1 (S. Car.) 218; *Taylor v. K. Exrs.*, 1 Dana (Ky.) 391.

When an agent is required to advance by him money of his principal which is chargeable with no more than ordinary interest. *Rochester v. Levering*, 1 Ind. 562.

Forwarding and commission merchants are entitled to interest on cash advances. *Trotter v. Grimes*, 1 Wend. (N. Y.) 413.

Where money is advanced upon the purchase of grain, only a portion of which is delivered, interest is recoverable upon the excess of money advanced, above the value of the amount of grain delivered. *Cease v. C.*, 76 Ill. 484.

A receipt for money advanced in cotton in store and to arrive entitles to interest from its date. *Grimes v. good*, 19 Tex. 246.

3. *Reid v. Rensselaer Glass Fa.*, 3 Cow. (N. Y.) 393.

4. *Osgood v. Breed's Heirs*, 17 (S. Car.) 356; *Hall et ux. v. Davis et al.*, 3 (Pa.) 450; *Green v. Howell*, 6 S. (Pa.) 203.

5. *Oakey, Ex parte*, 1 Bradf. (N.

er will not be entitled to interest for such advances or
s, but the liability of the firm will be by account.¹

Money Wrongfully or Unlawfully Withheld or Obtained.

one has received the money of another and has not the
scientiously to retain it, the law imposes interest as dam-
the breach of an implied promise to pay it over.² Where
plaintiff's money has come into the hands of the defend-
fraud or imposition,³ or, being due by a third person to
tiff, is wrongfully withheld,⁴ or is the proceeds of the
s property,⁵ the defendant is liable for interest from the
withheld.⁶

Yundt's Appeal, 1 Harr.

ice v. Elliott, 72 Ga. 154.

ere his copartner sees the
charged on the books and
objections he must be con-
having agreed thereto, as to
t stated. Lloyd v. Carrier,
(N. Y.) 364.

nting between partners, in-
chargeable against one, upon
he has actually collected
from the date of receipt; but
sums which he has not re-
fact, though he may have
be responsible in event of
collect them. Shepard v.
nn. Ch. 627.

1 v. Waite, 17 Mass. 560;
Emory, 1 Dall. (Pa.) 349;
Wilmot 22 Vt. 437; Close
3 Tex. 623.

holding money against the
owner is chargeable with
ough he has a set off and the
e by him was not liquidated
nging the action. Greenly
s, 10 Wend. (N. Y.) 96.

ne has the money of another
nds, and uses it, he cannot
payment of interest by an-
at he does not know what
made by its use. In such a
at least liable for interest,
was so employed. Lewis v.
8 Ala. 632.

ard v. Bulow, 1 Nott & M.
45; Wood v. Robbins, 11
Winslow v. Hathaway et al.,
ass.) 211; Arthur v. Wheeler
Mfg. Co., 12 Mo. App. 335;
rers' National Bank v. Perry,
313; Silver Valley etc. Co.
re etc. Co. (N. Y.), 6 S. E.

upon the termination of a
p, one of the partners wrong-

fully converted the remaining property
of the firm to his own use, held, on
bill filed to state account, that the
complainant could recover interest on
the amount found due him, from the
termination of the partnership. Rob-
bins v. Laswell, 58 Ill. 203.

4. Greenly v. Hopkins, 10 Wend.
(N. Y.) 96; Hazzard v. Duke, 64 Ind.
220.

5. Chauncey et al. v. Geaton, 1 N.
H. 151.

6. Lynch v. De Viar, 3 Johns. Cas.
(N. Y.) 303; Simpson et al. v. Feltz,
1 McCord (S. Car.) Ch. 213; Black v.
Goodman, 1 Bailey (S. Car.) 201;
Rapalie v. Emory, 1 Dall. (Pa.) 349;
Shipman v. Miller, 2 Root (Conn.)
405.

Specie was shipped from Boston to
Porto Cabello for the purpose of pur-
chasing a return cargo and the vessel
was obliged to put into Antigua, on
account of a disaster, where the master,
being destitute of funds, sold a part of
the specie for the purpose of making
the repairs, and the vessel proceeded to
her port of destination and thence to
Boston. Held, that the owners thereof
were entitled to interest on the value
from the time when they would have
had the benefit of it at Porto Cabello if
it had been carried forward with the
rest of the cargo. The Mary, 1
Sprague (U. S.) 51.

A public officer retaining money in
his hands after it is due is chargeable
with interest from such time as it is
unlawfully detained. People v. Ga-
sherie, 9 Johns. (N. Y.) 71; Slinger-
landt v. Swart, 13 Johns. (N. Y.) 255;
Monroe Co. Supervisors v. Clarke, 25
Hun (N. Y.) 282; Cassady et al. v.
Trustees of Schools, 105 Ill. 560;
Lawrence v. Murray, 3 Paige (N. Y.)
400; Board of Justices v. Fennimore,
Coxe (N. J.) 242; Stein v. People, 102

(c) *On Money Paid by Mistake.*—Where money has been paid and received by common mistake, and no fraud can be imputed to either party, interest will not be allowed except from the time when the mistake was explained and demand made.¹

In such case, the question of interest depends upon the facts of the defendant.²

(d) *On Funds Held in Trust.*—Executors, administrators, executors, and trustees generally, are chargeable with interest on the funds that they improperly retain in their hands,³ and they are al-

Ill. 540; *Hudson v. Tenney et al.*, 6 N. H. 457; *United States v. Curtis*, 100 U. S. 119.

An officer charged with the disbursement of public moneys is not liable for interest thereon, if he has not converted them to his own use, nor neglected to disburse them pursuant to law, nor, when thereunto required, failed to account for or transfer them. *United States v. Denver*, 106 U. S. 536.

A city treasurer having failed to pay over to the county collector the county's quota of taxes, he was charged with interest upon the same from the time when he ought to have paid them. *State ex rel. v. Van Winkle*, 43 N. J. L. 125.

1. *Simons v. Walter*, 1 McCord (S. Car.) 97; *King et al. v. Diehl et al.*, 9 S. & R. 409; *Jacobs v. Adams*, 1 Dall. (Pa.) 52; *Ashhurst v. Field*, 28 N. J. Eq. 315.

Money in Court. Where upon the motion of intervenors, acting in good faith, money for which plaintiff was suing was ordered to be paid to the clerk to await the further order of the court, and was there detained by an erroneous order of the court, whereby the cause was continued, *held* that the intervenors were not liable for interest on the money during the time of such detention, simply because they failed to establish their right to the money. *Van Gordon v. Ormsby Bros. & Co. et al.*, 60 Iowa 510.

2. *Gillet v. Maynard*, 5 Johns. (N. Y.) 85.

Taxes—Payment by Mistake on Another's Land—Recovery from Owner—Interest.—Where taxes are paid by a person upon another's land, under such circumstances as to give a right of recovery for the taxes so paid, the person paying is entitled to recover interest at the rate of six per cent. per annum from the time of payment, and to have a lien for the whole amount paid upon the whole land. *Goodnow*

v. Plumbe, 64 Iowa 672; *Goodnow v. Litchfield*, 63 Iowa 275, followed.

Where one of several joint owners had received a mortgage to indemnify them, which was supposed sufficient but proved insufficient, and after paying the debt, *held*, in a proceeding by him for contribution, he was entitled to interest from institution of suit. *Loe v. Clay*, 6 B. Mon. (Ky.) 236.

3. *Schieffelin v. Stewart*, 1 Johns. (N. Y.), Ch. 620; *Manning v. Manning*, 1 Johns. (N. Y.) Ch. 528; *Turner's Appeal*, 57 Pa. St. 46; *N. Appeal*, 71 Pa. St. 123; *Vance v. Vance*, 32 La. Ann. 186; *Shaw v. Shaw*, 53 Vt. 360.

After the accounts of a trust are stated, and he is ordered to pay the fund forthwith, he will be liable for interest unless he pays over to the party entitled or deposits the fund in court. *Lyons v. Chamberlin*, 2 Johns. (N. Y.) 49.

Trustee Charged with Interest on Proceeds of Sale.—Trustee *held* liable for interest on the proceeds of sale received from the sale of trust property from the time when the same were received. *Judd v. Dike*, 30 Minn. 100.

Guardian and Ward.—The decedent's intestate was appointed guardian of complainant, his daughter, in February, 1865, and was appointed guardian to sell some of her property in July, 1865, and he gave surety in each capacity. He sold those lands, but never rendered any account of the proceeds, nor of his disposition thereof, after his report of the inventory thereof, made soon after they came into his hands, and never filed any account as general or special guardian. His ward, who was born in 1863, and lived with him thereafter. He died insolvent in 1881. On exception to the master's report as to the allowance and charges by the guardian, and his sureties' respective liabilities, *held* that he should be charged with

ly on the amounts originally by him as general guardian, est on the rents, but the pro- the sale of the lands should luded therein, nor the interest proceeds, because, for them, es as special guardian are possible, since he never ob- y direction from the court to hose proceeds to his account l guardian. *Smith v. Gum-* N. J. Eq. 27.

a guardian's reports showed ot of moneys belonging to his payments made by him, but no item of interest, *held* county court might, on final t, charge him with interest, anding approval of the re- *ennett v. Hanifin*, 87 Ill. 31. a guardian acts in good faith, not make any use or profit for the funds, he is chargeable tutory rate of interest only. *well*, 55 Cal. 137.

dian receiving from the ad- or of the father of his wards ond bearing twelve per cent. a part of his ward's estate, investing the same, is to be the same rate of interest upon termination of his guardian- *avely v. Harkrader*, 29 Gratt.

dian received pension money early for nine years on ac- his ward. He never filed any from the time of his appoint- een years ago, until cited. at although there was no hat he had used the money, pay interest on the pension with annual rests. *Re Dis-* N. J. Eq. 227.

a collector of an estate does sit the funds collected with orated trust company as re- law, but with his firm or in- account, and it does not appear e was any profit arising he is e not with seven per cent. but with the rate the trust would have paid. [DAVIS, enting.] *Livermore v. Wort-* tun (N. Y.) 341.

three exēcutors managed the the estate, under an agree- all the beneficiaries that he arge no commissions for his should account and settle n once a year, and should not ed to pay interest on the bal- his hands, and should receive

none on balances in his favor, and this ar- rangement was acquiesced in by the administrator of one of the beneficiaries after her death, and the executor avowed his willingness, and was, in fact, willing and ready to account to him as usual. *Held*, that he cannot be charged with interest on the inte- state's share. *Barclay v. Cooper*, 42 N. J. Eq. 516.

An administrator, making a partial settlement with the next of kin, and retaining in his hands certain interest bearing notes for the purpose of meet- ing claims against the estate then in litigation, provided they be declared valid, and who fails to keep an account of the time when the notes were col- lected and the amount of interest re- ceived, will be charged with interest during the whole time. *Jackson v. Shields et al*, 87 N. Car. 437.

Where the widow of an intestate took possession of the estate and man- aged it for the benefit of all concerned, supporting the infant children out of the income, *held*, that upon an ac- count and settlement of the rights of the parties the widow was to be charged with interest only upon the residue of the funds received by her after deduct- ing her own share, offsetting against such interest the interest upon her ad- vances for maintenance of the children. *Wilkes v. Rogers*, 6 Johns. (N. Y.) 566.

Where an administrator, with funds to distribute, delayed for two months, during vacation and illness of the pro- bate judge to file his accounts, *held* that he was not chargeable with interest for the two months. *Seligman's Estate*, *Myrick's Probate* (Cal.) 8.

An administrator kept \$20,000 on de- posit for a year after the administration was substantially completed. *Held*, that from the expiration of a year from the time of his appointment he should be charged with interest at the rate of $1\frac{1}{2}$ per cent. *Re Mates*, 5 Dem. (N. Y.) 446.

Separate Estate—Husband Debtor.— If the husband, upon mortgage, note or otherwise, receive money, which is the separate estate of the wife, he will not be chargeable with interest, unless the facts and circumstances show that it was the intention he should pay interest; and when the wife brings her bill, inter- est will commence from the time it is filed and not before. *Lishey v. Lishey*, 6 Lea (Tenn.) 418.

If money is received by the husband

chargeable when they mingle the trust funds with their own deposit them to their own credit.¹ If the trust funds are into the business of the trustee, the *cestui que trust* may interest,² unless he elects to take the profits of the business. If a trustee neglects to make an investment which he is directed to make by the instrument of trust, or by statute, he is liable for the interest,⁴ unless the *cestui que trust* elects to take the value of

for the wife and kept by him at her request until she shall call for it, his estate is not chargeable with interest thereon, no demand being shown. *Boughton v. Flint*, 74 N. Y. 476.

Interest on moneys of the wife expended by the husband will be allowed only from his death, when the claim is set up against his succession. *Weldon's Succession*, 36 La. Ann. 851.

Garnishees.—Where a debt is attached, as a general rule, interest is suspended during the pendency of the attachment proceedings. This, however, is not the case where there has been collusion, unreasonable delay, or litigation on the part of the garnishee. *Jones v. Manufacturers' National Bank*, 99 Pa. St. 317; *Southern White Lead Co. v. Haas* (Iowa), 41 N. W. Rep. 63.

A garnishee who has used the money attached in his hands is liable to pay interest from the time of attachment. *Mattingly v. Boyd*, 20 How. (U. S.) 128.

Where a garnishee in a suit in chancery retains the money due on the debt in respect to which he has been garnished till final decree rendered directing payment thereof, he is liable for interest accruing during the pendency of the litigation. To avoid such liability the garnishee must have paid the money into court. *Smith v. German Bank*, 60 Miss. 69; *Work v. Glaskins*, 33 Miss. 539. See also *Blodgett v. Gardiner*, 45 Me. 542; *Candee v. Webster*, 9 Ohio St. 452.

In an action to recover a fund in the hands of a city treasurer, arising out of an award made for the taking of certain land of the plaintiff for streets, *held* that the city, being merely a trustee of the fund for the one entitled to the same, was not liable for interest until after demand for payment. *Barnes v. New York*, 27 Hun (N. Y.) 236.

1. *Hess's Estate*, 68 Pa. St. 458; *Aldridge v. McClelland*, 36 N. J. Eq. 288; *Estate of Perkins v. Hollister Exr.*, 59 Vt. 348.

It has been *held* in *Illinois*, in *Scho-*

field's Estate, 99 Ill. 513, that the fact that an administrator mingles trust funds with his own by depositing the money belonging to the estate in his own name, as he does his individual money, cannot be held a sufficient ground to charge him with interest thereon. There is no law requiring an administrator to keep the funds of the estate separate and distinct from his own. So long as he has the money belonging to the estate at his command ready to answer the order of the court, this is all the law requires.

2. *Stott's Estate*, *Myrick's Probate* (Cal.) 168; *Seligman's Estate*, *Myrick's Probate* (Cal.) 8; *Bourne v. May*, 81 Mo. 676.

An executor, who deposits the money of the estate in his name as executor with a trading firm, consisting of himself and his son-in-law, he having a fourths interest in the assets and business, and being the principal manager, commits a breach of trust, and is charged with interest from the date of each deposit. In this instance, under the circumstances, the executor is charged with simple interest, and allowed half commissions. *Cann v. Apperson*, 14 Lea (Tenn.) 553.

3. *Robinett's Appeal*, 36 Pa. St. 458; *Kyle v. Barnett*, 17 Ala. 306; *Barnett v. Saunders*, 16 How. (U. S.) 543; *Knight's Exrs. v. Walsh*, 8 C. E. (N. J.) 498.

4. *Re Thurston*, 57 Wis. 104. The executor collects money for the estate and permits it to remain in the estate uninvested. It not being affirmed shown that no good security could be found on which to put it out at interest, the executor failing to pay it into the estate is chargeable with it under the statute, as money retained on interest by him, and it should enter into his annual account as money so retained, and being added to the principal amount. *Eppinger v. Canepa*, 20 Fla. 262.

A guardian intrusted with the management of a ward's money should

ent.¹ If a trustee uses trust funds to his own advantage, appropriates them in any way, he may be charged with

interest not actually received delay to invest has been un-

Gott v. Culp, 45 Mich.

that the ward had disappeared had not been heard from for, is no excuse. Crosby v. 31 Minn. 342.

Money of the Ward Without of the Court.—A loan of the ward, by the guardian, estate security without the approval of the county court, is made at the guardian, and if a loss guardian cannot exonerate showing that he acted in, or that the security was taken. Winslow v. People,

a guardian lends out the ward without taking sufficiency, he must be regarded as if it on his own account, and chargeable with interest on the Brewer v. Ernest, 81 Ala.

trators, like other trustees, surers, and are not expected "illible;" but while the court wish to overturn or weaken rulings heretofore made favoring those who have acted in good faith with reasonable diligence," it there was no error in this appeal from the settlement of administrator's accounts, under the instructions of the court in the administration of the estate—in the administrator with interest in his hands collected during 1868-71, after the expiration of months from the time of his death, which he was authorized by order of court, to lend out of exchange and promissory notes two good sureties, and which he lend out; although he testified for himself, "that he to lend out the money, he considered it unsafe to do so, try was so unsettled that he knew who was safe to lend and that he never used any funds belonging to the estate for his benefit, and never mixed or with his own. Nunn v. Ala. 35.

Rate of Interest.—Where C. of L.—26

trustee invests trust funds at ten per cent., but *cestui que trust* repudiates the investment, and the same is held to have been improper, and the trustee is held bound for the amount invested, six per cent. is the rate of interest with which he is properly chargeable. Cogbill v. Boyd, 79 Va. 1.

An administrator may, on special facts, be chargeable with interest, though he made none, and though, because threatened with, expecting or engaged in litigation, and advised by counsel to retain the money in hand, he failed to put it out and make it productive. Where the jury could have arrived at the amount of their verdict by counting interest, or by disallowing commissions and extra compensation, or partly by the one process and partly by the other, the verdict may stand. Doster v. Arnold, 60 Ga. 316.

An executor is not discharged from the payment of interest on a sum found due from him by the probate court, by showing that he invested the money in confederate bonds and received no interest. Lockhart v. Horn, 3 Woods (U. S.) 542.

An executor, whose duty it is to put money held by him at interest for the benefit of usufructuary, is estopped to deny performance of his duty, and will be held to have retained the money at interest payable by himself. Saunders Succession, 37 La. Ann. 769.

An administrator deposited the assets in a trust company, when he received four per cent. interest. Held, that he should be charged with interest at that rate only, notwithstanding he had agreed, as guardian of next of kin, with the other persons interested in the estate, to distribute immediately; since this court has no concern with damages for breach of contract. Haskin v. Teller, 3 Redf. (N. Y.) 316.

1. Perry on Trusts, § 469. See McIntire v. Zanesville, 17 Ohio St. 352; Norris's Appeal, 71 Pa. St. 106, 125; Lamb's Appeal, 58 Pa. St. 142.

2. Merrifield v. Longmire, 66 Cal. 180; Whitney et al. v. Peddicord, 63 Ill. 249; Duffy v. Duncan, 35 N. Y. 187; Bruner's Appeal, 57 Pa. St. 46; Aldridge v. McClelland, 36 N. J. Eq. 288; Doremus's Est., 33 N. J. Eq. 234.

Compound interest will not be

VI. COMPUTATION—(a) Time During Which Interest Accrues
On contracts for the payment of money, interest is due from the time the principal should have been paid.¹ If a contract be

charged against negligent trustees, where the facts do not indicate a withdrawal of the funds from their legitimate channels of accumulation, or a realization by the trustees of profits on the assets, and do not raise a presumption that the assets would have been increased by a more strict adherence by the trustees to their line of duty. *Ames v. Scudder*, 11 Mo. App 168.

An administrator is not chargeable with interest, where the proof is that he has not used the assets for his personal benefit, nor unnecessarily detained the same in his hands, and has kept an account of his receipts and disbursements. *Wilson v. Lineberger*, 88 N. Car. 416; *Bartlett v. Fitz*, 59 N. H. 502.

If an executor has money belonging to the estate actually on hand and appropriates it to his own use in payment of a legacy not yet due, he must account for the interest. *McClure v. Brown*, 56 Iowa 768.

The payment by an administrator, with the will annexed, of a legacy which was barred by the lapse of time, is a misappropriation by him of the funds belonging to the estate; and he is chargeable with interest thereon from the date of the misappropriation. *Moody v. Hemphill*, 71 Ala. 169.

An administrator converted dividend paying bank stock of the estate into money, and with it paid off a mortgage on lands in which he had an interest as heir of the intestate. On exceptions to his account, credit for that payment was disallowed. *Held*, that he was chargeable with interest at the legal rate on that amount from the date of the payment, including the time during which litigation on the exceptions continued. *Mount v. Van Ness*, 35 N. J. Eq. 113.

An executor is chargeable with interest on sums appropriated by him in payment of his commissions in advance of their allowance by the surrogate, the law declaring that he shall be allowed commissions "on the settlement of his account." *United States Trust Co. v. Bixby*, 2 Dem. (N. Y.) 494; s. c., *Meyers' Est.* 67 How. (N. Y.) Pr. 170.

The fact that a debtor to the decedent's estate becomes administrator thereof, and includes his debt in the inventory as an asset of the estate, does not affect his individual relation as

debtor to the estate; and upon settlement of his administration as he is personally chargeable with interest until the debt was paid, amount was shown to be in his hands as administrator. *Rodenbach's Est.* 102 Pa. St. 572.

If a trustee wrongfully sells realties belonging to the trust estate, and converts the proceeds to his own use, an action against a surety on his bond for interest should be computed on the amount converted from the date found to be due up to the day of the execution, without restatement. *Kim v. Blake*, 139 Mass. 593.

Where an administrator did not reimburse all the money of the estate he received, but there is no positive evidence that he misapplied it, he is not to be charged with interest. When the time of his removal from his office as administrator he has funds of the estate in his hands, he is chargeable with interest on such funds. *Grant v. Ward*, 93 N. Car. 488.

Whether a trustee should be charged with any interest upon money in his hands, and if he is, then at what rate, must depend much upon the particular facts of each case. *Bobb v. Egan*, 111 Mo. 412; *Murphey's Appeal*, 6 Vt. (Pa.) 223.

An executor disbursed his own money in paying claims against the estate. It did not appear that his disbursements equalled the amount of a bond mortgage given by him to the testator and held by his co-executor. *Held*, that he was chargeable with interest on the mortgage. *Re Ackerman*, 40 N. Y. 533.

1. *Ruckman v. Bergholz*, 38 N. Y. 531; *Williams v. Sherman*, 7 We. (N. Y.) 109; *Still v. Hall*, 20 We. (N. Y.) 51; *Adams v. Fort Plain Bk.* 10 N. Y. 255.

Meaning of "After Maturity."—When a promissory note payable on a day bears interest "after maturity," the interest should be computed from the day fixed for payment, and not from the expiration of the days of grace. *Less v. Williams*, 62 Miss. 369; s. c., 10 Am. Rep. 190.

When the verdict is so much for the plaintiff as to include interest, and the interest is to be computed from maturity of the contract,

payment of a certain sum "with interest," the interest to run from the making of the contract.¹ Unless there is agreement to that effect, the interest is not payable before the

on, and if less principal is than the last instalment of that, the maturity of the instalment from which to compute in *Van Winkle v. Wilkins* (Ga.), 7 p. 644.

ker's certificate of deposit pay- presentation sixty days after with interest, carries interest till d and paid. *Payne v. Clarke*, 159.

ndant contracted to pay to plain- oo "out of any moneys or prop- ceived by him from the sale or of certain patented inventions. nt assigned the patents, the as- t to take effect when the pur- ice agreed upon (\$25,000) was he assignee did not pay, and nt revoked the assignment. nt, with the owners of certain tents, thereupon assigned their to H in trust, he agreeing to censes and sell royalties, and to ne proceeds as soon as received, n specified proportions, between gnors and himself, the amount ntiff, however, to be paid out of proceeds. In an action upon ract with plaintiff, *held*, that he e entitled to interest from the the first or the second assign- ut only from the time moneys ceived on sales or licences. *v. Johnston*, 82 N. Y. 271.

default in the performance of ment in the alternative to pay or in notes at three or four interest runs from the time tes or cash should have been *Stuart v. Binsse*, 10 Bosw. (N.

e by the terms of a written con- yments become due on a cer- in each month, it is proper to interest on such sum as may be he specified day, from that time id. *Dobbins v. Higgins*, 78 Ill.

action for damages for breach ract the plaintiff should be al- terest from the breach of the , not from its date. *Brackett v. on*, 14 Minn. 174.

discretionary for the court to al- erest from judicial demand on s for a breach of contract. *Por- arrow*, 3 La. Ann. 140.

1. *Connors v. Holland*, 113 Mass. 50.

A certificate of deposit promised "to pay the money with interest if ten days' notice was given,"—*held*, that the interest was due only from ten days after notice. *Cruikshank v. Comyns*, 24 Ill. 602.

A promissory note, payable at a future day, "with interest" at a specified rate, bears interest from date, since it would, without these words, bear interest from maturity. *Campbell Printing Press & Mfg. Co. v. Jones*, 79 Ala. 475.

A note was given due six months after date "without interest" on a contract, under which six months were allowed the makers of the note to perform certain stipulations necessary to the completion of the contract. *Held*, that the effect of the note was the same as if the words "without interest" had not been inserted, and that the note bore interest from the date of its maturity. *Roberts v. Smith*, 64 Tex. 94; s. c., 53 Am. Rep. 744.

Where a note is made payable at a future day "with" interest at a pre- scribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect. *Tanner v. Dundee Land Investment Co.*, 8 Sawyer (U. S.) 187.

A promissory note payable at a day certain "with lawful interest until paid (but if the principal shall be punctually paid when due, then in that case, and not otherwise, the interest is to be deducted)," if not paid at maturity, bears interest from date. *Ely v. Wither- spoon*, 2 Ala. 131.

A note on demand "with interest . . . till paid," bears interest from the day of its execution. *Pate v. Gray*, 1 Hempst. (U. S.) 155; *Pittman v. Barrett*, 34 Mo. 84.

In *Arkansas* a promissory note payable on demand draws interest from date without a demand. *Pullen v. Chase*, 4 Ark. 210. *Contra*, *Dillon v. Dudley*, 1 A. K. Marsh. (Ky.) 66; *Bartlett v. Marshall*, 2 Bibb (Ky.) 467; *Patrick v. Clay*, 4 Bibb (Ky.) 246; *Bishop v. Sniffen*, 1 Daly (N. Y.) 155; *Cannon v. Beggs*, 1 McCord (S. Car.) 370; *Schmidt v. Limehouse*, 2 Bailey (S. Car.) 276.

principal on which it accrues.¹ Where a sum is due on demand, interest runs from demand.² If there is no date of demand alleged or proved, the interest runs from the time of bringing the suit.³ On unliquidated claims, interest runs from time of demand or from the time the action is brought, if there be no demand.⁴

Where goods are sold for cash, interest begins to run im-

1. *French v. Kennedy*, 7 Barb. (N. Y.) 452; *Bander v. Bander*, 7 Barb. (N. Y.) 560.

2. *Butler v. Austin*, 64 Cal. 3.

A principal is entitled to interest on money collected by his agent only from demand (date of summons here) and default of agent. *Neal v. Freeman*, 85 N. Car. 441; *Pipkin v. Bond*, 5 Ired. (N. Car.) Eq. 91; *Thornton v. Thornton*, 63 N. Car. 211; *Deal v. Cochran*, 66 N. Car. 269; *Hyman v. Gray*, 4 Jones (N. Car.) 155.

3. *Whitaker v. Pope*, 2 Woods (U. S.) 463.

In an action on a policy of life insurance, payable if the person whose life is insured survives a certain day, the plaintiff can recover interest only from the date of the writ, unless in his declaration he alleges a demand before that time. *Pierce v. Charter Oak Ins. Co.*, 138 Mass. 151.

4. *David v. Conard*, 1 Greene (Iowa) 336; *Whereatt v. Ellis*, 68 Wis. 61; *Hall v. Farmers & Citizens' Savings Bank*, 55 Iowa 612; *Case v. Osborne*, 60 How. (N. Y.) Pr. 187; *Hunt v. Nevers*, 15 Pick. (Mass.) 500; *Brewers v. Byringham*, 12 Pick. (Mass.) 547; *Houghton v. Hagar*, *Brayt.* (Vt.) 133; *Tucker v. Grover*, 60 Wis. 240; *Gammell v. Skinner*, 2 Gall. (U. S.) 45; *McCullum v. Seward*, 62 N. Y. 316. See *Pearson v. Grice*, 8 Fla. 214; *Neal v. Freeman*, 85 N. Car. 441; *Porter v. Grimsley*, 98 N. Car. 550.

Where a definite sum is ascertained to be due to a distributee upon settlement of an estate, and ordered to be paid, no demand is necessary before suit brought to entitle him to interest on the amount from the date of the decree. *McRae v. Malloy*, 87 N. Car. 196.

In an action for a breach of a contract by the terms of which damages for the breach are liquidated, interest is properly chargeable upon the amount fixed, from the date at which such damages became due and payable. *Winch v. Mutual Benefit Ice Co.*, 86 N. Y. 618.

Where a defendant before suit

brought has acknowledged an indebtedness for the items of the plaintiff but has reserved the right to question the amounts charged, as to interest tested as to amount, interest is chargeable only from the commencement of the action. *Hand v. Church*, 30 (N. Y.) 303.

Interest on a sum due for labor performed and materials furnished in a ship will be computed in a petition for the enforcement of a lien therefrom the time of filing the petition. *Barstow v. Robinson*, 2 Allen (U. S.) 605.

Where, in an action for money on contract or for labor performed, the petition demands interest, the plaintiff will draw interest, at least from the date of filing the petition. *Swiss v. Cissna*, 61 Iowa 693.

Where no time is agreed upon for payment for personal services, a charge made for them, nor present demand for payment in the lifetime of the party, and the claim has been permitted to sleep a long time from the act of the party rendering the services, no interest should be allowed on such claim except from the death of the party. *Newell v. Keith*, 11 Vt. 214.

A depositor in a national bank who suspends payment and a receiver appointed, is entitled from the date of his demand to interest upon his deposit. *National Bank of the Commonwealth v. Mechanics' National Bank*, 94 (U. S.) 437.

In *Louisiana*, since 1839, sum on contracts, though unliquidated, draw interest from the time of judicial demand. *Barrow v. Reab*, 9 How. (U. S.) 366.

Unless a claim be such that it can be set running by a demand, such case instituting suit is a suit on demand,—interest cannot be allowed from the time of the commencement of an action on a claim of such a nature that it does not draw interest from an earlier date. *White v. Miller*, 10 (U. S.) 393.

On a contract to pay for goods sold and delivered, from
 2 Where there is a sale on credit, interest runs from the
 n of the credit, agreed upon or fixed by usage.³ If
 no evidence of length of credit, only from time of bring-
 4
 nuities, legacies, etc., interest runs from the time they are
 5 On advancements, from the death of the testator.⁶
 damages arise from an injury, interest runs from the
 injury happened.⁷

plaintiff is entitled to interest
 collected by defendant from
 f collection, but the date of
 s not shown on the trial, in-
 be allowed only from the in-
 f the action. *Hubenthal v.*
Iowa, 39 N. W. Rep. 694.
 ment provided that defend-
 pay for a party wall, upon
 t being ascertained by ap-
 be appointed by the parties.
 until an appraisal or
 done by defendant to
 plaintiff could not sue on the
 and the amount being un-
 a demand would not entitle
 erest, though defendant was
 wall. *Thorndike v. Wells*
Association, 146 Mass. 619.
v. Foster, 26 Ga. 465.
 is allowed on a stated ac-
 n the time of signing the
Dickinson v. Legare, 1
Car. 537.
g v. Henry, 30 Ala. 721;
Henry, 31 Ala. 53; *Foot* v.
 6 Allen (Mass.) 221; *Atlan-*
ate Co. v. Grafflin, 114 U. S.
 one purchasing materials
 ction of a church agreed to
 t on any materials furnished
 rtain day at ten per cent.,
 such rate might properly be
 from the day of delivery.
 an Church of New Boston v.
 6 Ill. 269.
lister v. Reab, 4 Wend. (N.
Bate v. Burr, 4 Harr. (Del.)
a v. Smith, 7 Wend. (N. Y.)
e v. Patton, 2 Port. (Ala.)
an v. Otto, 1 Bush (Ky.) 225.
v. Boston etc. Aid Society,
 91; *Clayton v. Somers*, 27 N.
 ; *Succession of Breaux*, 38
 728; *Adams v. Heffernan*, 9
) 529; *Lynch v. Mahoney*, 2
 Y.) 434; *Wheeler v. Ruth-*
f. (N. Y.) 491.

In an action against an attorney for
 moneys collected on a judgment upon
 which the attorney had a lien for his
 services the referee allowed plaintiff
 the amount collected with interest from
 the date of the collection, and deducted
 therefrom a sum found by him to be
 the value of the detandant's services,
 upon which no interest was allowed.
Held, error. The defendant was en-
 titled to interest upon the amount
 allowed from the date of the collection
 of the judgment. *Hover v. Heath*, 5
Thomp. & C. (N. Y.) 488; s. c., 3 Hun
 (N. Y.) 283.

On money of the principal detained
 against right the agent is chargeable
 with interest from the time when it
 should have been paid, at the rate fixed
 by the law of the place where it is de-
 tained. *Bischoffsheim v. Baltzer*, 21
Fed. Rep. 531.

While it has been authoritatively set-
 tled that liens divested by a sale made
 by the assignee of an insolvent, in pur-
 suance of an order of court, cease to
 draw interest beyond the date of con-
 firmation of the sale to be paid out of
 the proceeds, yet, if the creditor whose
 lien is thus divested, and who is en-
 titled to receive his money, is not then
 paid the same, and it is kept or invest-
 ed afterwards so as to draw interest, it
 is interest produced by the money to
 which he was justly entitled, and he
 can properly claim the interest thus pro-
 duced. *Appeal of the Brownsville De-*
posit and Discount Bank, 96 Pa. St. 347.

6. *Steele v. Trierson*, 1 *Pickle* (Tenn.)
 430; *Roberson v. Nail*, 1 *Pickle* (Tenn.)
 124.

And this though the receipts given
 by the donees stipulate for the payment
 of interest from an earlier date. *Rob-*
erson v. Nail, 1 *Pickle* (Tenn.) 124.

7. *Erwin v. Neversink Steamboat*
Co., 23 Hun (N. Y.) 578; *The Morning*
Star, 4 Biss. (U. S.) 62; *Ripley v. Mil-*
ler, 1 Jones (N. Car.) L. 479; s. c., 62
Am. Dec. 177.

Where money is paid by mistake, interest can only be recovered from the time of demand and refusal.¹ Where it is wrongfully obtained, it is due from the time it was so obtained, and not from demand.² Where it is paid at the request and to the use of another, from the time of payment.³

Interest is not recoverable on a debt due by a citizen of one State to a citizen of another State during the period the two respective countries are at war, as all unlicensed intercourse between them is forbidden; but where the payee of a note and the parties thereon are residents of the same country, they may lawfully make payments and stop interest; and they are liable accordingly in a suit against them, though by reason of their principal being an alien enemy of the creditor, the latter could not recover the interest of the principal in a direct suit against him.⁴ Neither is interest due during the time a right of action is suspended by legislative enactment; nor pending judicial proceedings.⁵

Judgments and decrees bear interest from their date.

In an action for damages, judgment should be for the amount of the verdict and interest on this amount from the date of the judgment and not from the date of the verdict. *Fowler v. Balt. & Ohio R. R. Co.*, 18 W. Va. 579.

1. *Simons v. Walter*, 1 McCord (S. Car.) 97.

2. *Atlantic Nat. Bank v. Harris*, 118 Mass. 147.

3. *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Chamberlain v. Smith*, 1 Mo. 718; *Thompson v. Stevens*, 2 Nott. & M. (S. Car.) 493. *Contra*, *Hanley v. Crowe*, 3 N. Y. S. 154.

A contract with a city for constructing a sewer provided that the contractor should receive no payment for labor or materials until the work should be completed, and the assessment to be levied therefor duly "confirmed," but advances might be made, in conformity with a city ordinance, which provided that seventy per cent. might be paid on certificates, "the remaining thirty per cent. to be reserved until the final completion of the contract," but required interest to be paid on the advances to be charged from the time of making them up to the time of final payment. *Held*, (1) that such interest should be charged up to the time of the confirmation of the assessment; (2) that proof that the city had for many years charged interest only up to the time of the completion of the work was immaterial. *Fellows v. New York*, 17 Hun (N. Y.) 249.

4. *Bean v. Chapman*, 62 Ala. 53.

The rule that interest was not demand-

able in a certain class of cases, which occurred after the revolutionary war, does not apply to a case where a citizen resided in the Confederate States during the war of 1861-65, but had an interest in the loyal State where the debts of interest were payable, and where the principal did not become due until after the suppression of the rebellion. *v. Lambert*, 15 Minn. 416.

The removal of the assets of a bank and the absence of a note with the bank in the Confederate States, held not to be an obstacle to its payment as to the maker from liability for interest in the cashier having still remained in him within the federal lines. *G. Union Bank*, 12 Heisk. (Tenn.) 303.

5. *Wainwright's Estate*, 13 Pa. 336; *Curd v. Letcher*, 3 Marsh. (Ky.) 443; *Tillson v. U. S.*, 100 U. S. 43.

Effect of Laches in Entry of Judgment.—A plaintiff obtained a judgment against the United States in the year 1861, subject to the opinion of the court on a case to be made, and rested nearly thirty years before the entry of judgment. *Held*, that under such circumstances interest should run from the entry of the judgment. *Field v. Ystalyfera Iron Company*, 10 U. S. 174.

Damages for Right of Way.—If a plaintiff recover an award of damages for a condemned and occupied for public road purposes the damage be for the excess that returned by the commissioners, the owner may have in-

action upon a foreign judgment, the interest is computed date to the date of the judgment in the action.¹ Interest accrues *de die in diem*, and is always apportionable.² *Compound Interest*.—Interest upon interest is not recoverable incident, nor as a compensation for the detention of money.³

from the time he was entitled to satisfaction. *Sioux City etc. R. Co. v. Brown*, 13 Neb. 317.

On appeal from the award of commissioners in proceedings to set aside a railroad, as a general interest should be allowed on the whole sum assessed by the commissioners, from the filing of the petition of the commissioners. The award upon the railroad company to the existence of conditions which make the case out of this general that the sum awarded was tendered to the owner instead of paid into court, or that the owner received the amount paid, or that he has continued to use the land for the benefit of the use of the land or the value of which equals the interest. The mere fact that the company has not taken possession of the land is not sufficient. *Chicago etc. R. Co., 67 Wis.*

Mortgage creditor of a decedent estate is solvent, and whose land is sold by order of the orphans' court for the payment of debts, may interest on his accompanying bill for the confirmation of said sale from the date of payment. *Aliter*, if the estate were insolvent. *Yeatman's Estate*, 102 Pa. St. 297.

On appeal by the plaintiff from a judgment of foreclosure the judgment is reversed and the cause remanded for entry of judgment for a sum. *Held*, that the plaintiff is entitled to interest upon the mortgage from the date of the entry of the judgment upon the remittitur. *Beckwith v. Kaggs et al.*, 61 Cal. 362.

As to the claims of creditors against the estate of one deceased is not between the time of the contract and the absolute contract. *Wainwright's Estate*, 13 Cal. 336.

Land belonging to the estate of a decedent is sold by order of the court for the payment of debts; interest on the debts ceases, not until confirmation of the order but the money is made, according to

its terms. *Meals's Estate*, 13 Phila. (Pa.) 558.

A judgment founded in tort bears interest in the District of Columbia from the date of rendition. *Hellen v. Metropolitan R. Co.*, 4 Mackey (D. C.) 519.

1. *Clark v. Childs*, 136 Mass. 344; *Hopkins v. Shepard*, 129 Mass. 600.

2. *Wertz's Appeal*, 65 Pa. St. 306.

3. *Stokely v. Thompson*, 34 Pa. St. 210; *Lewis v. Small*, 75 Me. 323; *Wilson v. Davis*, 1 Montana 183; *Force v. Elizabeth*, 28 N. J. Eq. 403; *Dyar v. Slingerland*, 24 Minn. 267; *Broughton v. Mitchell*, 64 Ala. 210; *Wofford v. Wyly et al.*, 72 Ga. 863; *Denver etc. Co. v. McAllister*, 6 Colo. 261.

The law is otherwise in some States. In *Georgia*, in a suit to foreclose a mortgage made to secure notes on which interest was payable annually at a certain day, *held* that interest should be allowed on all interest which was not paid from the time it became due. *Calhoun v. Marshall*, 61 Ga. 275.

It was *held* in *Michigan* that How. Stat., § 1599, in permitting interest to be compounded on instalments that fall due separately under some written contract, does not apply to new interest that accrues merely by lapse of time after the maturity of the debt. *Voigt v. Beller*, 56 Mich. 140. See also *Rix v. Strants*, 59 Mich. 364.

And in *North Carolina* when a promissory note is given with the stipulation that the interest is to be paid annually or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest as if he had given a promissory note for the amount of such interest. By this mode of computation compound interest is not given, but a middle course is taken between simple and compound interest. *Bledso v. Nixon*, 69 N. Car. 89.

In *Texas*, where a contract stipulates for the payment of interest annually, interest runs on the annual interest as it accrues. *Lewis v. Paschal*, 37 Tex. 315.

The following words in a note mean interest at eight per cent., payable annually: "With eight per cent. annual interest." *Kurz v. Suppiger*, 18 Ill. App. 630.

It can only be recovered upon agreement, and upon sufficient consideration, or in mercantile transactions upon a contract implied from the course of dealing, or from custom.¹ Where there has been a settlement between the parties, or a judgment which turns the aggregate amount of principal and interest due is turned into a new principal, interest upon such new principal is allowed.² An agreement to pay interest upon interest without consideration other than a moral one has been held invalid, as usurious, in New York, except in the case of interest already accrued.³

In legal contemplation a contract for "annual interest" is the same as if written for "interest annually." *Catlin v. Lyman*, 16 Vt. 44.

Compound interest may properly be allowed in a decree for an accounting by way of damages for persistently and wrongfully refusing to account. *Heath v. Waters*, 40 Mich. 457.

A trustee who uses the funds of the trust's estate for his own profit is liable for interest at the legal rate with annual rests. *Merrifield v. Longmire*, 66 Cal. 180. *Re Thurston*, 57 Wis. 104; *Thorn v. Garner*, 42 Hun (N. Y.) 507; *Dixon v. Storm*, 5 Redf. (N. Y.) 419.

1. *Young v. Hill*, 67 N. Y. 162; *Genin v. Ingersoll*, 11 W. Va. 549; *St. Louis Gaslight Co. v. St. Louis*, 11 Mo. App. 55.

The "mercantile method" of computing interest on unsettled demands by making annual rests, and carrying the balance, including interest, as principal into the subsequent statement, is not sanctioned by the laws of *Ohio*. *Averill Coal & Oil Co. v. Verner*, 22 Ohio St. 372.

Compound interest will not be allowed on an account between planting partners without clear proof of the debtor's acquiescence therein. Interest cannot be charged on a claim never presented to the debtor before suit, which is allowed on a *quantum meruit*. *Baly v. Becnel*, 36 La. An. 496.

Although by the terms of a contract interest is payable half yearly, yet, when, upon maturity of the contract, and default in payment of the principal, interest is to be computed for the purpose of incorporating it in a judgment for the amount of the indebtedness, any interest allowable from after maturity is awarded by way of damages and is not governed by the terms of the contract, but is computed without rests. *Ashuelot Railroad Co. v. Elliott*, 57 N. H.

397. See also, *Re Bartenbach*, Bankr. Reg. 61.

2. *Stokely v. Thompson*, 34 210; *McClelland v. West*, 70 183; *National Bank of the Commonwealth v. Mechanics' National Bank*, 94 U. S. (4 Otto) 437; *Bainbridge v. Wilcocks*, 1 Baldw. (U. S.) 536.

Where a decree was entered causing ascertaining and fixing the aggregate amount of the plaintiff's debt, giving interest on such aggregate from the date of the decree, as prescribed in the West Virginia Code, ch. 13, § 1, *held*, it is error in a subsequent decree, entered in the same cause, to add interest for the years thereafter, to reaggregate the debt by calculating interest on the aggregate sum to the date of the decree, then adding this interest to the sum of the first decree and giving interest on the second aggregate from the date of the last decree. *The Admr. v. Minghini's Admr.* et al., 11 W. Va. 314.

In rendering a decree for the amount due on a promissory note, it is to compute interest on the note from the time of its maturity and add it to the principal, and then compute interest on the gross amount from the maturity of the note to the time of rendering the decree. The proper mode of computing interest is, when there have been no payments, to compute from the time the note begins to draw interest to the time of rendering the decree. *Barker v. International Bank*, 80 Cal. 1.

The decree in bottomry is, to consider the sum lent and the premium on a principal, and to allow compound interest on that sum for the delay in payment after it is due. *Ship Parsons v. Ship Parsons*, 10 Mass. (U. S.) 255.

3. *Young v. Hill*, 67 N. Y. 162; *Connecticut v. Jackson*, 1 John. (N. Y.) Ch. 14; *Van Benschooten v. L. B. Johns*, (N. Y.) Ch. 313. See also *Perkins v. Coleman*, 51 Miss. 299.

the doctrine of the decisions generally is that the taking of compound interest cannot, *per se*, be considered usurious, and the agreement to pay it after the interest has become due on a loan is not only legal, but is generally just and equitable, being based upon a moral and equitable consideration.¹

Willing v. Pawling, 4 Yeates 11; *Camp v. Bates*, 11 Conn. 405; *Chisolm v. Nott & S. Car.*) Rep. 38; *Rose v. Hart*, 17 Conn. 246; *Meeker v. Conn.* 577; *Radford v. South-ual Life Ins. Co.*, 12 Bush 41; *Carter v. Carter* (Iowa), 41 Rep. 168; *Mueller v. McGregor*, St. 265; *Thayer v. Wilmington ing Co.*, 105 Ill. 540.

In the *akota* case it was held that a provision that annual instalments of interest not paid when due should bear interest. This is not compound interest. *Hovey v. Edmison*, 449.

Section.—A provision in a promissory note that the principal be paid "with interest at two per cent. per month; interest payable monthly, and if not paid to become part of the principal," construed to mean that the notes should bear interest at the rate of two per cent. a month, compounded monthly. *Page v. Willard*, 562.

A provision in a bond, providing that "in case any sum of principal or interest shall not be paid when the obligors shall pay interest at the rate of ten per cent. a month, during all the time the same remains overdue and unpaid," held that this did not authorize the compounding of interest; unpaid principal interest would draw interest at the rate of ten per cent. a month, but without rests. *Morgan v. R. Co.*, 57 Mich. 430. The court was authorized to purchase a bond at nine per cent. territorial rate of premium as to the first four and one half per cent. of the life of the bonds. *Held*, that the ordinary rules of arithmetic applied to the rule of computation, and moreover, was to be made so as to compute interest on interest, but not on principal. *Livingston v. Nev.* 352.

An agreement in writing plaintiff to purchase the timber on certain land at a certain price per thou-

sand feet of timber, defendants to have five years from May 1st, 1882, to wholly remove the timber, and to cut and take away a specified amount in each of the winters of the years 1882 and 1883, or, in case of failure to do so, to pay plaintiff interest on the amount of the deficiency in each year from May 1st following to May 1st, 1884, to be settled for with interest from January 1st, 1882; all timber cut in any year to be paid for on or before November 1st following, with interest from May 1st preceding, on which day the account of the timber was to be made and adjusted. *Held*, that the stipulation for interest from January 1st, 1882, upon the price of the timber remaining uncut on May 1st, 1884, could not be held void as inconsistent with the provision giving five years for the removal of the timber, or with the provisions for annual settlements in May, or as of May, and annual payments in November afterwards, plaintiff to receive interest accruing between those dates; that the contract was not to be construed as requiring interest upon interest, or double payment of interest, but that interest paid on deficiencies before May 1st, 1884, should be credited as prepaid interest on cuttings after that date, and that the stipulation was not so unconscionable that it should be adjudged void. *Goodridge v. Forsman*, 79 Me. 132.

In *Oregon*, an agreement to compound interest oftener than once a year cannot be enforced, but does not render the agreement void as to the principal sum secured and simple interest. *Murray v. Oliver*, 3 Oreg. 539.

Defendant executed her promissory notes, payable in thirty days with interest at four per cent. per month, interest to be paid monthly in advance, and if not so paid, to become a part of the principal and bear thereafter the same rate of interest, compounding monthly in advance. *Held* in an action on the notes that the court did not err, in calculating the interest due to plaintiff, in allowing interest on compound interest. *Fisk v. Lee* (Cal.), 12 Pac. Rep. 255.

Coupons payable at a certain time and place bear interest from the time they fall due without demand of payment.¹

(c) *Application of Payments.*—The rule is, where compound interest is not allowed, that where payments are made from time to time on a debt bearing interest, the interest is to be computed on the debt up to the time of payment, and the payment is to be deducted from the *amount*, principal and interest, and the balance forms a new capital; on that balance interest is to be computed from that time, but the new capital must not be more than the former. If the payment be less than the interest due at that time, the surplus of interest must not augment the capital.² If compound interest is allowed, it is only the interest on the principal which will become principal. Credits will be applied, first to the deferred amounts of annual interest, with the second to the interest accrued thereon, and the remainder, if any, to the interest accrued on the principal since the last annual period, and so on (if any remains) to the principal itself. It will be only the interest on the balance of principal from that time to the next annual period which will be next payable, or be subject to interest, and so on.³

When a higher rate of interest than the law allows has been paid, the excess of the payments above the legal rate will be credited to the principal; but when the payments have been made specifically as interest at a rate higher than the law requires, which it does not prohibit, a debtor cannot charge the excess of his payments above the legal rate.⁴

1. *Langston v. S. Car. R. Co.*, 2 S. Car. 248; *Rich v. Seneca Falls*, 19 Blatchf. (U. S.) 558; *Humphreys v. Morton*, 100 Ill. 592.

Comp. St. Neb. [1887], ch. 44, § 1, provides that any rate of interest agreed upon not exceeding ten per cent. per year shall be valid, either annually or for a shorter period, or in advance if so expressly agreed. *Held*, that this section forbids the allowance of interest in excess of ten per cent., and where the interest on a note is represented by coupons, providing that interest shall be allowed thereon after maturity at the rate of ten per cent. per annum, no interest will be allowed on them. *Mathews v. Toogood*, 23 Neb. 536; s. c. (Neb.), 41 N. W. 130.

2. *Hurst's Admr. v. Hite Admr.*, 20 W. Va. 183; *Case v. Fish*, 58 Wis. 56; *Hill v. Durand*, 58 Wis. 160; *Baker v. Baker*, 4 Dutch. (N. J.) 13; s. c., 75 Am. Dec. 243.

Interest on an account for purchase money, with payments, should be computed on the basis of partial payments. *Curd v. Davis*, 1 Heisk. (Tenn.) 574.

A tender so far as the computation of interest is concerned must be considered as a payment. *Hidden v. Johnson*, 39 Cal. 61.

Interest is allowed upon the interest on an independent account when used to set off or counter claim to extinguish the debt, but it is not to be computed upon payments as such, the effect is to reduce *pro tanto* the due, interest being first discharged. *Overby v. Fayetteville Building Ass'n*, 81 N. Car. 56.

A note for \$550 and interest bearing credit of \$450. An order after maturity given on third parties for the amount of the note bore a credit of \$580, which was found to include the credit on the note. *Held*, that the interest bearing principal should be reduced by \$450 from the date of the credit of that amount. *Cowles v. Curry*, 96 N. Car. 331.

3. *Vaughan v. Kennan*, 38 Ark. 117; *Heartt v. Rhodes*, 66 Ill. 351; *Flannery v. Flannery*, 58 Vt. 576; *Ankeny v. Converse*, 17 Ohio St. 11; s. c., 91 Am. Dec. 115.

4. *Mueller v. McGregor*, 28 Oh.

re a statute prescribes a mode of computing interest in cases, it does not apply to an instrument given prior to the date of the statute.¹

Interest follows the principal as an incident to it so long as it is an incident; but where it is separated and set apart from the principal by actual payment, or being carried, when due, to the credit of the owner of the principal, in his account with the creditor, and this in pursuance of a provision in the contract creating and defining the principal debt, it is so separated and severed from the principal as to cease to be an incident to and not follow it.²

RATE—(a) *In General.* The rate of interest which may lawfully be taken, and the rate which will be allowed in the absence of contract is generally fixed by statute.³ A person is allowed to pay the legal rate, except where there is an express

see v. Rider, 60 N. H. 452; *Pettis v. R. I.* 344; *Marye v. Strouse*, (U. S.) 204.

—**Contract for**—**Application of**—**Payments.**—The plaintiff borrowed

sums of money, at various times, from the defendant, a national bank, contracted to pay usurious interest therefrom from time to time deposited in the bank. Occasional settlements were had, at which times the sums were deducted from the principal and interest and new notes were given for the balance so found. Subsequently to the settlement, plaintiff brought an action on the national banking act to double the amount of the interest paid within two years.

(1) That in the absence of an agreement that the payments should be made in the discharge of the indebtedness defendant could not so apply the payments.

(2) That the usurious transaction was held to have occurred and that the usurious interest sought to be recovered was paid. (3) That under the facts and the rules of law, the payments must be held to have been made *pro rata* to the principal and interest due at the time, unless there was an agreement to apply them first to the principal interest; and that the burden was on the defendant to establish the agreement. *Kinsler v. Farwell*, 58 Iowa 728. *Compare v. Campbell*, 36 Ohio 361.

The notes were given for a loan at interest, and various payments were made, without direction as to how the payments should be appropriated, and under the contract to keep down in-

terest or to satisfy the usury charged, there was no error in refusing to charge to the effect that such payments were made to satisfy the usury, and that as more than six months had elapsed before this defence was set up, a claim that the note was usurious was barred by the statute of limitations. The statute of limitations relied upon to defeat this defence is alone applicable to suits brought to recover usury which has been paid, or to a set off claiming such a demand. *Cheapstead v. Frank et al.*, 71 Ga. 549.

1. *Troxwell v. Fugate*, Hard. (Ky.) 2.

2. *Ohio v. Cleveland etc. R. Co.*, 6 Ohio St. 489.

3. **Legal Rate in the Several States and Territories:**

Alabama. Eight per cent. is the legal rate. A greater rate forfeits interest.

Arizona. Seven per cent. is the legal rate. Any rate may be agreed upon in writing.

Arkansas. Six per cent. is the rate allowed by law where no rate is contracted for. Ten per cent. may be contracted for, but a higher rate forfeits principal and interest.

California. Ten per cent. is allowed by law on debts due on instruments of writing unless the rate is fixed by contract in writing, in which case any rate will be allowed that the contract calls for. Judgments bear seven per cent.

Colorado. Ten per cent. is the legal rate. Parties may contract in writing for any rate.

Connecticut. The legal rate is six per cent. Any rate may be agreed upon.

Dakota. Seven per cent. is the legal rate. Twelve per cent. may be con-

tracted for. A higher rate is prohibited.

Delaware. Six per cent. is the legal rate. If more is charged the principal is forfeited.

District of Columbia. Six per cent. is the rate allowed by operation of law. Ten per cent. may be contracted for. The whole of the interest is forfeited by contracting for a higher rate.

Florida. Eight per cent. is the legal rate. Parties may contract for any rate.

Georgia. The legal rate is seven per cent. Eight per cent. may be contracted for in writing. If above eight per cent. is charged the excess is forfeited.

Idaho. The legal rate is ten per cent. Any rate not exceeding $1\frac{1}{2}$ per cent. a month may be contracted for.

Illinois. The legal rate is six per cent. Parties may contract in writing for any rate not exceeding eight per cent. If a higher rate is contracted for the whole interest is forfeited.

Indiana. The legal rate is six per cent. Contracts in writing for any rate not exceeding eight per cent. are valid.

Iowa. The legal rate is six per cent. Any rate not exceeding ten per cent. may be contracted for.

Kansas. The legal rate is seven per cent. Contracts may be made for any rate not exceeding twelve per cent.

Kentucky. The legal rate is six per cent. If a higher rate is contracted for the excess is not collectible.

Louisiana. The legal rate is five per cent. Parties may contract for any rate not exceeding eight per cent.

Maine. Six per cent. is the legal rate. Any rate may be agreed upon in writing.

Maryland. Six per cent. is the legal rate. Contracts in excess are void as to the excess.

Massachusetts. The legal rate is six per cent. Any rate may be agreed upon in writing.

Michigan. The legal rate is six per cent. Parties may contract for ten per cent., and if contracts for a higher rate are made the excess is forfeited.

Minnesota. The legal rate is seven per cent. Ten per cent. may be contracted for. Where higher rates are contracted for the contract is void and all the interest paid may be recovered.

Mississippi. Six per cent. is the legal rate. Contracts may be made in writing for ten per cent. All contracts in excess of that rate forfeit all interest.

Missouri. The legal rate is ten per cent. Parties may contract for any rate not exceeding ten per cent.

Montana. The legal rate is ten per cent. Contracts in writing may be made for any amount.

Nebraska. The legal rate is seven per cent. Contracts may be made for any rate not exceeding ten per cent. Where higher rate is charged the principal only may be recovered.

Nevada. The legal rate is seven per cent. Any rate may be contracted for.

New Hampshire. The legal rate is six per cent. If more is taken the lender forfeits three times the excess.

New Jersey. The legal rate is six per cent. If more is taken the interest is forfeited.

New Mexico. The legal rate is six per cent. Contracts may be made in writing for any amount not exceeding twelve. To take more subjects the lender to fine and a forfeiture of the amount of interest paid.

New York. The legal rate is six per cent. For taking higher rates interest and principal are forfeited, except in case of loans payable on demand secured by collateral, when any rate may be contracted for in writing.

North Carolina. Six per cent. is the legal rate. By special contract in writing eight per cent. may be taken. If interest is forfeited if more is taken twice the amount paid may be recovered by the party so paying.

Ohio. The legal rate is six per cent. Parties may contract for any rate not exceeding eight per cent. All contracts above that rate may be charged to principal.

Oregon. Eight per cent. is the legal rate. Contracts may be made for any rate not exceeding ten per cent. Where more is charged the interest and principal are forfeited.

Pennsylvania. The legal rate is six per cent. Contracts for higher rates are void only as to the excess.

Rhode Island. The legal rate is six per cent., but any rate may be contracted for upon.

South Carolina. The legal rate is seven per cent. Contracts in writing may be made for ten per cent. Any interest is forfeited for contracting for higher rates than that also double the sum received.

Tennessee. The legal rate is six per cent. No higher rate may be contracted for. If more is contracted for only legal interest can be collected.

Texas. Eight per cent. is the legal rate.

Twelve may be contracted for. Contracts are made for more the interest is forfeited.

The legal rate is ten per cent. It may be agreed upon.

Mont. The legal rate is six per cent. All in excess may be recovered. Minn. The legal rate is six per cent. If a higher rate is contracted for the interest is forfeited.

Virginia. The legal rate is ten per cent., but any rate may be contracted for.

Virginia. The legal rate is six per cent. If more is contracted for the interest is forfeited.

Wisconsin. The legal rate is six per cent. Any rate not exceeding ten per cent. may be contracted for. If more is contracted for the whole interest is forfeited.

Writing. The legal rate is twelve per cent. Any rate may be contracted for.

Change in the Statute Rate.—An account extending over a number of years was ordered as to an interest, and the rate of interest during the time had been changed by law, so that the interest payable on account must conform to such fluctuations. *Wilson v. Cobb*, 31 N. J. Eq.

Where the legacies are by the will directed to be payable with interest, the lawful rate of interest is after the change, the rate of interest on legacies continues unchanged. *Hard v. Woodward*, 28 N. J. Eq.

Where the rate of interest has been changed by statute, the rate prescribed by the former law should be applied up to the time of the change, and that of the new law during the subsequent. *Stack v. Olney*, 33 Besser v. Hawthorne, 3 Oreg. 644. *Esse v. Rutherford*, 90 N. C. 644. Rate of interest upon a judgment determined by the law existing at the time of its entry. *Prouty v. Lake*, 26 R. Co., 26 Hun (N. Y.) 546; *v. Aikin*, 57 Tex. 511.

It is stipulated in plaintiff's mortgage which were executed prior to the passage of the act (ch. 538, Laws of 1878) reducing the rate of interest to six per cent., that the principal sum should bear interest of seven per cent. By the decision and judgment entered thereon, interest was directed to be paid on the amount found due on the date of the decision, at

the rate of seven per cent. *Held*, error; that after entry of judgment the mortgages were merged therein, and thereafter plaintiff was entitled to interest, not by virtue of the mortgages, but of the judgment; and so, that the interest should have been at the lawful rate. *Taylor v. Wing* (23 Hun 233) reversed; *Taylor v. Wing*, 84 N. Y. 471.

In *California* the act of March 30th, 1868, reduced the rate of interest in case of the absence of a contract from ten to seven per cent. per annum; and the effect was that, though ten per cent. might be computed up to the taking effect of the act, only seven per cent. was allowable afterwards. *White v. Lyons*, 42 Cal. 279.

After the revival of a debt by a new promise it still bears the conventional rate of interest, although by a change in the law of usury made in the interval between the execution of the note and the new promise, the conventional rate exceeds the rate allowed by the new law. *Vines v. Tift* (Ga.), 7 S. E. Rep. 227.

By a special act of the legislature, approved April 4th, 1872, commissioners authorized to improve the Bergen Line Road, were empowered to let the work by contract, and to issue certificates of indebtedness in payment for work done. The act provided that such certificates should bear interest at the rate of seven per cent. The relators contracted for the work by a contract in writing, bearing date October 3rd, 1878. The contract stipulated for payment by certificates of indebtedness, payable out of assessments, when collected, bearing interest at the rate of seven per cent. When the act was passed, the legal rate of interest was seven per cent. When the contract with the relators was made, the legal rate of interest had been reduced to six per cent., by the general statute passed February 26th, 1878. *Held*: (1) That the act of 1872, under which this improvement was made, being a special statute, was not repealed by the general statute of 1878, regulating interest. (2) That the contract with the relators for certificates, which should bear interest at the rate of seven per cent., was a legal contract, and that by its terms the relators were entitled to have certificates issued to them, which should bear interest at that rate, notwithstanding the reduction of the rate of interest on contracts by the act of 1878. *State ex rel. v. Dwyer*, 42 N. J. L. 327.

agreement to take less.¹ In the absence of any statute, a reasonable rate will be allowed.² Where there are no statutes on the subject of usury, parties may contract for any rate they choose, provided such interest be intended as a compensation for the use of money, and not as a penalty for its nonpayment when

Contracts in Writing.—Under the *Tennessee* act of February 21st, 1860, which provides that ten per cent. interest on loans of money may be taken provided that the parties to such contract shall have so agreed and such agreement be expressed on the face of the contract, etc., the note itself need not show that it was given for loaned money. The "agreement" referred to relates to the rate of interest. *McGhee v. Trotter*, 1 Heisk. (Tenn.) 453.

Under the *Illinois* statute, judgments and decrees can only draw six per cent. interest, and a decree which provides that the sum found due shall bear ten per cent. interest until paid is erroneous to the extent of the difference between six and ten per cent. interest. *Haas v. Chicago Building Soc.*, 80 Ill. 248.

National Bank—Limitation on Rate of Interest.—Section 30 of the National Banking act (Rev. Stats., § 5197), provides: "Every association organized under this act may take, receive, reserve and charge on any loans . . . interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where by the laws of the State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed every association organized in any State under this act." *Held*, that under this section—construed with § 1918 C. C.—the national banks in this State are allowed to charge and receive such rates of interest as may be agreed upon. *Hinds v. Marmolejo et al.*, 60 Cal. 229; *Farmers' Gold Bank v. Stover*, 69 Cal. 387.

1. *Gaillard v. Gaillard*, 1 Nott. & M. (S. Car.) 67; *Bell v. Arndt* (Neb.), 38 N. W. Rep. 750.

Where the rate of interest is not fixed in a note, after maturity the amount represented by the note becomes "money due upon an instrument in writing," and in such case the statute of *Indiana* fixes the rate at six per cent. *Gale v. Cory*, 112 Ind. 39.

2. *Davis v. Greely*, 1 Cal. 422.

On the 27th of April, 1872, the plaintiff loaned to defendant the sum of

\$2,500 on an agreement for interest at the rate of ten per cent. per annum, payable annually, and, in pursuance of the agreement, took from defendant promissory notes for \$1,250 each, maturing in one and two years, with provisions therein for interest at the rate of eight per cent. per annum, payable annually, secured by mortgage; and at the same time took from defendant two promissory notes for the additional two per cent. interest agreed upon, which side payments amounting to \$209, were paid. On proceedings to enforce the mortgage, the plaintiff, under the statute of 184th, 1869, commonly called the eight per cent. interest statute, was entitled to a decree for \$2,500 with interest at the rate of six per cent. per annum, but \$209 so paid, and no more. *Land v. Sorter*, 39 Ohio St. 12.

A decree will draw different rates of interest, if part of the debts thereunder included draw one rate and part another. *Burrows v. Stayker*, 47 Iowa 477.

3. *Buckingham v. Orr*, 6 Colo. 307; *Minnesota* Gen. Stat., ch. 23, § 1, which does not enable a promisor in a note to bind himself by an engagement that in case of default in payment the note shall bear a higher rate of interest than that allowed before maturity. *v. Houlton*, 22 Minn. 19.

Otherwise under *Maine* Rev. Stat., ch. 45, § 1. *Capen v. Crowell*, 282.

Where by the terms of the note it appears, upon the happening of one event, that the makers were to pay a certain rate of interest, and upon the happening of another event they were simply to pay a sum with no specified rate of interest, and in a suit on the note in the court the law the happening of the latter event was proved: *Held*, that the judgment of the court should have been for the rate of interest allowed by law, and not at ten per cent. *Daniel v. Daniel*, 30 Tex. 26.

In case of a discrepancy in the rate of interest named in a bond and in the instrument attached, the amount named in the instrument controls. The holder of such instrument is not bound after its severance from the bond.

more than legal interest cannot be recovered unless there is express agreement to pay it.¹ A mere change in the form of security for a debt for money loaned will not operate to change the rate of interest to be paid from that reserved in the original contract.²

After Maturity.—Where there is an agreement to pay a certain rate up to maturity, but nothing is said as to the rate of interest thereafter, the question arises as to whether the rate stipulated for, or the legal rate, shall be charged after maturity. The question has been decided differently in the different States. In

to recover the sum named in the note, if larger than that named in the note as the interest, without showing that the note or some prior holder of the note had a coupon, acquired the same in full before maturity and without showing error. *Goodwin v. Bath*, 77

to enforce a note provided for interest at ten per cent. per annum, and the note was executed to secure it stipulating "interest at the rate of ten per cent. per annum, payable annually, according to the terms of the promissory note," *held*, that the mortgage was proper something respecting which the note was silent and would thereupon govern. *Dobbins v. Parker*, 46

57. *Proper v. McNeill*, 14 Ill. App. 378. *Ell v. Eldred*, 49 Cal. 399; *Ford v. Brown*, 49 Ill. 142; *Rice v. Hulbert*, 72 Ga. 724; *Wofford v. Wyly*, 72 Ga.

to promise in writing to pay interest at the rate of ten per cent. per annum judgment entered upon the execution, will not, under *Tennessee v. Canale*, 1944a, make the judgment carry interest at that rate. *Rickman v. Rickman*, 1944a, *Lea* (Tenn.) 483.

to be a person in a receipt for a note agrees to give a note therefor, stipulating interest at seven per cent., thereupon contract to pay such rate of interest. *Atterson v. Graham*, 1 N. Y.

Accounting—Trust.—Under a contract to account for and pay moneys for a trust, interest was agreed to be at the rate of one and one-half per cent. per month *after demand*. No devaluation having been found, it was error to compute interest at that rate. *Butler v. Austin*, 64 Cal. 3.

to be the payee of a promissory note appearing on its face interest at ten per cent. makes a written agreement with the maker of the note to take

only eight per cent. after a specified date, and it is not shown that the agreement is without consideration, or induced by fraud, the note will draw eight per cent. only, from the specified date, in accordance with the terms of the written agreement. *Warren v. Johnson*, 38 Kan. 768.

When one of two parties having mutual transactions renders an account current to the other, in which the names of both appear and he charges interest at a specified rate on both sides of the account, it is a contract in writing, under which he is liable for interest at the rate charged himself in the account. It is a contract in writing by which he stipulates to pay such rate of interest. *Pratolongo v. Larco*, 47 Cal. 378.

A sold a house to B, but made out the deed to C, who agreed verbally with B to pay him the price with interest at the rate of seven and three-tenths per cent. In an action by B against C to enforce his vendor's lien, *held*, that B was entitled to interest at the rate of six per cent. from the day of purchase to the day of trial. *Stephens v. Burgess*, 69 Mo. 168.

In the statement of an account by an intestate, upon which action was brought against his administrator, he had charged himself with interest at the rate of ten per cent. *Held*, that if such statement amounted to an account stated, his estate was liable for interest at that rate. *Savage v. Aiken*, 21 Neb. 605.

Interest payable at stated periods may be recovered as principal from the time of payment, with interest from the time the interest becomes due, but at only six per cent. per annum. Otherwise if the interest on the interest had been stipulated for, at a higher rate authorized by statute. *Dunlap v. Wiseman*, 2 Disney (Ohio) 398.

2. *Union Mut. Co. v. Slee*, 110 Ill. 35.

the following States, interest has been allowed after maturity the agreed rate whether greater (if not unreasonable nor unlawful) or less than the statute rate:

California, Florida, Georgia, Indiana, Illinois, Iowa, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Texas, Virginia and Wisconsin.¹

Elsewhere, only the statute rate is allowed after maturity, there is no agreement upon that point, whether such rate is greater or less than the contract rate.² Where there is an express

1. *Kohler v. Smith*, 2 Cal. 597; *Adams v. Way*, 33 Conn. 419; *Jefferson County v. Lewis*, 20 Fla. 980; *Daniel v. Gibson*, 72 Ga. 367; s. c., 53 Am. Rep. 845; *Kilgore v. Powers*, 5 Blackf. (Ind.) 22; *Burns v. Anderson*, 68 Ind. 202; *Kerr v. Haverstrick*, 94 Ind. 178; *Hand v. Armstrong*, 18 Iowa 324; *Phinney v. Baldwin*, 16 Ill. 108; *Etnyre v. McDaniel*, 28 Ill. 201; *Brannon v. Hursell*, 112 Mass. 63; *Pierce v. Boston etc. Bank*, 129 Mass. 425; *Union Institution for Saving v. Boston et al.*, 129 Mass. 82; s. c., 37 Am. Rep. 305; *Warner v. Juif*, 38 Mich. 662; *Meaders v. Gray*, 60 Miss. 496; s. c., 45 Am. Rep.; *Macon County v. Rodgers*, 84 Mo. 66; *Broadway Savings Bank v. Forbes*, 79 Mo. 226; *Kellogg v. Lavender*, 15 Neb. 256; s. c., 48 Am. Rep. 339; *McLane v. Abrams*, 2 Nev. 199; *Genet v. Kissam*, 53 N. Y. Super. Ct. 43; *Andrews v. Keeler*, 19 Hun (N. Y.) 87; *Ritter v. Phillips*, 53 N. Y. 586; *Shaw et ux. v. Rigby*, 84 Ind. 375; s. c., 43 Am. Rep. 96; *Monnett v. Sturges*, 25 Ohio St. 384; *S. P. Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Hydraulic Co. v. Chatfield*, 38 Ohio 575; *Hopkins v. Crittenden*, 10 Tex. 189; *Cecil v. Hicks*, 29 Gratt. (Va.) 1; *Spencer v. Maxfield*, 16 Wis. 178; *Pruyn v. Milwaukee*, 18 Wis. 367; *Thorn v. Smith*, 71 Wis. 18. See *Cromwell v. Sac County*, 96 U. S. 51.

The statute of Ohio (Swan. 481) permitting parties to agree upon any rate of interest not exceeding ten per cent. and fixing six per cent. as the legal rate in the absence of any special agreement, *held*, not to apply to a chartered corporation empowered to receive loans at three per cent., but that if loans so made to such a corporation were not paid at the time agreed upon six per cent. might be demanded. *Tuffli v. Ohio etc. Trust Co.*, 2 Disney (Ohio) 121.

In an action upon notes containing the following provision, "the rate of in-

terest to be ten per cent. per annum not paid at maturity, and attorney's fee of ten per cent. if placed in the hands of an attorney for collection;" *held*, that the effect of the provision was to provide for a higher rate of interest after maturity than before and that interest at the rate of seven per cent. could be recovered after maturity. *White v. Iltis*, 24 Minn. 43.

In an action for specific performance of a contract to convey certain real property, the purchase price was twenty-five hundred dollars, five hundred dollars of which was paid down and time notes given for two thousand dollars, payable in one and two years from date with interest at the rate of twelve per cent. per annum. These notes were endorsed by the vendor, for value before maturity, and the property conveyed to a third party with notice. *Held*, that the holders of said notes were entitled to interest thereon at the rate therein provided for, after as well as before maturity. *Kellogg et al. v. Lavender et al.*, 15 Neb. 256; s. c., 48 Am. Rep. 339.

2. *Gardner v. Barnett*, 36 Ark. 477; *Newton v. Kennedy*, 31 Ark. 626; *Sumfield Soc. v. Loomis*, 42 Conn. 57; *Searle v. Adams*, 3 Kan. 513; *Union Bank v. Chapin*, 9 Wend. (N. Y.) 47; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ludwick v. Huntzinger*, 5 W. & A. (Pa.) 51; *Eaton v. Boissonnault*, 67 Me. 540; *Lash v. Lambert*, 15 Minn. 41; *Moreland v. Lawrence*, 23 Minn. 8; *Duran v. Ayer*, 67 Me. 145; *Brown Hardcastle*, 63 Md. 484; *Rushing Seabee*, 12 Bush (Ky.) 198; *Lucking Gegg*, 12 Bush (Ky.) 208; *Rilling Thompson*, 12 Bush (Ky.) 310; *New England Mortgage Co. v. Vader*, 1 Fed. Rep. 265; *Pearce v. Hennessy*, 1 R. I. 223; *Langston v. South Carolina R. Co.*, 2 S. Car. 248; *Briggs v. Williams*, 10 S. Car. 133; *Maner v. Wilson*, 16 S. Car. 469.

The United States courts have fo-

on that a certain rate shall run after maturity, interest at is recoverable.¹

the Law of Place.—When the rate of interest at the place contract is made differs from the rate at the place of payment the parties may contract at either rate, and the contract

rule in late cases that after the contract ceases and that rate only should be allowed as damages. *Holden v. Sav-*
ust Co., 100 U. S. 72; *Ewell*
v. Firman, 22 Wall. (U. S.)

ection of Words in Written Obli-
On a note payable *on de-*
erest runs at the rate therein
until verdict on default. *Colby*
v. Me. 524; *Paine v. Cas-*
le. 80.

a promissory note, by its
es a legal rate of interest per
from date until paid," such
draw interest at the agreed
as well as before maturity. And
ent or decree rendered there-
aw the same rate of interest
anding the legal rate upon
s and decrees may be reduced
xecution of the note. *Bond*
v. Neb. 491; *S. P. Shipman*
v. W. Va. 140.

ssouri a note expressed to bear
from date bears the same rate
st after as before maturity.
v. Kinealy, 8 Mo. App. 76;
v. Barbar, 81 Mo. 636.

Arkansas a promissory note
at a future day, and bearing
er cent. interest *from date*,
aying "*until paid*," will bear
er cent. after maturity. *Gard-*
v. Barnett, 36 Ark. 476.

a bond by its terms bears in-
three per cent. per annum
e, a decree for the payment
ould be for the aggregate sum
interest being computed at the
ree per cent. to the date of the
d then the decree should pro-
he payment of interest thereon
e of three per cent. until paid.
providing for interest at *six*
on such aggregate sum is er-
(p. 353.) *Pickins v. McCoy*,
v. Ga. 344.

e for advances payable at a
y, secured by an agricultural
h provides for interest on the
at the rate of two and one-half
a month from the date of each,

C. of L.—27

after maturity draws legal interest only.
Thatcher v. Massey, 20 S. Car. 542.

A note payable one day after date,
"with interest from date at the rate of
twelve per cent. per annum, interest to
be paid annually," draws twelve per
cent. interest after maturity. *Sharpe v.*
Lee, 14 S. Car. 341; *S. P. Piester v.*
Piester, 22 S. Car. 139; s. c., 53 Am.
Rep. 711; *Casteel v. Walker*, 40 Ark.
117; s. c., 48 Am. Rep. 5.

A bond executed January 1st, 1873,
conditioned for the payment "of \$1,195
in five equal annual instalments, with
interest payable annually from date
upon the whole amount unpaid and at
the rate of ten per cent. per annum, the
first instalment payable January 1st,
1874, being \$239, besides interest, and
the last instalment of like amount on
January 1st, 1878, and the same amount
with all interest due, payable on the
first day of January of each intervening
year," bears annual interest at the rate
of ten per cent. a year after maturity of
the last instalment as well as before.
Miller v. Hall, 18 S. Car. 141.

A note payable twelve months after
date, "with interest from date, at twelve
and a half per cent. per annum, interest
payable annually," and described by the
maker, in a mortgage contemporane-
ously executed, as a note "with interest
thereon at the rate of twelve and a-half
per cent. per annum till paid," draws
the same rate of interest after maturity
as before. The rule laid down in
Langston v. S. Car. R. Co., 2 S. Car.
248, approved. *Mobley v. Davega*, 16
S. Car. 73; s. c., 42 Am. Rep. 632.

1. *Scottish-American Mortgage Co.*
v. Wilson, 24 Fed. Rep. 310; *Eaton v.*
Boissennault, 67 Me. 540; *Reeves v.*
Stipp, 91 Ill. 609.

In *Missouri*, where a note called for
interest at ten per cent. after maturity,
and the time of payment was extended
by agreement for a certain time at the
rate of nine per cent., it was held that
after the expiration of the extended
time the note would bear interest at the
rate of ten per cent. *North v. Walker*,
66 Mo. 454.

And so in *Georgia*, where a debt is
over due, future indulgence for a defi-

will be upheld.¹ Where the rate contracted for is higher than that allowed by the laws of either State, the fate of the contract depends upon the laws of the State where it was made.²

Generally, where there is a contract for interest without specifying any rate, the rate allowed will be according to the law of the place of contract for its payment.³ Where the place of pa

n. e period is a sufficient consideration for an agreement to pay increased interest. *Taylor v. Thomas*, 61 Ga. 472.

A note naming the rate of interest at two per cent. per month was endorsed by an agreement to pay compound interest at fifteen per cent per annum on the sum named as the amount then due. This sum was arrived at by compounding the interest quarterly, without the knowledge of the maker, according to an alleged oral agreement, which he denied. In an accounting the judgment was for the amount of the note with interest at two per cent. per month to the date of the endorsement, and from that time to the date of the decree at fifteen per cent. per annum. *Held*, no error, since the alleged agreement before the date of the endorsement for compounding the interest quarterly was without effect, under Gen. St., Colo., § 1708, providing that a higher rate of interest than ten per cent. may be lawful and enforced if stipulated for in writing. *Beckwith v. Beckwith* (Colo.), 19 Pac. Rep. 510.

Upon a note providing for ten per cent. interest after maturity, it bearing the same rate before maturity, evidenced by coupon interest notes, interest is chargeable after maturity at ten per cent. under Gen. St. *Minnesota*, 1866, ch. 23, § 1. *Holbrook v. Usher* (Minn.), 39 N. W. Rep. 74.

After maturity, municipal bonds and coupons bear interest at the legal rate unless otherwise specified, although before maturity they bore interest at a higher rate. *Nash v. El Dorado Co.*, 24 Fed. Rep. 252.

If a mortgagee refuses to accept payment of the mortgage debt, bearing interest at a greater rate than six per cent., when tendered by the mortgagor, except upon compliance with an illegal demand, on a bill in equity to redeem from the mortgage, interest should be allowed the mortgagee only at six per cent. from the time of the tender. *Donohue v. Chase*, 139 Mass. 407.

Where an obligation matures before the passage of a legislative enactment changing the legal rate of interest,

interest between the time of maturity and judgment is to be computed at former rate. *Aged Females' Assoc. v. Eagleson*, 60 How. (N. Y.) Pr. 9.

1. *Story Conf. Laws*, 291; *Pease v. Mayo*, 14 Vt. 33; *Cromwell v. County of Sac.*, 96 U. S. 51, 62; *Milburn v. Tiffany*, 1 Wall. (U. S.) 298; *Chapman v. Robertson*, 6 Paige (N. Y.) 627; *Kilgore v. Dempsey*, 25 Ohio 413; *Butters v. Olds*, 11 Iowa 1.

But in a *Pennsylvania* case it was held that a contract made in California to pay monthly two and a half per cent. interest, and to compound, though lawful under the local law, not only unconscionable but deceptive, and a court of law in Pennsylvania would not enforce it, but enter judgment for amount of principal and simple interest at ten per cent. *Sime v. Norris Phila.* (Pa.) 84; *S. P. Estate of Brown*, 8 Phila. (Pa.) 197.

2. *Adams v. Robertson*, 37 Ill. 100; *Scofield v. Day*, 20 Johns. (N. Y.) 100; *Richards v. Globe Bank*, 12 Wis. 60; *Vliet v. Camp*, 13 Wis. 198; *s. Engler v. Ellis*, 16 Ind. 475; *Shipman v. Bailey*, 20 W. Va. 140.

If no place of payment is specified, and the residence of the parties is shown, the legality of the interest stipulated is determined by the laws of the state where the note is dated. *Richards v. Presler*, 2 La. Ann. 264.

A note and mortgage drawing two per cent. interest, executed in a state where such rate of interest is allowed by law, is valid in the state where executed, although made payable in a state in which such a rate would render it usurious. *Fisher v. Otis Pinn.* (Wis.) 78; *Kilgore v. Dempsey*, 25 Ohio St. 413.

A foreign corporation may receive the legal rate of interest in *Missouri* upon a contract performed here, though it is larger than that which its charter and the laws of its own state would allow. *Bank of Louisville v. Young*, 37 Mo. 398.

3. *Story Conf. Laws*, 291; 2 *Kent Com.* 460; 2 *Burge Colonial Laws*, 8. See also *Steward v. Ellice*, 2 Paige 1

Smith v. Smith, 2 Johns. (N. Y.) 285; Thompson v. Ketchum, 4 Barb. (N. Y.) 118; Fanning v. Consequa, 17 Johns. (N. Y.) 511; v. Gaskins, 28 Gratt. (Va.) 207; v. Belmont, 2 Atk. (Eng.) 382; Hall, 37 Ala. 702; Ala. Sel. Cas. v. Andrews, 9 Port. (Ala.) 12; Masero v. Gilbert, 24 Ill. 293, 651; Lauve, 3 La. Ann. 88; Hawley v. Little, 12 La. Ann. 815; Little v. N. H. 109; Bolton v. Street, 1 (Tenn.) 31; Summers v. Tex. 77; Whitlock v. Castro, 108; Jeffray v. Dennis, 2 Wash. 283; Cowqua v. Lauderbrun, (U. S.) 521; Bushby v. Canac, (U. S.) 206; Bank of Illinois v. McLean (U. S.) 268; Moore v. son, 18 Ala. 209; Lester v. v., 18 Ind. 246; Von Hemert v. 11 Metc. (Mass.) 210; Win- Carleton, 12 Mass. 4; Healy v. n, 15 N. J. L. 328; Consequa v. g, 3 Johns. (N. Y.) Ch. 587; n v. Gee, 5 Ired. (N. Car.) Davis v. Coleman, 7 Ired. (N. Car.) 424; Irving v. Barrett, 2 Grant v. 73; Roberts v. McNeely, 7 (N. Car.) L. 506; Archer v. W. & S. (Pa.) 327; Swett v. Miss. 667; Gaillard v. Gail- ott. & M. (S. Car.) 67; Gray v. 72 Ind. 567.

a general authority is given bills of exchange from a cer- on account of advances then undertaking is to replace the t that place. The interest of e is to be allowed. Lanusse v. , 3 Wheat. (U. S.) 101.

neither the bonds nor the provide for the rate of interest ury, it must be determined e provided by the law of the ere they are payable. Gray v. Ind. 567.

a debt is payable in Great d it is agreed, for the accom- of the debtor, that it may be the creditor is entitled to the of interest here from the time greement. Pearce v. Wallace, J. (Md.) 48.

missory note was drawn, in payable to parties residing in "with interest until paid in " Held, that the plaintiffs, on ent obtained in New York e makers, were entitled to in- cording to the legal rate in- only up to the time of judg-

ment, without any allowance for the difference of exchange with England. Scofield v. Day, 20 Johns. (N. Y.) 102.

Where goods were consigned from a foreign port, to be sold in this country, for the benefit of the consignor, *held*, that he was entitled to interest upon the proceeds for the improper detention thereof by the consignee, only at the rate allowed by law at the place to which the goods were consigned. Fanning v. Consequa, 17 Johns. (N. Y.) 511.

A New York merchant consigned goods to his factor in California to be sold under a *del credere* commission, and the proceeds to be remitted in the usual way. *Held*, in an action to recover the proceeds, that the contract was to be performed in California, and that the consignor was entitled to the California rate of interest. Cartwright v. Greene, 47 Barb. (N. Y.) 9.

As between the parties to a promissory note, executed in the State of New York, and made payable generally, interest will be allowed after the rate of six per cent., if it appear that it was the intention of the parties that it should be paid in Vermont. Austin v. Imus, 23 Vt. 286.

A city in Missouri issued bonds payable in New York, with interest at ten per cent. until payment; to these bonds were attached interest coupons, payable in New York, but expressing no rate of interest. *Held*, in an action upon one of these bonds and coupons, that under 1 Wag. Mo. St., p. 782, the plaintiff was entitled to ten per cent. interest upon the principal of the bond from its maturity to date of judgment, and that thereafter so much of the judgment as related thereto must bear the same rate; that the plaintiff was entitled to but six per cent. upon the coupons, and that thereafter the portion of the judgment relating to the coupons and accrued interest thereon must continue to bear the same rate. Fauntleroy v. Hannibal, 5 Dillon (U. S.) 219.

Where a mortgage was made and signed in New Jersey, by a resident of that State, the mortgagee being then temporarily in that State but having his permanent residence in New York, and the mortgage was delivered to the mortgagee at his place of business in New York, where he paid the money thereon; *held*, that the place of the contract was New York and that it was to be governed by the laws of that State in respect to interest, though both par-

ment is not expressed nor implied in the contract, the law presume that it was to be paid at the place where it was made and the law of that place will govern.¹

ties were described in the bond as of New Jersey. *Varick v. Crane*, 4 N. J. Eq. 128.

A marriage settlement made in another state upon land in South Carolina, draws interest according to the laws of the latter State. *Quince v. Callender*, 1 Dessau. (S. Car.) 160.

Creditors resident in Pennsylvania, where the limit of interest is six per cent., holding a mortgage made in and on lands in New York, may receive seven per cent. thereon, if there is nothing to indicate where the securities were payable, nor that a different rate of interest than that allowed by the laws of New York was intended. *Lewis v. Ingersoll*, 3 Abb. (N. Y.) App. Dec. 55.

1. 2 Burge Colonial Laws, 860; *Evans v. Clark*, 1 Port. (Ala.) 388; *Evans v. Irwin*, 1 Port. (Ala.) 390; *Chase v. Dow*, 47 N. H. 405; *Hopkins v. Miller*, 17 N. J. L. 185; *Butters v. Olds*, 11 Iowa 1; *Burton v. Anderson*, 1 Tex. 93; *Lynes v. Mack*, 19 Ind. 223.

Where nothing in the record shows the *lex loci contractus*, or any other valid authority, interest on a promissory note will not be allowed at any higher rate than that permitted by the laws of the State where the note is put in suit. *Booty v. Cooper*, 18 La. Ann. 565.

Where there is no proof of the place where a note is made, it will be presumed to have been made and be payable within the State. A note sued upon was dated "Philadelphia" and the court held that it could not judicially know that Philadelphia was not in the State and they allowed only the current rate of Texas. *Cook v. Crawford*, 4 Tex. 420.

Where the co-obligors of F, in a promissory note made in New Mexico and bearing ten per cent. interest after a partial payment thereon, assume in the absence of F to renew the same for the balance still due thereon, and accordingly such co-obligors at Santa Fe subscribe a new note dated at Santa Fe, and stipulating for ten per cent. interest; and F afterwards in Missouri, with full knowledge of all the circumstances, also signs the new note, he thereby ratifies the agreement made by his co-obligors, and the new note is to be regarded as made in New Mexico,

and is governed by the laws of that territory, in respect to the rate of interest accruing thereon and the legal effect of the stipulation embodied therein. *Lay v. Hall*, 12 Ohio St. 610.

A, who had levied an execution on the property of a mining company in Colorado, and had bought the property when sold under the levy, and was a creditor of the company, entered into an agreement in Massachusetts, which it was agreed that there would be a certain sum and interest; A should manage the property and pay it to B whenever he realized the proceeds of his demand "and interest as aforesaid," either from the property of B. *Held*, on a bill in equity brought against A for the conveyance of the property, that the defendant was not entitled to interest on the principal to the date of the decree, and upon advancements and payments made by him in managing the property; and that the rate of interest was to be governed by the laws of Massachusetts, although the property was to be managed in Colorado. *French v. French*, 126 Mass. 360.

Where an advance is obtained in Louisiana through an agent of a principal, on merchandise to be sold and sold by the latter, interest on the balance of account due him is allowed according to the laws of his domicile. *Ballister v. Hamilton*, 3 La. 410.

Interest is computed on contracts made in foreign States according to the *lex loci*, unless a different rate is shown to have been agreed upon, or to have been fixed by the law and usage of the place of contract. *Longee v. Washburn*, 1 N. H. 134; *Hall v. Woodson*, 1 N. H. 462.

In assumpsit on a note made in New York and payable there, the declaration, generally, set out the state of the law in New York in reference to interest, and a demurrer to this part of the declaration was held bad for uncertainty, it was held insufficient. *Brackenridge v. Baxton*, 1 N. H. 501.

Where a declaration on a note made in Kentucky does not aver the rate of interest in the place where the note was made, the rate of interest in Kentucky will be allowed. *Surlott v.*

where interest is allowed not under contract, but as damages, it is according to the laws of the place where the suit is brought.¹ The rate of interest in another State is a question for the jury,² where it is not specified in the contract.

J. Marsh. (Ky.) 174; s. p. in Chumaseo v. Gilbert, 26 Ill. n v. Crume, 46 Ill. 69.

"If a promissory note is dated at 'Macon' and 'payable at either of the places named in the note,' it cannot in the absence of an allegation or proof be interpreted as 'payable at Macon' if 'Macon' is in another State, to devolve upon the plaintiff the burden of proving the rate of interest in that State, especially if there is a county which comprises several villages called 'Macon,' although there is no incorporation of a bank in either. *Smith v. ...*, 11 Ala. 270.

"If, as it has been held that no interest can be allowed on a note payable in another State, the jurisdiction of the State in such an action, in the absence of an allegation and proof of the rate of interest at the place of payment, is not affected. *Wheeler v. Pope, 5 Tex. 1; v. George, 5 Tex. 87; Able v. ...*, 10 Tex. 350; *Pridgen v. ...*, 12 Tex. 420; *Ingram v. Drinkwater, 35 Tex. 351.*

Ward v. Foster, 17 Wall. (U. S.) 62; v. Cooper, 18 La. Ann. 100; v. Daus, 31 Tex. 67; Clark v. ..., 136 Mass. 344; *Hopkins v. ...*, 129 Mass. 600; *Templeton v. ...*, 9 S. W. Rep. 606.

"In an action upon a foreign judgment the plaintiff is entitled to recover interest on the judgment, both for damages and costs, from the date of that judgment to the date of the judgment in this State, computed at the regular legal rate of interest in the State where the action is brought, although a different rate of interest, being the rate in the State in which the judgment was obtained, is embodied in the record of that judgment. *Clark v. ...*, 136 Mass. 344; *Hopkins v. ...*, 129 Mass. 600.

"Where, in a suit alleging the infringement of the complainant's letters patent, the defendant is charged with an account of profits, a decree in his favor for a certain sum on appeal affirmed in the Supreme court, with 'interest until the same rate per annum that decrees bear in the courts of the State and that rate on money decrees is paid,' held, that the decree so affirmed bears interest at that rate. *Chicago*

etc. R. Co. v. Turrill, 101 U. S. 836.

In an action upon a note made and payable on a day certain in another State, without any agreement, express or implied, to pay interest, the plaintiff can recover only the legal rate of interest in Massachusetts, though less than that in the other State. *Ayer v. Tilden, 15 Gray (Mass.) 178; Wood v. Corl, 4 Metc. (Mass.) 203.*

Coupons bear interest from the date of their maturity; and in an action thereon in Missouri, coupons payable out of the State will be allowed the same rate of interest as those payable in the State, no proof of the rate of interest in the foreign State being offered. *Huey v. Macon Co., 35 Fed. Rep. 481.*

In absence of evidence of the rate of interest in another State, interest on a judgment there rendered and sued on in Missouri must be computed according to the Missouri rate. *Crone v. Dawson, 19 Mo. App. 214.*

On a note executed and payable in another State stipulating for eight per cent interest, if there is no evidence of the legal rate of interest in such other State, the judgment should allow eight per cent. interest to the date of the judgment, but only the legal rate in this State after judgment. *Gordon v. Phelps, 7 J. J. Marsh. (Ky.) 619.*

2. *Richardson v. Williams, 2 Port. (Ala.) 239; Jaffray v. Dennis, 2 Wash. (U. S.) 253; Peacock v. Banks, Minor (Ala.) 387; Hunt v. Mayfield, 2 Stew. (Ala.) 124; Harrison v. Harrison, 20 Ala. 629; Nalle v. Ventress, 19 La. Ann. 373; Swelt v. Dodge, 12 Miss. 667; Henry v. Halsey, 13 Miss. (5 Smed. & M.) 573; Holley v. Holley, Litt. (Ky.) Sel. Cas. 505; *Ingraham v. Arnold, 1 J. J. Marsh. (Ky.) 406; Johnsons v. Williams, 1 J. J. Marsh. (Ky.) 489; Russell v. Shepperd, Hard. (Ky.) 44; Pawling v. Sartain, 4 J. J. Marsh. (Ky.) 238; S. P. Davidson v. Gohagin, 2 Bibb (Ky.) 634.**

The rate of interest due on a contract, if not fixed by agreement of the parties, nor by statute, is to be fixed by the custom of the place where the contract is made, found by a jury. *Tate v. Innerarity, 1 Stew. & P. (Ala.) 33.*

INTERESTED.—See INTEREST; CONCERN.¹

1. Any person who has property listed on the assessment roll of a county for taxation is "interested" in the proceedings of the county board of equalization in the sense of a statute giving him a right to appear before such board and have redress against an unjust valuation. *Dundee Mort. Trust Invest. Co. v. Charlton*, 32 Fed. Rep. 192.

No person has the right to appeal from the decision of commissioners of highways in laying out a new road or vacating an old one, as a "person interested," unless he is the owner of land adjoining the road to be laid out or vacated. *Taylor v. Normal*, 88 Ill. 527.

"The word 'interested' must receive a reasonable construction, such as will, on the one hand, protect those who have a direct and substantial interest in the matter, and, on the other hand, protect the commissioners of highways from unnecessary litigation in defending their action as such at the suit of persons who may imagine they have an interest, when, in fact, they have no such interest as was contemplated by the legislature. Every citizen of a county, in one sense, has an interest in the public highways. So, too, it may be said, and properly, that every citizen of the State has an interest in the highways in the different counties of the State. If, therefore, the language of the statute is to be interpreted literally, an appeal might be taken by any citizen of the State. But we apprehend that it was not the intention of the legislature that the word 'interested' should receive such a liberal construction. It was, doubtless, intended to give the right of appeal to those persons who had a direct and pecuniary interest not shared by the public at large; such as owned land adjoining the new road laid out or the old one vacated."

In *Whitmer v. Comms. of Highways*, 96 Ill. 289, in commenting on the use of the words "land adjoining the new road," etc., in the above case, it was said: "If that is to be taken in the strict meaning of touching the land, so that no person can appeal from such an order unless he is the owner of land which is actually touched by the road to be laid out or vacated, we are satisfied that the construction there adopted was a too narrow one. The language of the statute is that any person 'inter-

ested' in the decision of the commissioners of highways may appeal. Surely there may be persons who have a direct interest, ordinarily speaking, in the laying out or in the vacating of a road, merely as a thoroughfare for travel, without having any land to be taken or restored to them in consequence of laying out or discontinuing the road.

In allowing the right of appeal to persons, or to one whose land is actually touched by the road, it would not necessarily follow, as is insisted, that any citizen of the State might appeal as having an interest in the public highways. . . . A broader term here used in the latter statute, the word 'interested' admitting of a wider application than the words 'owners of land upon the route or line of road' which the highway altered, discontinued or laid out, ran, fairly indicative of the intent, think it may be said, of the intention to enlarge the right of appeal and extend it beyond the particular land owner whom it had before been given to."

Without attempting to draw the dividing line between the persons who are and who are not interested in such a decision, we are of opinion that though the vacated portion of the road here did not actually adjoin and touch the land of Sabin, yet circumstances here he was with respect to it, he had a direct interest in its continuance, and such an interest that he may properly be considered as a person interested in the decision of the commissioners of highways in vacating the road, within the contemplation of the statute giving the right of appeal to any person "interested in such a decision." Three judges dissented. In the above case the road vacated was within a short distance of Sabin's land and not far from his house, which had been built with reference to such a road and the part vacated ran diagonally across an adjoining quarter section of land, the vacation carrying the road around part of two sides of such quarter; and the road so vacated was a continuation of a road leading from Sabin's premises to the county seat, and to a railroad station, which was his principal place of business. See also *Brown v. Roberts*, 2 App. 461.

In *Ashe v. Bd. of Suprs.*, 16 Pac. 783 (Cal.), it was held that an affidavit for a writ of review to an order of a board of supervisors granting the

INTERESTED.

Definition.

highway for a railroad, was by a "party beneficially interested" the court saying: "It does not appear from the petition in this case that the petitioner has any other or greater interest in the public highway mentioned than any other citizen of the state. The requirement that the application must be made by 'the party beneficially interested' has been commonly understood to mean 'that, in an application for a private party, his interest is of a nature which is distinguishable from that of the mass of the property.'" *Linden v. Alameda Co.*,

"interested therein," who by law is entitled to notice of the proceedings of a committee to whom an application for a highway has been referred. "all who may be affected by the contemplated highway, and all persons whose interests may be adverse to those of the owner on the question of dam-
Whelton v. Town of Derby, 27

owner is a "party beneficially interested" in having all the property properly assessed, and is a proper party to make affidavit for the issue of a writ of *mandamus* to the assessor. *Allen*, 54 Cal. 353.

An act provides for reasonable notice to "owners or parties interested" in the sale of property for taxes, a tax sale is not rendered invalid by failure to give the notice upon a mortgagee, if his mortgage appears on record and is not rendered invalid by failure to give the notice. *Smyth v. Neff*, 17 N. E. 2d 111. (Ill.). The court said: "As seen, the phrase 'or parties interested' might include persons directly or indirectly interested, and the number of persons is very large, and often it would be impossible, even if at all practicable, to give notice to every one that might be interested in the property sold. No doubt the framers of the constitution intended that the general assembly should give by law that reasonable notice be given to the owner, or to any person who had a specific or other interest in the property, as should be proper in legislative discretion. Its clear meaning and nothing less than the general assembly has provided by law for reasonable notice to the owner, but has designated no other persons who might be directly or indirectly interested in the property, upon whom notice should be served. It is, therefore, apparent, when the purchaser

at the tax sale has given the proper notice to the owner, he has complied with the statutory requirements in that respect, for no other 'parties interested' are designated by law, either as a class or as individuals, upon whom he could serve notice. Had mortgagees or judgment creditors or other persons having a lien on such property of record been designated by name or as a class, such persons could have been readily ascertained by an examination of the public records. But, as the statute now is, the purchaser cannot know, from any direction given, to whom he is expected to give such notice as the statute requires other than to the owner. In that respect the statute might be regarded as meaning precisely the same as it would mean if the words 'or parties interested' had been omitted."

A mortgagee out of possession, whose mortgage is recorded, should be made a party to proceedings instituted before county commissioners to ascertain the damages of land owners for land taken for a railroad. He comes within the description of "persons having any interest in land." *Wilson v. E. & N. A. R. Co.*, 67 Me. 358. And see *Michigan Air Line R. v. Barnes*, 40 Mich. 383.

In *State v. Easton etc. R. Co.*, 36 N. J. L. 184, it is said: "The charter plainly distinguishes between the owner and *persons interested* throughout the entire proceedings for condemnation as provided for in the seventh and eighth sections. By owner is meant the person having some legal estate which the company proposes by the condemnation to acquire. Under the more comprehensive expression of 'persons interested' are included, not only the person in whom is vested the legal title which the company proposes to acquire, as indicated by their application, but also other individuals having some independent right or interest therein not amounting to an actual legal estate, such as an easement of a right of way, inchoate rights of dower or curtesy or encumbrances, such as by judgments or mortgages, which are charges or liens on the legal estate. The object attained in making the latter class of individuals parties to the proceedings is that their interests may be extinguished by payment out of the money awarded or compensated for under the provisions of the general statute, which authorizes the court into which the money may be paid to make allowance out of the fund in satisfaction of such interest."

In decreeing damages as compensation for the construction of a railway it was *held* that the trade carried on in particular premises was a thing appertaining to the premises, and, as such, was included in the "interest" of the occupier, for which compensation was to be given; and also that the meaning of "parties interested" was parties retaining a special and individual loss by reason of the works which the company had constructed. *Ricket v. Metrop. R. Co.*, L. R., 2 H. L. 175.

A creditor is a "person interested" in proceedings relating to the settlement of estates of decedents. *Byrd v. Jones*, (Ala.) 4 South. Rep. 375. And see *Phillips v. Smith*, 62 Ala. 575; *Smith v. Phillips*, 54 Ala. 8.

So is one entitled to a remainder after a life estate. *Campbell v. Purdy*, 5 Redf. (N.Y.) 434.

The State is not "interested as a party or otherwise" in a proceeding in the nature of a *quo warranto* to try the title of a person to an office into which it was alleged he had intruded, in such sense as to give the supreme court jurisdiction to hear an appeal. The interest which a state must have in such a cause is a substantial interest—as a monetary interest. *McGrath v. The People*, 100 Ill. 464.

The meaning of the words "the party really interested" in moneys, for which an action is brought, was *held* to be certainly determined by no fixed rule. Whether a party has or has not the legal title, if he is the party to whom payment can legally be made, and who can legally discharge the debtor, the action may be brought in his name, although the money, when collected, is not for his use, but for that of some other persons, to whose use he is required to apply it, or to whom he is bound to pay it. *Yerby v. Sexton*, 48 Ala. 311.

The executor of a will who is a devisee and legatee with two trustees was *held* not a "person interested" in proceedings regarding the trust. *Greene v. Borland*, 4 Metc. (Mass.) 330.

The beneficiary in a deed of trust of personal property is a "party in interest," and may file his claim with the sheriff. *State v. McKellop*, 40 Mo. 184.

The trustees of a burial society who, by its constitution, could not be members, are not "persons interested," so as to be able to institute proceedings against the society. *Hull v. McFarlane*, 2 C. B., N. S. 796.

Under the provision of the Patent Act of 1836 enacting that damages be recovered by an action brought by the name of the person "interested," original owner of the patent, who afterwards sold his right, may recover for an infringement committed during the time he was owner. The word "interested" means interested in the patent at the time when the infringement was committed. *Moore v. Marsh*, 7 Vt. (U. S.) 515.

A bankrupt out of whose estate the costs is paid by the trustee in bankruptcy is not a "party interested" in the property out of which the bill is paid, so as to be able to make application to refer the bill to be taxed, even though ultimately the creditors are paid in full and there is a surplus. *In re Leavitt v. Harvey*, 27 W. R. 267.

A clerk in a district local board is a shareholder in a gas company which supplies gas to the district officer "concerned or interested in" a contract made with the board, and is liable to the penalties imposed by the statute. *Todd v. Robinson*, 54 L. R. Q. B. 47.

Where by the terms of a contract entered into with a local authority a surveyor to the local authority was to receive from the contractors, in respect of bills of quantities to be prepared for him, percentages on the amount of the bills, he should certify to be due to such contractors, it was *held* that in respect of each contract the surveyor was liable to a penalty as being "concerned or interested" therein. *Whiteley v. Barle*, L. R. Q. B. D. 154; (s. c., 57 L. J. R., 643). *LINDLEY, L. J.*, said: "This is not a question of exacting or accepting any fee or reward, but of being 'interested in a contract,' and if a man is entitled to be paid an amount which varies with the contract price, it appears to me utterly immaterial to consider who his paymaster is. He comes immediately interested in the contract, and he is a person hit by this section."

The addition of the words "being concerned in" or "interested in," in addition to a promise not to "carry on" or "engage in" a business, shows that the parties intend to extend the contract further than the latter terms alone would do. *Nelson v. Johnson*, (M. S.) 36 N. W. Rep. 869.

A complaint that complainants "interested in the reversion" was dismissed upon general demurrer, a sufficient

INTERFERE—INTERFERING PATENTS.

INTERFERE.—To intervene, so as to cut off, intercept, or interrupt.¹ To come into collision; to clash; to be in opposition.

INTERFERING PATENTS.—See PATENTS.

that they were "entitled to the mail." *Peck v. Peck*, 35 Conn.

Common carrier engaged in carrying United States mail and also in transportation of passengers wrote to a postmaster at one of the places from which he was accustomed to deliver the mail, informing him that on a certain day one of his vessels, which did not ordinarily stop, would arrive, and also requesting him to be ready to receive the mail in readiness and to "advise the passengers who may feel interested in the mail."

Held, that the expression "all persons who may feel interested," did not refer to persons interested in the mail under the circumstances, included those who wished to take passage on the vessel; and, further, that it was not to introduce *parol* evidence of circumstances under which the vessel was written, and of the nature of the business in which the common carrier was engaged, in explanation of the case. "all who may feel interested" in order to show that "passengers were embraced in it." *Heirn v. Heirn*, 32 Miss. 19.

Interest that will disqualify a trustee must be direct and immediate and not remote and contingent. . . . A more liberal construction would be harsh, strained and technical; and would, for any just reason, merely throw obstacles in the way of suits and unnecessarily embarrass the administration of justice." *Peck v. Freeholders*, 35 Conn. 466; *Ellis v. Ellis*, 32 Ala. 353.

A probate judge who has a power of appointment from any of the persons claiming as heirs of the deceased, authorized to receive for them any money or property to which they might be entitled from the estate, and also letters testamentary giving him a percentage upon profits from the estate, is "interested" in the estate and cannot act as a trustee in any matter pertaining thereto. *White*, 37 Cal. 190.

A law partner and co-counsel of a defendant who was a law partner and co-counsel of a defendant in another case, and a "person interested" and unable to take a deposition. *Dodd v. Dodd*, 37 Conn. 216.

A sheriff is not so "interested" in an action of replevin brought against his deputy for property attached by him as to authorize a coroner to serve the writ. *Browning v. Bancroft*, 5 Metc. (Mass.) 88.

Nor will the owning of stock in a corporation by a sheriff disqualify him as "interested" from executing process in a case where the corporation is a party. *Hardwick v. Jones*, 65 Mo. 54.

1. Thus it has been held (*COCKBURN, C. J., dissentiente*), that the provision of the Metropolitan Sewers act, 1848, 11 & 12 Vict., ch. 112, § 50, which provides that "where any work of the commissioners done or required to be done in pursuance of the provisions of this act shall interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby," did not apply to cases in which the effect of the sewer was only to intercept under ground springs which would otherwise have risen into a pond, even though the pond thereby became dry. *Queen v. The Metropolitan Board of Public Works*, 3 B. & S. 710. See also *Chasemore v. Richards*, 7 H. L. C. 349.

The provision of the constitution of Arkansas, art. 7, § 5, providing that the "general assembly shall not interfere with the term of office of any judge," does not deprive the legislature of the power to abolish the office, and thereby put an end to the term. *Board of Supervisors Van Buren Co. v. Mattox*, 30 Ark. 567.

A, a trader, entered into an agreement with his creditors, by deed, by which he was to have license to carry on his business for five years under supervision, and it was provided therein that if any creditor so covenanting should, during the continuance of the licence, molest or interfere with A, contrary to the true intent and meaning of the indenture, A should thereupon be exonerated and relieved from all debts and demands of such creditor, by whom the letter of license should be so contravened. A creditor, party to the deed, brought suit against A within the five years, and it was held that it was a

INTERIM—INTERIOR—INTERLINEATIONS.

INTERIM.—A Latin word, meaning in the meanwhile, in the intervening time. Used as an adjective in the sense of temporary.¹

INTERIOR.—Inland; remote or distant from the coast.²

INTERLINEATIONS.—See ALTERATION OF INSTRUMENTS, vol. 1, p. 497; AMBIGUITY, vol. 1, p. 525.

"molestation or interference" with A, within the meaning of the proviso, and might be pleaded in bar as such; WILDE, C. J., saying: "Then it is said that that which has occurred here is not a molestation within the meaning of the deed. Looking at all the circumstances it is impossible to doubt that suing the debtor was the very species of molestation which the parties sought to guard against, and no other. They clearly could not have had anything else in their contemplation. When, therefore, this action,—which in the ordinary course would go on to judgment and execution,—was brought, the defendant had a right to assume that it was brought for the purpose of molesting or interfering with him, and so preventing him from carrying into effect the contract he had entered into. In the absence, therefore, of anything to control it, it seems to me that the parties contemplated a molestation by suing out a writ. *Gibbons v. Vonillon*, 8 Manning, Gran. & Scott 483.

1. **Interim Factor.**—A judicial officer appointed under the Bankruptcy law of Scotland, to preserve the estate until a fit person shall be elected trustee. 2 Bell's Com. 299.

Interim Curator.—An officer appointed by the justice of the peace under 33 & 34 Vict., ch. 23, which abolished forfeiture and escheat on conviction of treason and felony, to have the custody and management of the property of the convict. 4 Stephen's Com. 462.

2. **More Interior District.**—In construing the 29th section of the Revenue Collection act of 1799, ch. 128, which enacts, "that if any ship or vessel, which shall have arrived within the limits of any district of the United States from any foreign port or place, shall depart or attempt to depart from the same, unless to proceed on her way to some *more interior district*, to which she may be bound, before report or entry shall have been made by the master, or other person having the charge or command of such ship or vessel, with the collector of some dis-

trict of the United States, the master, etc., shall forfeit and pay the sum of four hundred dollars," the STORY, J., said: "The defendant master of the Schooner Hope Esther, bound on a voyage fromifax, in Nova Scotia, to the port of New York. He voluntarily put into the harbour of Hyannis in the Barnstable district, and after remaining there for sixteen hours, departed without necessity, without making any report to the collector of the district, or entry with the collector of the district of or of any other district. It is of course in the reach of the possibility that he was bound to do so, unless he was bound to a *more interior district*; and the question, therefore, whether New York is such a district within the sense of the act. The district court decided it, as a question of law, that New York was such an *interior district*, there being no doubt as to the facts of the case, and the relative geographical position of the ports in the districts being well known and not controverted. What, then, is the exposition of the phrase '*more interior district*?' in the section under consideration? Does it mean any other district to which the vessel may be bound, and through which she has not already passed in her voyage, although, geographically speaking, not more inland, or indeed is less inland, than the district at which she arrived? If so, the exposition of the learned judge was right, for his opinion is understood to have turned upon the most general import which could be applied to the phrase. Or does the expression '*more interior district*' apply only to those districts which, in a strict sense, deeper within the interior of the country than the district at which the vessel has arrived, through which she must go before she can reach the interior district? I think to be the true meaning, it is agreed to be the opinion of the learned judge cannot be maintained, for New York is not a district with reference to Barnstable. There are many such districts within the United States upon our long river and extended bays, such as Hudson's

LOCUTORY.—(See also DECREE; DEFINITIVE; ERROR; ; FINAL; FINAL JUDGMENTS; JUDGMENT; ORDER).
 cutory (in law) means that which decides, not the cause, settles some intervening matter relating to the cause.¹

ver, Penobscot bay, Chesa-
 etc. I confess that, after
 ction, I have reluctantly
 conclusion that this last is
 se of the terms, and that in
 the legislature intended, by
 rior district," a district
 a reference to local and
 l position, and in common
 emed interior to another,
 er within the indentations
 the contiguous or surround-
 y, than that in which the
 ready arrived, and through
 would or might ordinarily
 er to reach such inner dis-
 e not found the words used
 r section of the act, but in
 in the 18th section the words
 et" occur in a sense exactly
 hich I feel constrained to
 section under examination.
 ions of the act may be hard
 s; but if they are so, the
 with congress, and not
 of law." U. S. v. Bearse, 4
 S.) 192.

r. The Sun Mut. Ins. Co.,
 (N. Y.) 304; s. c., 22 How.
 60.

ory and Final Distinguished.

rds have received frequent
 , of which the following
 es: "According to Harri-
 ice in Chancery (622), 'a
 nal when all the circum-
 facts material and neces-
 sary complete explanation of the
 litigation are brought be-
 fore and so fully and clearly
 by the pleadings on both
 sides the court is enabled, from
 ect the respective merits of
 the litigant, and upon full con-
 sideration of the case made out and re-
 sult, determines between
 them as to equity and good
 conscience. 'A decree is interlocutory
 when it disposes of some material
 fact, necessary to be
 brought before the court, is either not
 made out by the pleadings, or so imperfec-
 ted by them, that the court,
 without that defect, is unable to
 decide finally between the parties;
 or, by a reference to, or an en-

quiry before, a master, or a trial of
 the facts before a jury, becomes neces-
 sary to have the doubts occasioned by
 that defect removed. The court, in the
 meantime, suspends its *final judgment*,
 until, by the master's report, or the ver-
 dict of a jury, it is enabled to decide
 finally.' " Travis v. Waters, 12 Johns.
 (N. Y.) 500. See also Griffin v. Or-
 man, 9 Fla. 22, 46.

"An *interlocutory* decree is one made
 in the progress of a cause for the pur-
 pose of ascertaining some matter of
 fact or law, preparatory to a final de-
 cree. This is done by a reference to
 the master, a commissioner or jury, in
 an interlocutory decree, by the terms
 of which, the principles governing the
 rights of the parties, are generally set-
 tled, but a more perfect ascertainment
 of the facts to which they apply are
 necessary for a final disposition of the
 case. Bar. Ch. Pr. 326. A decree is
final when all the facts and circum-
 stances material and necessary to a
 complete explanation of the matters in
 litigation are brought before the court,
 and so fully and clearly ascertained on
 both sides, that the court is enabled,
 upon a full consideration of the case
 made out, *finally* to determine between
 them according to equity and good con-
 science. Bar. Ch. Pr. 330. . . . A
 decree which disposes of the whole
 merits of the cause, leaving nothing for
 the future judgment of the court in the
 case, which will make it necessary to
 bring it again before the court for final
 decision, is a final decree." Delap v.
 Hunter, 1 Sneed (Tenn.) 101.

"The distinction between *final* and *in-
 terlocutory* decrees is oftentimes ex-
 ceedingly nice, yet of most important
 consideration in practice, as the kind of
 proceeding to be had after a decree de-
 pends upon its character. When to
 take appeals, the time limited for peti-
 tions for rehearing, or bills of review,
 or whether to question the decree on
 motion, or by original proceeding, are
 all involved. A want of observing at
 all times the distinction between *final*
 and *interlocutory* decrees, has intro-
 duced some doubt and uncertainty in
 practice. A decree is *final* which dis-
 poses of the whole merits of the cause,

and leaves nothing for further consideration of the court. A decree is *interlocutory* which finds the general equities, and the cause is retained for reference, feigned issue, or consideration, to ascertain some matter of fact or law, when again it comes under the consideration of the court for final disposition. When no further action of the court is required, it is *final*; when the cause is retained for further action, it is *interlocutory*. Further decrees and orders of the court sometimes become necessary to carry into effect the rights of parties fixed by final decree; and final decrees oftentimes direct an act to be done, as in case of specific performance, that on payment of the purchase money as specified in the final decree the vendor shall execute a deed; or in case of redemption, that on payment of the money due, the mortgage be cancelled, and even sometimes all the rights of the parties being found, and all the consequences to flow from a certain fact having been finally determined, a reference as to such fact may be had to a master, and still the decree be final. The confusion has sprung up from failing to observe the distinction between facts and things, to be ascertained *preparatory* to final decree, and facts and things to be ascertained *in execution* of final decree. Because a final decree might direct that certain facts should be ascertained in execution of such decree, it will not make it *interlocutory*; nor, on the other hand, because a decree finds the general equities of the cause, and reference is had to a master to ascertain facts preparatory to final disposition, will it be regarded as final. It seldom happens that a first decree can be final to conclude the cause, and yet, in all cases, the general equity should be found, and the principles laid down for the government of the master, before reference had. But such decrees are never held to be final. Indeed it is remarked by JUDGE SPENCER, in *Jaques v. Methodist Episcopal Church*, 17 Johns. (N. Y.) 548, that no case can be found in which a decree directing a reference to a master, or a feigned issue, for the purpose of ascertaining a material fact, has been held final. But under the practice of our courts, a decree finding the general equities of the case, for the purpose of reference, etc., has been held final to support an appeal, but for no other purpose. In case of a final decree, an appeal of course brings up

the whole merits of the cause. Proceeding upon the principle that a party questioning the finding of the generally, he can appeal from a decree, may possibly dispose of the case, without the expense of reference or proceeding, or he may await the action of the court, and then appeal if he be desired. In all cases where a decree is *interlocutory*, the merits of the cause are before the court for consideration, and it is their duty to render such final decree as equitably good conscience, from a view of the whole case, may require. Even decrees whilst they rest in paper, before enrollment, are within the control of the court for modification, annulment, or to be set aside. And in this State, final decrees are always under the control of the court, during the term in which they were rendered, the decree being but one day for the purpose of justice." *Kelly v. Stanberry*, 13 Ala. 408, 421.

Judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the progress of a cause upon some plea, proceeding by default, which is only intermediate, and does not finally determine or conclude the suit, but contemplates further proceedings for that purpose. 2 Tomlyn's Law Dict. 287; Bingham on Judgments, 2, 3 Bl. Com. 396. Final judgments are such as at once finish the proceeding by declaring that the plaintiff has or has not entitled himself to the redress he sought, and by ascertaining what amount he shall recover. Bingham on Judgments 2; 3 Bl. Com. 396. Tomlyn's Law Dict. 288. Decrees are either *interlocutory* or *final*, and their character is to be ascertained by a comparison of the tests we have laid down. Bouv. Law. Dict. 295." Elliott v. Field, 3 Ala. 223.

On the question of § 4191 of the Georgia Code, which provides "No cause shall be carried to the supreme court upon any bill of exceptions so long as the same is pending in the court below, unless the decision complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause," BROWN, C. J., says: "It follows, therefore, that the cause is still *pending* till the remedy which the law affords is reached, or finally denied, and all issues or orders springing out of the main cause of action and ancillary to it, are collateral only."

Definition.

or decrees rendered upon
not final judgments, and can-
ought up to this court, by any
ceptions, till the final disposi-
cause. Bouvier says: A
ment is one which puts an
suit. An *interlocutory* judge-
given in the course of a
final judgment. Blackstone,
8, says: *Final* judgments are
once put an end to the *ac-*
clarating that the plaintiff has
titled himself, or has not, to
the remedy he sues for. The
or, vol. 3, p. 396, says: *Inter-*
gments are such as are given
iddle of a *cause*, upon some
eeding, or default, which is
mediate, and does not *finally*
or complete the suit. Ac-
these standard common law
, and the reported decisions
preme Court of the United
is clearly obvious, that a de-
der, granting or dissolving an
which springs out of a suit
pending, and is intended to
ly till the final hearing, is an
interlocutory only, and is not a final
of the cause. And, as the
cause is still pending in the
law, and the right of the plain-
plainant, to the remedy for
sues, has not been *finally* de-
n that court, the statute says
shall not be brought to this
on any bill of exceptions." The
e Hydraulic Mining Co. v.
Ga. 309, 320. See also Ward
7 Tex. 389; Snell v. Bridge-
con Mfg. Co., 24 Pick.
36.
all discussion of this subject,
s to the meaning of *interlocu-*
final, but also as to what
and decrees, etc., are inter-
and what are final, see the notes
v. Field (2 Wis. 421), 60
426.
in judgment creditors of one
d made an assignment for the
creditors, filed a bill in equity
pose of setting aside the as-
and having the property
on their judgments. They
an injunction upon the assign-
ing him "from selling, as-
sionveing, or in any way or
sposing of or encumbering or

intermeddling with, etc., receiving or collecting any of the property of the defendant." Pending the injunction, the property of B was levied on by the sheriff and sold by him. Subsequently the injunction was dissolved and suit was brought by the assignee against the sheriff's personal representatives for the alleged conversion of the property so levied on by him. More than three years having elapsed between the sale of the property and the bringing of the suit, the court *held* the statute of limitations was a complete bar to the action; SMITH, J., saying: "Did the injunction order restrain the commencement of an action for the recovery of such property or damages for the taking thereof? I think it did not. It clearly does not in *express terms*. No words in the injunction order restrain the commencement of a suit to recover for taking the property in question from the plaintiff's possession. He is forbidden to sell, assign, or in any way or manner to dispose of or encumber the property. These words do not forbid the commencement of a suit. If there is any such prohibition it must be embraced in the words *intermeddling with* such property. The words receiving or collecting any of such property apply to notes and accounts, or property not in possession of the plaintiff at the time of the service of the injunction. What is the meaning of the phrase *intermeddling with* such property? Webster defines the word *intermeddling* as follows: 'To meddle with the affairs of others in which one has no concern; to meddle officiously; to interpose or interfere improperly; to intermix.' *Intermeddling* with the property referred to in the injunction order meant to meddle with it *improperly*, to do some thing to or with it that might affect injuriously the plaintiff's rights in that action. It was used as a more comprehensive word than any other employed to forbid such interference with the property. It did not mean that the defendant should not take care of or protect such property. One of the articles of property was a carriage. If this carriage had happened to be in the street or field, exposed to rain or other injury, certainly it would not have been *intermeddling* with the same, in the sense of the in-

INTERMEDIATE.—Intervening; interposing; lying between.

INTERNAL.—Used in the phrase INTERNAL COMMERCE in the sense of "within the boundaries or limits of a State," as contrasted with commerce between States, or commerce among the States.²

INTERNAL IMPROVEMENT.—See IMPROVEMENTS.

INTERNAL REVENUE.—See REVENUE LAWS.

junction order, to have put it under cover or in a place of safety. Suppose the lumber also seized by the defendant had been exposed to injury from any cause, it would not have been a violation of this clause of the injunction to have taken care of it. The plaintiff was a trustee of this property. It was in his possession as such trustee. The title to it was in him, as against all persons except some judgment creditors who might impeach it for fraud. It was a trespass, *prima facie*, for the defendant's testator to seize such property. Such seizure could only be justified by proof of fraud in the assignment from Brown to the plaintiff, and a lien upon such property under judgment and execution against Brown. Having accepted the assignment from Brown and entered upon the duties of assignee, and received the property in question in that capacity, it was his clear duty to protect and defend such possession and preserve the property. If he had permitted any person to remove the property from his possession he would have been liable therefor. Until a receiver had been appointed in the creditor's suit, no one but the plaintiff could protect the property from waste, conversion or destruction. As it was thus his duty as a trustee to take care of and protect and preserve such property, he could maintain an action of trespass against any person who interfered therewith. The commencement of such action would be in furtherance of his duty, and could not be in contempt of the injunction order. If he had lain still, and suffered such property to be taken away and it had carelessly been lost, he would have been clearly liable therefor. This seems to me to settle the question that to commence an action against a person who assumed to take such property out of his possession would not be *intermeddling with* such property improperly or within the sense and meaning of this injunction order. It follows that if he could commence such suit and it was his duty to do so to protect

the property, the injunction order could not be construed to forbid commencement of such action. It clearly did not. The right to sue arose upon the taking of the property by the defendant's testator out of the plaintiff's possession. Such action was not suspended by the injunction order, and consequently the statute of limitations is a good defense in this action. Judgment should therefore be given for the defendant on the verdict." *McQueen v. Brown*, 41 Barb. (N. Y.) 337.

1. Intermediate Orders.—An order of prohibition used in the New York Code of Procedure, title ii, § 11, subd. 1, declaring the jurisdiction of the court on appeals. This section provides: "The court of appeals shall have exclusive jurisdiction to review every appeal, every actual determination of an appeal after made at a general term, and every order of the trial courts, 'in the following cases: (1) no other, etc.; and upon appeal from any such judgment to review a judgment of an intermediate order involving the merits of the case necessarily affecting the judgment of the court below.'"

Orders denying motions to set aside the verdict are not *intermediate orders* within the provision, and are not reviewable. *Selden v. The Hudson Canal Co.*, 29 N. Y. 634.

Nor is an order substituting a personal representative of a decedent for a plaintiff in his stead. *Hacker v. State*, 47 N. Y. 624.

Intermediate Tolls.—Tolls levied on persons who travel over a turnpike but who neither pass by, through, nor around the toll gates. *Holl v. State*, 29 Ohio St. 552.

2. Internal Commerce.—Used in the phrase INTERNAL COMMERCE. In *McQueen v. Brown* it was held that an injunction could not lie to restrain a steamship company from plying between New York and Troy on the Hudson, the State of New Jersey, on the ground that the State of New York has the sole right to navigate these waters for a term of years. *Steamboat Company v. Kingston*, 3 Cow. (N. Y.) 713.

INTERNATIONAL LAW—(See ADMIRALTY; CHINESE; CON-
 AND AMBASSADORS; CONTRABAND OF WAR; DIVORCE;
 DIATIZATION; EXTRADITION; NATURALIZATION; SHIPPING).

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Definition.—International law is the recognized rule of action
 governing the intercourse of enlightened nations.¹ It is the sys-
 tem of jurisprudence which appertains to political governments,
 governing not only what they have agreed upon in their conven-
 tions but what they have adopted in practice, without any pre-
 compact, but also whatever commends itself to the en-

ternational law, as understood by civilized nations, may be de-
 fined as consisting of those rules of law which reason deduces, as con-
 sistent with justice, from the nature of the existing among independent
 nations with such definitions and modi-

fications as may be established by general consent." Lawrence's Wheat-
 on's Int. Law, p. 26.

International law is "the system of
 which christian states acknowledge to
 be obligatory upon them in their rela-
 tion to each other and to each other's

lightened reason and conscience of publicists and jurists and right among nations in dealing with each other.¹

Distinction may be drawn between international law and law of nations, in some respects, though these terms are used as convertible, and properly so used for the most part. The former is law between or among nations, *jus inter gentes*, while the latter is broader, *jus gentium*, and may comprehend the laws of nations, not merely those governing their intercourse. Conflicts between those general laws give rise to questions which properly come within the domain of international law; while different national systems clash, there the publicist finds occasion to apply the recognized rules of intercourse which Christian nations have adopted; but wherever the systems agree, the broader designation is applicable and rather preferable.²

It is proposed here to treat the rule, or system of rules governing intercourse among civilized and enlightened peoples rather than to descant upon the general systems of jurisprudence prevailing in different countries. Conflicts between those systems will not be treated, except those interfering with national intercourse.

2. Divisions.—International law may be divided into: moral or natural rules, deducible from reason and conscience applicable to nations in their intercourse. What ought to be the measure of obligation among them is that measure, if it can be ascertained. Publicists have differed about this; and many writers have sought to reconcile them by saying that one has written of what *ought to be*; and another, of what *is* true among nations. But what is the final resort of an enlightened

subjects. It is the *jus inter gentes* as distinguished from the *jus gentium*." Bouvier's Law Dict.

1. The duties of men, of subjects, of princes, of lawgivers, of magistrates and of states, are all parts of one consistent system of universal morality. Between the most abstract and elementary maxim of moral philosophy, and the most complicated controversies of civil or public law, there subsists a connection. The principle of justice, deeply rooted in the nature and interest of man, pervades the whole system, and is discoverable in every part of it, even to its minutest ramification in a legal formality, or in the construction of an article in a treaty. Mackintosh, Miscellaneous Works, p. 183.

2. "Hobbes, in whose work we discover the hand of a master, notwithstanding his paradoxes and miserable maxims,—Hobbes was, I believe, the first who gave a distinct, though imperfect, idea of the law of nations. He

divides the law of nature into the law of man, and that of states; and that is, according to him, what we call the law of nations. 'The rule,' he adds, 'of each of these laws is precisely the same; but as states are established, assume personal principles, that which is termed the natural law, when we speak of the duties of individuals, is called the law of nations when applied to whole nations or states. This author has well observed, that the law of nations is the law of nature applied to states or nations. But I see, in the course of this work, that I was mistaken in the idea that the law of nature does not suffer any change in that application, and that from which he concluded that the maxims of the law of nature and of the law of nations are precisely the same. Puffendorf declares that he reservedly subscribes to this law as espoused by Hobbes. He has therefore, separately treated of

determining a question between litigants? In the absence of any written law, and of any common rule established by custom and recognized by general consent, he asks: What is natural law? and he decides accordingly. So, when, between nations, there is a dispute which neither prior treaty nor established custom has settled, resort must be had to an enquiry into the rights of the parties, and to justice and conscience. The nations must recognize the forum of conscience when deciding questions between nation and nation, just as a judge upon the bench does when adjudicating between man and man. In the absence of there is such a thing as the moral code, or the rule of natural law, to be observed by nations in their relations towards each other.¹

This international morality is to be designated and staked out, not to be more definitely stated than to say that the opinions of publicists of acknowledged standing and recognized authority are generally received as valuable, if not conclusive, as to what is just or unjust among nations.² Their general principles are confidently received. The application of those principles to particular cases, however, must be left to the judgment of arbitrators appointed to settle particular disputes among national

publicists have differed as to the nature and effect of the

but blended it with the law of nature. Vattel's Law of Nations, preface, p. 10.

Moderns are generally agreed in the appellation of "the law of nature" to that system of right which ought to prevail between nations or sovereign states. It is only in the ideas they entertain of the origin whence that system of the foundations upon which rests. The celebrated Grotius has it to be a system established by the common consent of nations and he thus distinguishes it from the law of nature, "When several nations at different times and in various places maintain the same thing as certain coincidence of sentiment attributed to some general law, in the question before us, it must necessarily be one or the other of these two—either a just law drawn from natural principles of universal consent. The former we call the law of nature, the latter the law of nations." Law of Nations (Chitty), vol. 8, citing De Jure Belli et Pacis, translated by Barbeyrac; Preface, § 41.

Law of Nations.—"The term natural law of nations is a particular science, consisting

of those rules of justice which ought to govern the conduct of men, as moral and accountable beings, living in a social state, independently of positive human institutions (or, as is commonly expressed, living in a state of nature), and which may more properly be called the law of God, or the divine law, being the rule of conduct prescribed by Him to His rational creatures, and revealed by the light of reason, or the sacred scriptures." Lawrence's Wheaton's Int. Law, p. 2.

According to Vattel, the law of nations, in its origin, is nothing but the law of nature applied to nations. Lawrence's Wheaton's Int. Law, p. 12.

3. Application of Natural Law.—There certainly exists a natural law of nations, since the obligations of the law of nature are no less binding on states, on men united in political society, than on individuals. But to acquire an exact knowledge of that law, it is not sufficient to know what the law of nature prescribes to the individuals of the human race. The application of a rule to various subjects cannot otherwise be made than in a manner agreeable to the nature of each subject. Hence, it follows, that the natural law of nations is a particular science, consisting

law of nations, though generally agreeing substantially on principles.¹ There may have been fallacies in their reasoning but of the frequent use of the terms *law* and *international*, each senses different in the same argument.² What ought to be the law of nations is succinctly expressed in the golden rule.³ Considered as human beings aggregated, a nation possesses rights and has obligations resting upon it. It has the right to be

in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns. All treatises, therefore, in which the law of nations is blended and confounded with the ordinary law of nature, are incapable of conveying a distinct idea, or a substantial knowledge of the sacred law of nations. Vattel's *Law of Nations* (Chitty), preface, p. 7.

1. Grotius considers the law of nations as a positive institution, deriving its authority from the positive consent of all, or the greater part of civilized nations, united in a social compact for this purpose. While Rutherford denies the existence of any such social union among nations, and concludes that what is called the law of nations, when applied to states, is nothing more than what is called natural law when applied to individuals as parts of these collective bodies. Hobbes and Puffendorf also consider the general principles of natural law, and the law of nations, as one and the same thing, and the distinction between them as merely verbal, while others define this law to consist only of the usages, customs and conventions adopted and observed among nations. The definition here given avoids any reference to those questions which have been so much discussed by publicists, and upon which there is very little prospect of a general agreement. Halleck's *Int. Law*, p. 43, citing Vattel, *Droit des Gens*, Prelim. § 3; Wheaton, *Elem. Int. Law*, pt. 1, ch. 1, § 11; Bentham, *Morals and Leg.*, vol. 2, p. 256; Foelix, *Droit Int.*, tit. Pre., ch. 1, § 1; Polson, *Law of Nations*, p. 1; Manning, *Law of Nations*, pp. 2, 57-58, etc.

2. *Abuse of Terms.*—The expression "International Law" is (MR. JUSTICE STEPHEN argues) inexact, ambiguous and misleading, because it is applied to a variety of rules and principles, some of which are not *law*, while the remainder are not *international*. "When it is applied to principles and rules prevailing between independent nations,

the word 'law' conveys a false idea, because the principles and rules are not to be not and cannot be enforced by any common superior upon the conduct to which they apply. When it is applied to parts of the law of each nation in which other nations are interested, the word 'law' is misleading, because though such laws are in the fullest sense of the word and are enforced as such, they are laws of each individual nation, not laws between nation and nation. The stipulations of treaties are as an instance of the first class of laws, and the law that ships may be captured for breach of blockade as an example of the second. Lawrence says, p. 28.

3. *Golden Rule of Nations.*—The general law of natural society is, that every individual should do for others the same thing which their necessities require, and which he can perform without neglecting the duty that he owes to himself: a law which all men must observe in order to live in a manner consonant to their nature and conformable to the views of their common Creator, a law which our own safety, our happiness, our dearest interests, our duty render sacred to every one of us. It is the general obligation that binds us to the observance of our duties. We fulfil them with care, if we wisely endeavor to promote our own advantage. Vattel's *Law of Nations* (Chitty), preliminaries, ix.

Natural Right.—A nation is an aggregation of individuals, and has no rights of attack and defence that are not in a state of nature would have. It is a part of the law of nature. Whatever is right in the law of nature is such a one could lawfully do. It is never is right in itself, a nation may lawfully do. There being no parliament or tribunal of nations to agree upon rules of right, we may say in general that the true law of nations, as of every individual person, is the law of nature. Certainly both communities and

y the territory on which it stands, etc., and it owes to nations all that it may reasonably ask of them for

Common or Customary.—International law is that which is upon the usages of nations. Maritime law is an illustration. Commerce has given rise to rules of trade which are generally recognized and observed. Unwritten law, originating in custom and growing into favor among enlightened nations because of convenience and facility which it affords in dealing one with another, is now well established with regard to most of the matters that concern international intercourse.²

A division is called, by JUDGE STORY and others, the “customary law of nations,” embodying the usages which have been found conducive to the interest, convenience and rightful privilege of different peoples in dealing with each other. What the customary law is in a particular country, the habit of nations regarded by christian states as just and equitable, and constituting the basis of the system, is to them. And those states hold even barbarous nations to this system, since there is no other rule when there are

are bound to act justly, mercifully and reasonably. Morality is inapplicable upon both. The law of nations is summarily written in the ten commandments.

It is not unjust, unmerciful or unkind for a man or a nation to defend itself when attacked. Both may not be the antagonist's weapons, and both may not be able to strengthen the enemy, but each may defend his life, if necessary. A nation's self-defence, may not only cripple the resources of the enemy, seize his property, destroy them, but may also take the life of the enemy. Waples on Proceedings in

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Natural and Necessary Law.—“Nations,” says WOLF, “do not, in their relations to each other, acknowledge any other law than that which nature has established. Perhaps, it may seem superfluous to repeat the law of nations, but it is not from the law of nature. But to entertain this idea have not been fully studied the subject.

Nations, it is true, can only be considered as so many individual persons living together in a state of nature; and, for this reason, we must apply to them the same duties and rights which nature has assigned to men in general, being naturally born free, and equal to each other by no ties but those of justice alone. The law which arises from this application, and the obligation

resulting from it, proceed from that immutable law founded on the nature of man; and thus the law of nations certainly belongs to the law of nature; it is, therefore, on account of its origin, called the *natural*, and by reason of its obligatory force called the *necessary* law of nations. That law is common to all nations; and if any one of them does not respect it in her actions, she violates the common rights of all the others.” Vattel's Law of Nations (Chitty), preface, p. 11.

2. The principles of natural justice, applied to the conduct of states, considered as moral beings, must therefore constitute the foundation upon which the customs, usages and conventions of civilized and christian nations are erected into a grand and lofty temple. The character and durability of the structure must depend upon the skill of the architect, and the nature of the materials; but the foundation is as broad as the principles of justice, and as immutable as the law of God. Halleck's Int. Law, p. 51, citing Wheaton, Elem. Int. Law, pt. 1, ch. 1, § 10; Montesquieu, Esprit des Lois, liv. 1, ch. 3; Ward, Hist. Law of Nations, vol. 1, ch. 1; Grotius, De Jur. Bel. ac Pac., lib. 1, ch. 1, § 14; Leibnitz, Juris. Gent., pref.; Manning, Law of all Nations, p. 59; Martens, Precis du Droit des Gens, § 9; Bowyer, Universal Public Law, ch. 5, § 7; Mackintosh, Miscellaneous Works, p. 183.

no compacts to bind them, except the general, natural or law, which is not so well defined.¹

In treating hereafter of the laws of war, and of peace, and commercial intercourse, of offences against nations, and other subjects connected with international intercourse, it will be seen that the common or customary law must govern.² It is proposed to present these topics in order under this particular head, but the legal reader will perceive readily that they are embraced under it where they cannot be classified under the head. It is convenient to treat them, however, under other well established classifications.

c. Conventional international law is that which is established by compacts and treaties. It is not general, like the two foregoing divisions, but is binding only on the parties to compacts on the particular nations which contract a treaty. The term is more "high, contracting parties" which enter into stipulations.

1. "The customary law of nations embodies," says Mr. JUSTICE STORY, "those usages which the continued habit of nations has sanctioned for their mutual interest and convenience." As the law is founded on the tacit or implied consent of nations as deduced from their intercourse with each other, in order to determine whether any particular act is sanctioned or forbidden by this law, we must enquire whether it has been approved or disapproved by civilized nations generally, or at least by the particular nations which are affected in any way by the act. Halleck's Int. Law, p. 48, citing Wheaton, Elem. Int. Law, pt. 1, ch. 1, § 9; Story, Miscel. Writings, p. 536; Vattel, Droit des Gens, prelim., § 25; Heffter, Droit International, § 5; Bello, Derecho Internacional. No. Prel., § 5; Wildman, International Law, vol. 1, ch. 1; Polson, Law of Nations, § 1; Manning, Law of Nations, pp. 67 *et seq.*; The Herstelder, 1 Rob. Rep., p. 115.

Voluntary Law.—Wolfins, and his abridger, Vattel, distinguish between particular and general usages, and confine the term *customary* to the former, and introduce a third division of the positive law of nations, which they call the *voluntary law of nations* to designate that universal voluntary law of usage or of custom, which has been established and sanctioned by the frequency of its recognition and the numbers who have approved of it. From this subdivision they would exclude all usages which are confined to particular periods or to particular nations and countries. Halleck's Int. Law, p. 49, citing Vattel,

Droit des Gens, prelim., § 25, 27; Wolfins, Jus Gentium, proleg., § 25; Wheaton, Elem. Int. Law, pt. 1, ch. 1, first edition, § 13; Chitty, Comm. Int. Law, pp. 28, 29; Wildman, Int. Law, vol. 1, ch. 1; Wheaton, Hist. Law of Nations, p. 139; Bello, Derecho Internacional. No. Prelim., § 4.

2. Customs which are lawful and innocent are binding upon the nations which have adopted them; but customs which are unjust and illegal, and in violation of natural and divine law, have no binding force. "When a custom is generally established," says Vattel, "either between all the civilized nations of the world or only between the nations of a certain continent, as of Europe, or of America, or between those who have the most frequent intercourse with each other, if that custom is in its nature indifferent, and much more if it is useful and reasonable, it becomes obligatory on all the nations in the world, which are considered as having given their consent to it, and are bound to observe toward each other as they have not expressly declared that their intention of not observing it was. But if that custom contains something unlawful or unjust, it is not obligatory; on the contrary, every nation is bound to relinquish it, and nothing can oblige or authorize a nation to violate the law of nature." Halleck's Int. Law, p. 48, citing Vattel, Elem. Int. Law, p. 48; Wolfins, Jus Gentium, proleg., § 26; Manning, Int. Law, vol. 1, ch. 1; Manning, Law of Nations, pp. 61-73; Fenwick, Lord Grenville, 1 Taunt. Rep.

themselves only.¹ Vattel says that the treaty making is justifiable in forming a confederacy for the purpose of punishing a sovereign who disregards a treaty made, who deserves to be treated as an enemy of the human race. This cannot be true, unless the violator is a party to the treaty; and, therefore, the learned publicist did not design that his remark should be given greater latitude.²

Under a treaty mutually obligatory, there should be free voluntary concurrence of two or more minds (speaking of official persons contracting as though they were natural persons), there should be right and ability to contract, and there should be actual contract.

Nations, competent and willing to treat with each other, are bound to carry out the provisions agreed upon in perfect good faith. The right to treat carries with it the right to abrogate a treaty by mutual consent. But one contracting party cannot do so without violation of its honor and subjecting itself to the possibility of war. Nor can one alone interpret a treaty where misunderstanding arises between the parties. Arbitrators should be appointed to decide any disputed matter. And, if a treaty has a fixed time for fixing a time during which it shall remain in force, one party alone is competent to shorten the period.³

Conventional law of nations rests upon the stipulations of treaties, and upon the rules of conduct agreed upon by the contracting parties. As a treaty binds only the contracting parties, it is evident that the conventional law of nations is not an abstract law, but a particular law. Nevertheless, these agreements are not altered by the intercourse of the contracting parties with each other, and do not affect their intercourse with other nations, and are, moreover, frequently intended to express opinions or establish rules of action, with respect to particular points or questions in the relations; they belong to history, and have an important influence in regulating the general intercourse of nations, and in modifying and determining the principles of international law. The stipulations of treaties between civilized nations form an important branch of the general law of nations. Halleck's *Int. Law*, p. 48, note 1; Wheaton, *Elem. Int. Law*, pt. 1, c. 1, § 9; Vattel, *Droit des Gens*, § 24; Wolfens, *Jus Gentium*, § 25; Polson, *Law of Nations*, § 25; Manning, *Law of Nations*, pp. 1, 2.

Customs.—Certain maxims and principles have been consecrated by long use, and

observed by nations in their mutual intercourse with each other as a kind of conventional law, form the customary law of nations, or the custom of nations. This law is founded on a tacit consent, or, if you please, on a tacit convention of the nations that observe it toward each other. Whence it appears that it is not obligatory except on those nations who have adopted it, and that it is not universal any more than the conventional law. The same remark, therefore, is equally applicable to the customary law, viz. that a minute detail of its particulars does not belong to a systematic treatise on the Law of Nations, but that we must content ourselves with giving a general theory of it; that is to say, the rules which are to be observed in it, as well with a view to its effects as to its substance; and with respect to the latter, those rules will serve to distinguish lawful and innocent customs from those that are unjust and unlawful. Vattel's *Law of Nations* (Chitty), *prelim.*, lxx.

3. Equality.—Modern International Law, of which Grotius must be considered the father, was, in its origin, an attempt to find a working substitute for the exploded theory of universal supremacy. It obtained rapid and complete success because it pressed into

3. Sources of International Law.—The system of law recognized among nations has been derived from various sources, of which the following may be specified: the writings of publicists; treaties; ordinances governing the taking and adjudication of prizes of war; arbitrations of disputes between nations; and the settlement of questions between influential powers in which distinct principles are formulated and acted upon.¹

The commercial regulations of particular states in time of peace, and the rules adopted for the conduct of war upon the high seas have proved valuable contributions, since they have been generally adopted when found worthy of imitation by other powers.²

New rules are added to the international code from time to time. Principles, once established, have obtained firm footing, and additional regulations have been received generally from nations only after they have been found useful in themselves and in accord with the recognized system.³ Treaties, though binding

on its service the generally received doctrine of the existence of a state and a law of nature. It set forth that since states had no common superior they were in the same condition as men before civil governments arose, and, like them, were ruled in their mutual intercourse by natural law. Natural law postulated the equality and independence of those who lived under it, and, therefore, all fully sovereign states were equal and independent. Lawrence's *Essays*, p. 204.

1. Sources of International Law.—1. Text writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.

2. Treaties of peace, alliance, and commerce, declaring, modifying or defining the pre-existing international law.

3. Ordinances of particular states, prescribing rules for the conduct of their commissioned cruisers and prize tribunals.

4. The adjudications of international tribunals, such as boards of arbitration and courts of prize.

5. Another depository of international law is to be found in the written opinions of official jurists, given confidentially to their own governments.

6. The history of the wars, negotiations, treaties of peace, and other transactions relating to the public intercourse of nations, may conclude this enumeration of the sources of international

law. Lawrence's *Wheaton's International Law*, pp. 27-31.

2. Laws of States.—The ordinances and commercial laws of particular states, and the rules prescribed for the conduct of their commissioned cruisers and prize tribunals, may also be referred to for illustrations of the customary law of nations, as understood and practiced by such states. They, however, should be investigated with caution, and are received only as partial admissions of general principles. Nevertheless, some of the most important modifications and improvements of the modern law of nations have originated in the ordinances and commercial regulations, the proclamations and manifestoes of particular states. "These public documents furnish the basis of events," says Phillimore, "decisions of law against any state which afterwards departs from the principles which have thus deliberately invoked; and, in such case, thus clearly recognize the fact that a system of law exists which ought to regulate and control the international relations of every state." Halleck's *International Law*, p. 57, citing Polson, *Laws of Nations*, § 3; Phillimore on *International Law*, vol. 1, § 57; Wheaton, *Elements of International Law*, pt. 1, ch. 1, § 12; The Santa Clara, *Rob. Rep.*, p. 61.

3. New Rules.—Since 1648, international law has had no rival system to contend with. It has been enriched by many new rules; and some of its ancient precepts have given place to new ones deduced from the changed practices

the parties, have contributed much to the general stock of law; for, if many treaties are made between influential states, all embodying the same rule or principle, it is likely to pass into general respect, so that nations, not parties to any of these treaties will come to act upon it, and finally the publicists will set it down as part of international law.¹

Sovereignty—*a. Attributes of.*—A state is sovereign when it possesses the supreme power of controlling its citizens or subjects, of making war and peace, making and enforcing laws for the whole, and dealing with perfect equality in its intercourse with other sovereign nations of the earth.²

Sovereignty is an indivisible quality. Whether found in one state or in several conjoined; whether in a single state or in a confederated; whether simple or complicated in any particular case, it is always a unit, not susceptible of subdivision. More than one emperor has ruled in unison over a people at one time; many councils, consistories, many persons together, may wield the same authority, but that authority preserves its single character.

In the United States, sixty million inhabitants bear the same sovereign rule, and exercise much of their internal authority through "State" governments, yet is there one sovereignty only, necessarily so.³

times. It has altered some of the process of growth; but the continuity of its life has never been interrupted, and any change that may take place in its principles seems likely to be gradual. In spite of modifications and additions, it stands to-day as in all essentials as Grotius left it. Lawrence's Essays, p. 207.

Compacts.—Express compacts between states, and treaties of peace, and commerce, declaring, modifying, or defining the rules which regulate their mutual intercourse, furnish a fruitful source of international law. Such treaties and conventions are binding force only upon the contracting parties, and they cannot alter the original and pre-existing laws of nations to the disadvantage of those which are not direct parties to the compacts; but where they relax or modify the primitive law in favor of nations, or furnish a more definite practice in matters which have heretofore been subject to conflicting pretensions, the international laws thus introduced are obligatory upon the contracting parties, but constitute a rule to be observed by them toward the rest of the world. And although one or two states, varying from the general usage of nations, cannot alter the

pre-existing international law, yet an almost perpetual succession of treaties, establishing a perpetual rule, will go very far toward proving what that law is upon a disputed point. Halleck's Int. Law, p. 60, citing Wheaton, Elem. Int. Law, pt. 1, ch. 1, § 12; Phillimore on Int. Law, vol. 1, § 52; Polson, Law of Nations, § 3; Wildman, Int. Law, vol. 1, ch. 1; Manning, Law of Nations, p. 74 *et seq.*; Bello, Derecho Internacional, No. Prel., § 7; Heffter, Droit International, § 8; Masse, Droit Commercial, liv. 1, tit. 2, ch. 2; Ortolan, Diplomatie de la Mer, liv. 1, ch. 5.

2. Supreme Authority.—Sovereignty is that public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution. This authority originally and essentially belonged to the body of the society to which each member submitted, and ceded his natural right of conducting himself in everything as he pleased, according to the dictates of his own understanding and of doing himself justice. Vattel's Law of Nations (Chitty), p. 12.

3. State in the Union.—The term *State*, as used in the constitution of the United States, differs in meaning from the same term used in international

b. Exercise of Sovereignty.—This is divisible. Recurring to our own country as an illustration, here are millions of sovereigns, but, *ex necessitate*, the exercise of the power is delegated. It is impossible for each man and woman to exercise directly. The sovereignty is, therefore, delegated. And it has been found convenient to divide the exercise of it between the federal and the State governments. All that concerns the nation has been confided to the former for exercise. So when international law is concerned, we have to do with the federal government only, of the two agents who act for the sovereign people, who, in the aggregate, bear the supreme rule. They exercise many sovereign powers—they hang citizens pursuant to their respective laws—but they exercise no powers of an international character.¹

c. "State" and "Sovereignty."—The terms "state" and "sovereign" are frequently used synonymously. A state may embrace several races under one authority, constituting a single nation.

Sovereignty is divided in its exercise into internal and external sovereignty. The former springs from the constitution of a country: the latter is the general expression of national power and independence towards other nations. The former has no reference to intercourse with other states.²

Sovereign states are deemed equal. Whatever their p

law. *Texas v. White*, 7 Wall. (U. S.) 700.

In the constitution, the word applies to a member of the union; so there can be no such State *de jure* when out of connection with all the sister States, or when its constitution has been so changed as to render it no longer in harmony with the federal constitution. *Scott v. Jones*, 5 How. (U. S.) 343, 377; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, 18.

1. **Federation.**—The union of the United States of America by the federal constitution of 1787 is regarded, in international law, as a composite state, or supreme federal government. So, also, of the Republic of Mexico, both as a confederation of states, and as a more central organization under the departmental system. Halleck's Int. Law, p. 71, citing Phillimore on Int. Law, vol. 1, § 118 *et seq.*; Wheaton, Elem. Int. Law, pt. 1, ch. 2, §§ 22, 34; Story on the Constitution, b. 3, ch. 3; Martens, *Precis du Droit des Gens*, § 29; Heffter, *Droit International*, §§ 21, 22.

The several States of the union possess none of the national powers. *McCulloch v. Maryland*, 4 Wh. (U. S.) 316; *Cohens v. Virginia*, 6 Wh. (U. S.) 419; *McIlvaine v. Cox*, 4 Cr. (U.

S.) 209; *Buekner v. Finley*, 2 S.) 586; *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32; *Island v. Massachusetts*, 12 S.) 657; *Dodge v. Woolsey*, 1 (U. S.) 336; *United States v. 92 U. S. 214*; *United States v. Shank*, 92 U. S. 542; *Pennoy v. 95 U. S. 714*; *Crandall v. N. Y. Wall.* (U. S.) 35; *In re St. Josephine*, 39 N. Y. 19.

2. **Internal and External Authority.**—Sovereignty is the supreme power which any state is governed. The supreme power may be exercised internally or externally.

Internal sovereignty is that inherent in the people of any state, vested in its ruler, by its municipal constitution or fundamental laws. The object of what has been called internal public law, *droit public interne*, but which may more properly be termed constitutional law.

External sovereignty consists in the independence of one political body in respect to all other political bodies. The law by which it is regulated, therefore, been called external public law, *droit public externe*, but more properly be termed international law. Lawrence's *Wheaton's Int. L.*

influence or power, they are considered equal to each other in respect to their rights. They make treaties as independent contracting parties.¹ It is said that sovereignty may be qualified by treaty stipulations; unequal alliances established, and protected by one nation to another. Hence arises the term, "sovereign states," which some publicists employ. It may be better to say that some states are restricted in the exercise of their sovereignty. Tributary states cannot be said to maintain their sovereignty. There may be a union of states, with one common sovereignty, while they are not tributary. In such case they would constitute but one state, so far as external sovereignty is concerned. Other nations would deal with them as represented by their federal head. Each might exercise internal sovereignty. Distinction must be drawn (as previously remarked) between sovereignty itself and its exercise. The United States of America furnish a good illustration. Each State exercises certain powers of sovereignty, while the federal government exercises the external sovereignty wholly and exclusively; but sovereignty itself is vested in the people.²

It has been written on the subject of State sovereignty that the idea that the State governments themselves are sovereign powers; and, on the other hand, it has frequently been maintained that the sovereignty of the Republic is lodged in the federal government. The better view is, that each citizen is a sovereign; that the entire sovereignty is lodged in the people in aggregate; that the people, through the federal government, exercise the external sovereignty, and also the internal in part; and they, through the State governments, exercise no external sovereignty, but most of the internal.³

Foreign nations have the rights of self defence and preserva-

tion. A sovereign state is generally deemed to be any nation or people, whatever may be the form of its internal government, which governs itself independently of foreign powers. Law-son, *Wheaton's Int. Law*, p. 58, *cited*; *Droit des Gens*, liv. i, ch. i,

international law does not recognize the State of the American Union as a sovereign. The insurgents during the Civil War "setting aside the previous governments," and "making war on the United States, did not accomplish a separation of those governments from the union. *Shortridge v. State*, 1 Abb. (U. S.) 58. The acts of the legislatures in aid of rebellion are nullities. *Luter v. Hunter*, 30 Tex. 888; *Canfield v. Hunter*, 6 Tex. 166; *Thompson v. State*, 31 Tex. 166; *Head v. State*, 43 Ala. 340. *Comynolds v. Taylor*, 43 Ala. 420,

Ray v. Thompson, 43 Ala. 434. Their state governments *de facto*, however, have been held to be binding on the inhabitants in probate and other matters. *Cassell v. Backrack*, 42 Miss. 56; *Thomas v. Taylor*, 42 Miss. 651. See *Shepherd v. Reese*, 42 Ala. 329; *Chisholm v. Coleman*, 43 Ala. 204.

3. Organized People, a State.—A state is a body politic, or society of men united together for mutual advantage and safety. Such a society has affairs and interests peculiar to itself, and is capable of deliberation and resolution; it is, therefore, regarded as a kind of moral person, possessing a will and an understanding, and susceptible of rights and obligations. From the nature and design of such a society, it is necessary that there should be established in it a public authority, to order and direct what is to be done by each individual in relation to the end and object of the

tion, which they may exercise by resort to war, when other means are inadequate. Each has the right to select its own officers, make its own laws, provided it do not encroach upon the rights of other powers. Equality and independence are among the essential attributes of a state, and they must be respected as belonging to other powers.¹ A state, considered as an artificial person, is held to moral obligations. These spring from natural duty or from conventional stipulations. They are not destroyed by a change of government or by any act of the obligor. Whatever may be the change of policy; whatever the revolution of government occurring in any particular state, other nations consider it as one continuous government, bound by its obligations. They look upon it as a government *de facto*, troubling themselves little about its *de jure* character. They will not interfere with domestic affairs, as a general rule. But there are exceptions. Nations may rightly interfere when it has done something threatening their own self-preservation, tending to disturb the equilibrium of nations, or creating such a state of things as to render interference justifiable. In Europe, nations interfere to preserve "balance of power."²

5. International Intercourse.—A sovereign state is usually represented at the courts of other nations, in times of peace, by persons authorized to attend to its interests of a national character. It also keeps agents in the principal ports of other nations to attend to its interests in commercial affairs. The former are said, in technical phrase, to reside "near" governments to which they are accredited. There are several classes of public ministers: ambassadors, envoys, ministers plenipotentiary, resident ministers, and *chargés d'affaires*. A state to which any of these is sent is not absolutely bound to receive

association. This political authority, whether vested in a single individual or in a number of individuals, is properly the sovereignty of the state. This term, however, in international law, is usually employed to express the external rather than the internal character of a nation, with respect to its ability or capacity to govern itself, independently of foreign powers.

A sovereign state may, therefore, be defined to be any nation or people organized into a body politic and exercising the rights of self government. Halleck's Int. Law, p. 63. *citing* Grotius, De Jur. Bel. ac Pac., lib. 1, ch. 1, § 14; Vattel, Droit des Gens, liv. 1, ch. 1, § 4; Wheaton, Elem. Int. Law, pt. 1, ch. 2, § 12; Burlamaqui, Droit de la Nat. et des Gens, tome 4, pt. 1, ch. 4; Martens, Precis du Droit des Gens, §§ 16-19; Gardien, De Diplomatie, liv. 1, § 3; Bello, Derecho Inter-

nacional, pt. 1, ch. 1, § 1; Droit International, §§ 16-25; Repertoire verb. Souverainete.

1. Equality.—The doctrine that completely sovereign states are equal before the law has scarcely ever been challenged since the days when Grotius made it one of the fundamental principles of his system. It has been admitted that the more powerful a state is, the more influential it will be, but it has been asserted at the same time that superiority in power cannot confer no legal preeminence. The smallest and weakest of independent political communities has, said, exactly the same rights in international law as the strongest and most extensive empire. Lawrence's Int. Law, p. 208.

2. Nations or states are bodies or societies of men united together for the purpose of promoting their

ould it refuse, it could hardly expect its own representative accepted at the court of the power thus refused representation. The exchange of legates, though a matter of comity, is so common among the great powers, that a refusal to receive one other than personal grounds would seem to be unfriendly. Long ministers, ambassadors rank as the first class; but of the second may be clothed with powers as important. Distinction between the two, formerly very nice, is now almost entirely obliterated. Ministers resident and *chargés d'affaires* are accredited to sovereigns, as well as ambassadors, and their functions may be as important. Their relative rank has been much discussed by the older publicists.¹

Letters of credence are furnished to ministers addressed to the sovereign to which they are sent. The minister has an authentic copy. In this letter, his authority to negotiate a treaty, or other especial authorization, may be expressed. Besides this, he usually bears private instructions, written for his own direction and the necessary passport. He presents his letter to the sovereign minister representing the government to which he goes, and is introduced to the authorities with which he has to do, and to the reigning sovereign or the chief officer of the republic, as the case may be.²

Ministers are not generally subject to the jurisdiction of the government to which they are accredited, nor are their families, private and official. Even their dwelling house and personal property are free from the operation of the local law. Under the notion that they still live in their own country, they and their families, and the members of their households, and their servants are held not amenable to either civil or criminal law when

and advantage by the joint efforts of their combined strength. . . . of nations is the science which determines the rights subsisting between nations or states, and the obligations consequent to those rights. Vattel's *Nations* (Chitty), Prelim. 49. The third class are included ministers resident, and special ministers charged with a particular mission, and accredited to sovereigns. Vattel thus distinguishes between a minister resident and one called simply minister, and gives us the origin of the word *resident* formerly applied to the continuance of the minister's stay, and it is frequent in his time ambassadors in ordinary to be called only residents. But since the establishment of different orders of ministers, the name of resident has been limited to ministers of the third class, and to the character of which general law has annexed a lesser degree of

regard. The resident does not represent the prince's person in his dignity, but only in his affairs." . . . "Lastly, a custom still more modern has erected a new kind of ministers, without any particular determination of character. These are called simply *ministers*, to indicate that they are invested with the general quality of a sovereign's mandates, without any particular determination of character." Halleck's *Int. Law*, p. 204, citing Vattel, *Droit des Gens*, liv. 4, ch. 6, §§ 73, 74; Wheaton, *Elem. Int. Law*, pt. 3, ch. 1, § 6; Real, *Science du Gouvernement*, tome 5, p. 49; Horne on *Diplomacy*, §§ 1, 11, etc.

2. An ambassador is considered as peculiarly representing the honor and dignity of his principal, and, if the representative of a monarchical government, he has been regarded as entitled to the dignity and exact ceremonial of one representing the person of his sovereign. The terms ordinary and extra-

representing their country at a foreign court. There are exceptions to, or rather modifications of, the rule of nonresidence.

If the minister is a subject of the country to which he is accredited, he continues to be subject to its laws. So, also, if he is in the employ of that power while he represents another country at its court. So, also, if he voluntarily makes himself a party to a lawsuit. So, also, if he is engaged in a conspiracy against the country to which he is accredited. In the last mentioned case he is so far responsible that his person and papers may be seized and he may be sent out of the country by the injured power on account of violation of its amicable relations with the country to which the unworthy minister belongs.

For criminal offences committed by a minister's domestic attendants offenders should be sent home for trial by the minister himself. He may discharge them from his service, renounce the privilege which appertains to himself rather than to them, and give them up for punishment under the local law of the country. Ministers are not liable to taxation under the law. Their personal and family use are exempt from tariff duties. They, their families, and messengers bearing dispatches to them, are exempt from visitation, seizure and search. As a general rule, they pass through other countries on their way to or from their destination without the usual annoyances to which travellers are subjected. This is a matter of comity rather than international duty. It extends to envoys¹ and chargés d'affaires.²

Ordinary rules are applied to designate the time of their intended residence and employment, whether for an indeterminate period, or only for a particular or extraordinary occasion. In Europe, the right of sending ambassadors is considered as exclusively confined to crowned heads, to the great republics, and to other states entitled to royal honors. Papal legates or nuncios, at Catholic courts, are usually ranked as ambassadors. Halleck's Int. Law, p. 203, citing Wheaton, Elem. Int. Law, pt. 3, ch. 1, § 6; Vattel, Droit des Gens, liv. 4, ch. 6, §§ 70-79; Martens, Précis du Droit des Gens, liv. 7, ch. 9, § 192; Martens, Guide Diplomatique, §§ 9, 13; Horne on Diplomacy, §§ 1, 9; Phillimore, Int. Law, vol. 2, § 222 *et seq.*, etc.

1. Envoys and other public ministers not invested with the peculiar character which is supposed to be derived from representing generally the dignity of the state or the person of the sovereign, come next in rank to ambassadors. They represent their principal only in respect to the particular business committed to their charge at the court to

which they are accredited. They are variously named, as envoys, extraordinary, and ministers plenipotentiary, and internuncios of the Pope. MARTENS says: "A distinction is made between the envoy and the extraordinary, and between the extraordinary and the plenipotentiary. But these distinctions have no importance with regard to precedence." Horne on Int. Law, p. 203, citing Martens, Précis du Droit des Gens, § 195; Rostk, Derecho, Pub. Int., lib. 2, caps. 2; Real, Science du Gouvernement, tome 5, p. 42; Wheaton, Elem. Int. Law, pt. 3, ch. 1, § 6; Horne on Diplomacy, § 1, § 10; Phillimore on Int. Law, vol. 2, § 219; Martens, Guide Diplomatique, § 8, 14; Hugedorn, Discours sur le Rang, etc., § 7; Garden, De Diplomatie, liv. 5, §§ 3-6.

2. Charges d'affaires, near the rank of the monarchical government in Europe, are not accredited to the sovereign, but to the ministers of foreign affairs. They are divided into two classes, according to the nature of the subject of their appointments, viz.,

mission may be terminated when its object has been accomplished; when its time has expired; when the minister is recalled by his own government; when he is sent out of the country for reasons by the government to which he was accredited; when his diplomatic rank has been changed; when he has withdrawn himself to represent some indignity, or for any cause; when the sovereign to which he was accredited has died, abdicated, or been deposed; and when war has been declared between his own country and that to which he was accredited.

When the minister is recalled by his government, it is usually by a formal letter sent to him that he may deliver it to the minister of foreign affairs, who thereupon introduces him to the king or emperor, the exponent of sovereignty, that he may take his leave in accordance with international etiquette.

Recall of recall and its attending ceremonies are not usual. There is a misunderstanding between the two governments when the minister is called home on that account.

Treaties.—The mutual consent of two nations to certain conditions agreed upon by their respective representatives, when made and ratified, are subject to no particular form.¹ Some treaties are made by those representatives pursuant to express instructions, others are made under powers implied. Agreements of peace, capitulations, and other matters incident to war, are of the class of the latter. Should an instructed commissioner exceed his powers, the treaty would yet be susceptible of ratification.

A treaty, though duly ratified, may be inoperative because of impracticability; because of a mutual mistake by the con-

tractions *ad hoc*, who are originally accredited by their government in that capacity, and charges them *par interim*, who are substituted in the place of the minister of the respective nations during his absence. Halleck's Int. Law, p. 205; Wheaton, Elem. Int. Law, pt. 3, § 6; Merlin, Répertoire, verb. Int. Public, § 1; Webster, to Am. Minister at Vienna, June 8th, 1803, in Orne on Diplomacy, §§ 1-11; Hall, Précis du Droit des Gens, § 1; Phillimore on Int. Law, vol. 2, p. 10.

Usage.—Usage has not prescribed a necessary form of international agreement. A valid agreement is, therefore, concluded so soon as one party has manifested his intention to do or to refrain from a given act, conditionally upon the acceptance of his declaration of intent by the other party as constituting an engagement, and so soon as the acceptance is clearly indicated. The binding force of contracts,

which barely fulfil these requirements, and of those which are couched in solemn form, there is no difference. From the moment that consent on both sides is clearly established, by whatever means it may be shown, a treaty exists, of which the obligatory force is complete. Hall on Int. Law, p. 275, citing De Marten's Précis, § 49; Klüber, § 143; Heffter, § 87; Phillimore II, § 1; Bluntschli, § 422.

2. Requisites.—The antecedent conditions of the validity of a treaty may be stated as follows: The parties to it must be capable of contracting; the agents employed must be duly empowered to contract on their behalf; the parties must be so situated that the consent of both may be regarded as freely given; and the objects of the agreement must be in conformity with law.

All states which are subject to international law are capable of contracting for whatever object they may wish. The possession of full independence is

tracting parties; or because of a change of circumstances be the control of either nation of such a character as to render the treaty futile.

Each contracting party is governed by its own municipal law in making a treaty, while both are alike subject to international law. Impediments in the way of one party owing to its municipal regulations, should have effect before the making of a treaty. It is too late afterwards to urge them as a reason for violating it.¹

Once made, a treaty must be considered as a part of the preme law of the land. It must be so considered, though made with one of the weakest nations of the earth. When a treaty has been signed, and its ratification is pending, it must be considered sacred till the respective powers have had time to ratify it. If one nation has already ratified, it cannot violate the terms without disgrace, while the other party has not yet had time to ratify or reject it. The passage of a law in conflict with the treaty at an early stage of the negotiation would be repugnant to the law of nations. The recent action of congress in passing a bill prohibiting Chinese immigration before knowing that China

accompanied by full contracting power, but the nature of the bond uniting members of a confederation, or joining protected or subordinate states to a superior, implies either that a part of the power of contract normally belonging to a state has been surrendered, or else that it has never been acquired. All contracts, therefore, are void which are entered into by such states in excess of the power retained by or conceded to them under their existing relations with associated or superior states. Hall on Int. Law, p. 272, citing Bluntschli, § 403; Vattel, liv. 2, ch. 12, § 155; Calvo, § 579.

1. Different Kinds of Treaties.—Treaties are of various kinds. They may define private relations, like commercial treaties, or political relations. They may be temporary or of unlimited duration, and among the latter, some, or some provisions which they contain, may be dissolved by war, and others, intended to regulate intercourse during war, may be perpetual. They may secure co-operation merely, as treaties of alliance, or a closer union, as confederations, or the uniting of two or more states into one. All the intercourse of nations may come under the operation of treaties, and they may reach to the explanation or alteration—as far as the parties are concerned—of international law. Hence the importance of collec-

tions of treaties and of the history of diplomatic intercourse.

Besides these leading divisions, treaties may differ from one another in various ways. They may, for instance, be made by the treaty making power in person or by their agents, may be open or secret or with articles of conditions, may be absolute or conditional, may contain promises of performance on one or on both sides, may be absolute or not with a pecuniary payment, may be revocable at the will of either party or irrevocable. They may be principal, accessory, preliminary or definitive. They may be simple, consisting of a single engagement, or contain many engagements. Some are leading, others subordinate. They may contain new provisions, confirm or explain old treaties, or be some of the more important treaties of those of Westphalia and Utrecht, which have been confirmed many times. Woolsey on Int. Law, § 102.

2. Ratification.—Except when a treaty is an international contract is personally concluded by a sovereign or other person exercising the sole treaty making power in a state, or when it is made in a state of the power incidental to an international station, and within the limits of the power, tacit or express ratification is necessary to the supreme treaty making power of the state is necessary to its validity. Hall on Int. Law, p. 276.

upon a pending treaty, cannot be successfully defended.¹ Nations are free to make treaties provided they do not contravene the rules recognized as governing all nations.² They may acquire rights by treaty which they would not have under general rules alone.³ In treating, however, they must observe all the essentials of international contracts.⁴ Nations may combine to enforce the observance of a treaty. Non-parties to the treaty may join in the combination when invited to its observance.⁵

Observance of Treaty.—Treaties, like contracts, are violated when one neglects or refuses to do that promised to the other party to engage in a transaction. It is not every petty breach or delay to fulfil a treaty which authorizes the other party to regard it as broken, and demand reparation. When a treaty is broken by one party, the other can still require its observance. See on Int. Law, § 108.

Commercial Treaties.—Since a nation has a full right to regulate her commercial affairs by what is useful and advantageous to her, she may make commercial treaties as she thinks fit, and no other nation has a right to take offence, providing those treaties do not affect the perfect rights of nations. If, by the engagements contracted with a nation, unnecessarily, or for powerful reasons, renders her incapable of joining in the general alliance which nature recommends to nations, she trespasses against her treaty. But, the nation being the sole sovereign in this case, other nations are bound to respect her national liberty—she is free in her determination, and we cannot suppose that she is actuated by partial reasons. Every commercial treaty, therefore, which does not deprive a nation of the perfect right of others is allowable between nations; nor can the violation of it be lawfully opposed. See Law of Nations (Chitty), p.

nations termed conventional. The treaty that gives the right of commerce is the measure and rule of that right. Vattel's Law of Nations (Chitty), p. 39.

4. Essentials.—Martens says, that in order to make a treaty obligatory, the following five things are necessarily supposed: 1st. That the parties have power to contract. In other words, that the person or authority making the treaty, or ratifying it, had full power for that purpose. 2nd. That they have consented. The form of such consent is entirely unimportant, provided it is fully and clearly declared. 3d. That they have consented freely. The consent must have been a voluntary act of the contracting party. The plea of *fear*, however, cannot be opposed to the validity of treaties between nation and nation, except, at most, in cases where the injustice of the violence employed is so manifest as not to leave the least doubt. 4th. That the consent is mutual. 5th. That the execution is possible. The last two requisites are too plain to require explanation or comment. Halleck's Int. Law, p. 895, *citing* Martens, *Precis du Droit des Gens*, § 48; Vattel, *Droit des Gens*, liv. 2, ch. 12, § 157 *et seq.*; Phillimore on Int. Law, vol. 2, § 45; Riquelme, *Derecho Pub. Int.*, lib. 1, tit. 1, ch. 15; Real, *Science du Gouvernement*, tome 5, ch. 3, § 7.

5. Combinations to Enforce Treaties.

—"As all nations," says Vattel, "are interested in maintaining the faith of treaties, and causing it to be everywhere regarded as sacred and inviolable, so likewise they are justifiable in forming a confederacy for the purpose of repressing him who disregards it. . . . Such a sovereign deserves to be treated as an enemy of the human race."

The foregoing remarks of Vattel, with respect to nations combining together for the punishment of a state which violated its treaty stipulations,

Treaties are terminated by war, and all dealings between enemies are unlawful unless justified by necessity.¹

It is now becoming the practice for nations, in making a commercial treaty, to insert an article by which they agree to submit to arbitration any question that may arise under the treaty. This important advance towards the amicable adjustment of differences and disputes tends to an improvement in international law itself. The influence of the great powers may accomplish it, though they may claim that those powers have authority superior to that of other nations. States can hardly be admitted.³

a. Construction of Treaties.—The courts follow the executive department in exposition of treaty stipulations; that is, they allow the interpretation which that department puts upon an international agreement to have great weight when it is not de-

are not sustained by later authorities. A plain and indisputable violation of a treaty is, undoubtedly, a violation of the law of nations. While a treaty imposes, on the one hand, a perfect obligation, it produces, on the other, a perfect right. To violate a treaty is, therefore, to violate a perfect right of him with whom it was contracted. Moreover, such violations are injurious to other states who are not parties to the treaty, for, in the words of Vattel, "we can no longer depend on the conventions to be made, if those that are made are not maintained." Nevertheless, they cannot be classed with piracy, or violence to the person of an ambassador. One who openly violates the obligations of a treaty will incur the disgrace of infamy and the reproach of mankind, but, so far as penal consequences are concerned, it is only the injured party who is justified in resorting to open and solemn war for the purpose of inflicting punishment. Halleck's Int. Law, p. 893, citing Vattel, Droit des Gens, liv. 2, ch. 15, §§ 221, 222; Wheaton, Elem. Int. Law, pt. 4, ch. 4, § 8; Phillimore on Int. Law, vol. 2, § 44; Kent, Com. on Am. Law, vol. 1, p. 181; Riquelme, Derecho Pub. Int., lib. 1, tit. 1, ch. 15; Heffter, Droit International, § 104.

1. The only exceptions to this strict and vigorous rule of international jurisprudence are "contracts of necessity, founded on a state of war, and engendered by its violence." All ransom bills come under this exception, as, also, bills of exchange drawn by a prisoner in the enemy's country for his own subsistence. In the case of a bill of exchange drawn upon England, by a British pris-

oner in France, for his own subsistence, and endorsed to an alien enemy, the latter was allowed to enforce its return of peace. Halleck's Int. Law, p. 359, citing Kent, Com. on Int. Law, vol. 1, p. 68; Wheaton, Elem. Int. Law, pt. 4, ch. 1, § 15; Bynkershoek, Quaest. Jur. Pub., lib. 1, ch. 2, § 1, toine v. Morehead, 6 Taunton R. 237.

2. Arbitration.—Till almost the middle of the last century, arbitral tribunals have been almost entirely unknown. It was not until the latter part of the eighteenth century that the quarrel has broken out and the means of settling it have been sought in vain. But in recent years the practice has arisen of inserting in treaties of commerce clauses by which the contracting parties to refer to arbitration any differences which may arise between them regarding the interpretation of the treaty. This is a step forward, and it is due to the initiative of Signor Mancini, till then Italian minister for foreign affairs. During his tenure of office it fell to him to make or renew many treaties of commerce between Italy and other countries, and in every one of them he succeeded in inserting an arbitration clause. Lawrence's Essays, p. 26.

3. The "Great Powers."—It is clear, then, that the six great powers have by modern international law acquired an authority superior to that of other States, but that the method of enforcing it, and the subject-matter with respect to which it should be exercised, are by no means fully defined. They depend rather upon the will of the powers themselves, and the circumstances of each particular case, than upon any general rules. The

law.¹ Should a treaty be inconsistent with local law, that be no argument against it, for it is a part of the supreme legislative enactments must give way to it.² Construing our treaty with Denmark, which gives that all the commercial advantages accorded to the most nations, the supreme court held that, for adequate compensation, our government might yet give another nation better rates than those governing imports from Denmark.³

Neutrality Laws.—It is the duty of a State to preserve amity with other powers; not only to do so in her relations with them as a government, but also by requiring her own citizens to respect the rights of other States. In furtherance of the latter, neutrality laws are enacted by civilized nations fixing a penalty for the violation of neutral duties by subjects.

The duty of neutrality renders all aid, given to one belligerent with another, not only wrongful to the injured party, but a crime against the neutral country to which the wrongdoer is subjected, if the aid be given while he is still under its jurisdiction. Belligerent vessels, in the United States, to cruise against any nation with which we are at peace, renders the vessel culpable by legal process and subjects the personal offender to severe penalties; and actually engaged in "privateering" against such a nation is a crime of offence against our neutrality laws.⁴ To leave this

may be said of the means of enforcing obedience to their decisions. There is no definite sanction capable of being laid down beforehand, and sure to be obeyed by any state which sets at naught the law of Europe. But when the powers have come to an agreement, any question, they generally consent to make their decision rest on. Sometimes one or two of the powers engage actual hostilities against the neutral state, as the formal or informal mandates of the others. Sometimes a naval demonstration, or a declaration of war, is sufficient. Sometimes the powers consent to a compromise, and forego a portion of their demand in condition of compliance with the neutral power. We have not yet arranged a formal European Areopagus. See *Essays*, p. 230.

Construction.—The construction of a treaty by the executive department is binding on the courts when it is not repugnant to the language and purpose of the treaty. *Castro v. De Uriarte*, 16 N. Y. 93.

A treaty supersedes all local statutes. *Kull*, 37 Hun (N. Y.)

3. The provision of the "favored nation" clause, in the treaty with Denmark, *held* not violated by exacting a duty on sugar greater than that exacted on it from the Hawaiian Islands—the treaty with the latter power providing for compensation for the concession. *Bartram v. Robinson*, 122 U. S. 116.

4. **Neutrality Laws.**—Vessels are liable to condemnation for being fitted out as privateers to cruise against belligerent powers at peace with the United States, in contravention of the neutrality laws of this country, and American citizens engaged in fitting out such vessels are subject to punishment under those statutes. And for actually engaging in privateering without commission, offending vessels and persons are amenable under those laws. *United States v. Guinet*, 2 Dall. (U. S.) 321; *Talbot v. Janson*, 3 Dall. (U. S.) 133; *Geyer v. Michel*, 3 Dall. (U. S.) 285; *Moodie v. The Alfred*, 3 Dall. (U. S.) 307; *Moodie v. The Phœbe Anne*, 3 Dall. (U. S.) 319; *U. S. v. Quincy*, 6 Pet. (U. S.) 445; *The Arrogante Barcelona*, 7 Wheat. (U. S.) 496; *The Irresistible*, 7 Wheat. (U. S.) 551; *La Armistad de Rues*, 5 Wheat. (U. S.)

country with a vessel to be employed as a "privateer" against a nation with which the government is at peace, would be a violation of those laws; but a citizen may leave it with intent to enlist in a foreign army, without offending them.¹

Should a privateer be commissioned by one of the belligerents, that fact would not relieve from the penalty of sailing from the country to aid that belligerent against a nation friendly to the other.

8. Embargo Laws.—The laws of nations recognize the right of making contingent seizures, captures or reprisals, which are understood under the term *embargo*; but the practice is little followed and is unpopular in the United States. When employed by neutrals for the purpose of protecting commercial vessels against the depredations of belligerents, it is known as *civil* embargo, to distinguish it from *hostile*. The latter is a species of reprisal by which a vessel is detained in port pending the settlement of some national dispute as a kind of security against a threatened wrong.³

When the United States had established embargo laws, n

385; *Swartz v. Ins. Co. of N. A.*, 3 Wash. (C. C.) 117; *Arnold v. Delcob, Bee* (U. S. D. C.), 5; *Kemball v. Rhineland*, 3 Johns. Cas. (N. Y.) 130; *The Gran Para*, 7 Wheat. (U. S.) 471.

1. It is not a crime under the neutrality act of 1818, to leave this country for the purpose of enlisting in a foreign army. 3 Stat. at L. 447; *U. S. v. Kazinski*, 2 Sprague (U. S. D. C.), 7; *The Santissima Trinidad*, 1 Brock. (C. C.) 478.

2. "A capture made by a vessel fitted out and armed in an American port in contravention of the laws of neutrality, and proceeding thence on a cruise, cannot be justified, whether the vessel was with or without a commission." *The Santa Maria*, 7 Wheat. (U. S.) 490; *The Fanny*, 9 Wheat. (U. S.) 659; *La Concepcion*, 6 Wheat. (U. S.) 235.

A vessel commissioned with intent to violate our neutrality laws is confiscable. U. S. Rev. Stat., § 5283.

"Most of the statute in which this provision is found appertains to personal prosecutions for the violation of neutrality; and, in such prosecutions the forfeiture of the vessel, etc., may, perhaps, be pronounced as a part of the penalty. But that congress meant that proceedings *in rem* might be instituted against the vessel appears from the eighth section of the act respecting the seizure of such vessel with her prizes, and the restoration of such prizes 'in the cases in which restoration shall be adjudged.'

"The prizes, so called, illegally captured by offenders, are not prizes in the sense of the law of nations; they are not hostile things with relation to the United States, but are adjudged merely for the purpose of doing justice to their wronged owners by restoring them; a *piratis aut latronibus dominium non mutant*; while it is clearly a thing guilty when it has contravened the neutrality law, it is not enemy property, unless owned by insurgent enemies.

There has been some judicial interpretation of this act, though requiring any special discussion in connection. *The Estrella*, 4 S. 298; *The Gran Para*, 7 (U. S.) 471; *The Santa Maria* (U. S.) 490; *Monte Allegre* (U. S.) 520.

The Chapman having been detained within a loyal state, during the rebellion in this country, for the purpose of cruising against the commerce of the United States, under a letter of marque issued by J. Davis, was libeled and condemned on the instance side of the admiralty court, and the seizing officers were denied the motion of the court holding them not entitled to either under the law of prize or acts against piracy." *Proceedings in Rem*, 4 Sawyer 501; *W. Chapman*, 4 Sawyer 501; *W. Proceedings in Rem*, p. 312.

3. An embargo (from the Portuguese, *embargar*, to detain, the root of which is the same as that of *bar*, *barricade*) is, in i

necessity would excuse their violation.¹ Vessels were for-
 or contravention of them, and if a liable vessel escaped
 the jurisdiction so that she could not be prosecuted in
 action would lie to recover double her value.² The
 of such a vessel was confiscable, and a suit for double its
 also might be instituted in case it should escape by going
 the territorial jurisdiction of the United States. When
 prohibited by law was laden at an interdicted port and
 to this country, there was legal presumption of intent to
 the statute.³ Where there was not design to export pro-
 goods, they could be removed from one vessel to another,
 of our ports, without contravening the embargo laws.⁴
 jurisdiction was in admiralty, it was held, even when part
 cargo (of a vessel and cargo proceeded against) had been
 upon land.⁵

detention of vessels in a port, they be national or foreign, for the purpose of employing their crews in a naval expedition was formerly practiced, political purposes, or by reprisals. A *civil embargo* aid for the purpose of national or safety, as for the protection of commercial vessels against the rules of war, which would extend to capture.

A embargo is a kind of reprisal by which vessels within its ports are taken to another nation with which no peace exists, for the purpose of doing justice. If this measure is followed by war, the vessels are to be captured, if by peace, restored.

"Species of reprisal," says Kent is laid down in the books as a measure according to the usage of nations, but it is often reprobated, and not well distinguished from the practice of seizing property found in territory upon the declaration of war.

Woolsey on Int. Law, § 114. Evidence must be clear and of that necessity which will exaltation of the embargo laws. *United States v. Cranch*, 2. *Compare* The New York, (U. S.) 59; *United States v. 2 Gall.* (U. S.) 485.

essel, sailing from one port of the States to another, was obliged, by a justifiable necessity, to put into a port and sell her cargo. *Held*, was not guilty of a violation of embargo laws. *The William Gray*, (U. S.) 16. But see the *United*

States v. The James Wells, 3 Day (Conn.) 296.

2. A forfeiture of the vessel, imposed by the embargo laws, cannot be enforced after she has arrived within the jurisdiction of a foreign power; but the United States must then resort to the penalties imposed by those laws, and proceed for double the vessel and cargo, to which it is entitled upon their violation. *Parker v. United States*, 2 Wash. (U. S.) 361.

3. Where a prohibited cargo is taken in at a prohibited port, and brought into a port of the United States, it will be presumed that the cargo was laden with an intention to import it into the U. S. This presumption may, however, be repelled by evidence. *U. S. v. Shearman*, 1 Pet. C. Ct. 98.

Where, after a vessel had taken on board a cargo to be carried, the embargo law prevented the vessel from sailing, and the cargo remained on board upwards of a year, when it was sold at the port of shipment. *Held*, that the owner of the vessel could recover nothing of the shipper, either in the nature of freight or damages. *Kelly v. Johnson*, 3 Wash. (U. S.) 45.

4. It was no offence against the embargo laws of the United States to take goods out of one vessel and put them into another, in the port of Baltimore, unless it were with an intent to export them. *The Juliana*, 6 Cranch (U. S.) 327.

5. The *Sea Nymph* and her cargo were seized for a violation of the non-importation laws, in importing the goods seized into the port of Philadelphia. The vessel and part of her cargo

s regulations, however, the presidential licenses were re-
and facilitated, while other permits were granted by sub-
officers presumably under the authority of the presi-

supreme court applied the general law of nonintercourse
territory of the rebellion in this country.² The earlier
course laws subjected both vessels and cargoes to confis-
but neutrals were excusable for apparent violations
circumstances which they could not control.⁴ The latter
similar import.⁵

Trade License.—Commerce, otherwise illegal in war, may be
permitted. Licenses for the purpose are usually re-
to particular persons, to certain kinds of goods, to the
exchanged, and to time and place. There may be, how-
general licenses when war has been suspended for a period.
general and special are granted by supreme authority, or
presumably acting under it. There is such presump-
favor of licenses issued by a commanding officer, to have

United States v. Weed, 5 Wall.
Butler v. Maples, 9 Wall.
Gay's Gold, 13 Wall. (U.
Maddox v. U. S., 15 Wall. (U.

United States v. Lapene, 17 Wall.
Montgomery v. U. S., 15
S.) 395. In the former case
all commercial contracts with
its or in the territory of the
either made directly by one
indirectly through an agent
tral, are illegal and void.⁵

Nonintercourse Laws.—Un-
nonintercourse laws of the
ates which existed before the
vessels were liable to seizure,
and condemnation; and so
cargoes. Little v. Barreme,
169; Murray v. The Charm-
2 Cranch 64; Amory v.
14 Johns. (N. Y.) 24; Clark
States, 3 Wash. 101; The
k, 3 Wheat. (U. S.) 59; The
ia, 1 Paine 256; United States
ags of Coffee, 8 Cranch 398;
ates v. The Mars, 8 Cranch
Richmond, 9 Cranch 102; 10
Rum, 1 Gall. 188; The Rose,
The Mary, 1 Gall. 206; The
Gall. 239; The Nancy & Car-
ash. 281; An Open Boat, 5
The Adventure, 1 Brock.
Patriot, 1 Brock. 407; Graves
5 Duv. (Ky.) 108.

neutral vessel without knowl-
existing or impending war,
to harbor during a storm and

there awaiting orders after having been
prevented from going out by a mutiny
of her crew, did not thereby violate the
Nonintercourse act of 1809. (See *ante*,
EMBARGO.) The Fanny, 9 Cranch
181. See The Pitt, 8 Wheat. 371; The
Frances and Eliza, 8 Wheat. 398. That
act applied to all goods of British man-
ufacture, though imported into a neutral
country before the passing of the act.
10 Hogsheads of Rum, 1 Gall. 188; The
Rose, 1 Gall. 211; The Mars, 1 Gall.
237. Importation in violation of that
act was completed by voluntary arrival
with intent to unlade. The Mary, 1
Gall. 206; The Boston, 1 Gall. 239. If
British goods are laden with intent to
bring them into the United States, that
is held to be intent to violate the act.
The Boston, 1 Gall. 239; The Nancy
and Caroline, 3 Wash. 281.

5. The nonintercourse laws passed
during the rebellion have been con-
strued by the courts in several cases.
The Reform, 3 Wall. 617; The
Washita Cotton, 6 Wall. 521; Mc-
Krell v. Metcalf, 2 Duv. (Ky.) 533;
Leathers v. Com. Ins. Co., 2 Bush
(Ky.) 296; Mrs. Alexander's Cotton, 2
Wall. 404; United States v. Weed, 5
Wall. 62; The Cotton Plant, 10 Wall.
577; United States v. Steamer Hom-
meyer, 2 Bond 217; McKee v. U. S.,
8 Wall. 163; Gay's Gold, 13 Wall. (U.
S.) 362; Maddox v. U. S., 15 Wall. (U.
S.) 58; United States v. La Pene, 17
Wall. (U. S.) 603; United States v.
Mora, 97 U. S. 415.

effect within his lines, or between him and the force immediately opposing when there is agreement for the purpose with the proper commanding officer. Trade licenses have been granted for the protection of an enemy, and also for that of subjects of a friendly power with an enemy.¹

The license must not only be issued by lawful authority, but when issued by a commanding general without express authorization by the supreme power, it can only be justified by special circumstances, but it must be confined strictly to its proper objects, the person or persons to whom it has been granted.²

A trade license cannot be assigned. The trustworthiness of the person to whom it is granted is taken into consideration in giving the permit; so he cannot transfer it to another person. It might be made negotiable by the grantor, but such is not its proper usage. Goods brought in under a transferred, unnegotiable license are confiscable.³

Vessels are licensed with description of their nationality. If the vessel is designated as neutral, one belonging to the enemy of the power issuing the license could not be used in the enterprise contemplated—certainly an enemy ship could not be employed. It is said that where a license authorizes enemy goods to be brought in, there is an implication that an enemy ship may be used for that purpose.⁴

A ship, licensed to import specified goods is protected in going out for them in ballast; and the converse is true; a ship may safely return in ballast after having delivered her cargo to the enemy's country, under license. Should the vessel so authorized have the privilege in taking out goods when authorized to bring in, or in returning with them when only licensed to take out, both ship and cargo would be liable to condemnation.⁵

Any fraud on the part of the favored trader, such as taking out or bringing in goods different from those licensed, or a greater quantity than that authorized, would subject them to condemnation, and also involve the ship in the same liability.⁶

Violation of license cannot be excused on the plea of necessity or compulsion as a general rule. There must be strict observance of the license.

1. *The Hope*, 1 Dodson 226; *The Charlotte*, 1 Dodson 387; *The Cosmopolite*, 4 Rob. 11; *Shiffner v. Gordon*, 12 East 296; *Vandyke v. Whitmore*, 1 East 475; *Johnson v. Sutton*, Doug. 254.

2. "It is absolutely essential that the will of the grantor shall be observed; that only shall be done which he intended to permit; whatever he did not mean to permit is absolutely interdicted. Hence, the party who uses the license engages not only for fair intentions, but for an accurate interpretation and execution of the grant." 1 Duer on Ins., 598.

3. *The Jonge Johannes*, 4 The Acteon, 2 Dod. 48; *Pearson*, 15 East 419; *Busk v. East* 3; *Feise v. Thompson*, 122; *Morgan v. Oswald*, 3 Warin v. Scott, 4 Taunt. 60; *Scott*, 5 Taunt. 674; *Rodgers v. Morris*, 5 Taunt. 725.

4. 1 Duer on Ins., 609 et seq.; *Leck's Int. Law*, p. 682.

5. *Id.* 683, and cases there cited.

6. 2 *Wildman's Int. Law*, 11; *Jonge Clara*, 1 Edw. 371; *The Wolforth*, 1 Edw. 363; *The Cosmopolite*, 4 Rob. 11.

of the grant, not only with respect to quantity and quality of goods as specified in the grant, but also with respect to the route indicated and the destination mentioned. To touch an interdictioned port without permission is to forfeit the license subject the ship to the consequences of trading without it.¹

Declaration of War.—There is not now any formal declaration of war notified to the opposite belligerent as a general rule.² Cessation of peaceful relations is ordinarily indicated by the withdrawal of the minister resident at the court of the nation to which war is to be waged. The former practice of announcing war by heralds has grown into disuse. Whether there is a proclamation of war or not, a state of war exists when hostilities have commenced.³ Declaration of war may be optional.⁴

See Catharine Maria, 1 Edw. Europa, 1 Edw. 341; The Deborah, 1 Dod. 160; The 1 Dod. 357; Wainhouse v. 4 Taunt. 178; The Diana, 2

Declaration of War.—It is not necessary to adopt the artificial doctrine of notice must be given to an enemy entering upon war. The doctrine has never so consistently acted to render obedience to it at any obligatory. Since the middle of the century it has had no sensible influence upon practice. In its bare form it is now with little support, compared with that which it formerly received. In the form of an assertion of manifesto must be published, it is feeble as to be meaningless. Int. Law, p. 321.

A state of actual war may exist without having been formally declared by any party, equally in foreign and in domestic conflicts. Prize Causes, 2 Black 635. Declaration of war by congress does not imply authorization to the president to extend the area of the war by States by conquest. Fleming v. 9 How. (U. S.) 603.

Whether war exists is a political question, not one for the courts. Sutherland v. Tiller, 6 Coldw. (Tenn.) 593. Courts should take cognizance of a state of war. Cuyler v. Ferrill, 1 U. S. 169. They note the close of a proclamation by the political authority. Philips v. Hatch, 1 Dill. 571; v. Mason, 2 Heisk. (Tenn.) 223; States v. Anderson, 9 Wall. (U.

Beginning of War.—If a declaration of war is no longer necessary, a State

which enters into war is still bound (1) to indicate in some way, to the party with whom it has a difficulty, its altered feelings and relations. This is done by sending away its ambassador, by a state of nonintercourse, and the like. (2) It is necessary and usual that its own people should have information of the new state of things, otherwise their persons and property may be exposed to peril. (3) Neutrals have a right to know that a state of war exists, and that early enough to adjust their commercial transactions to the altered state of things, otherwise a great wrong may be done them. Such notice is given in manifestoes. "These pieces," says Vattel, "never fail to contain the justificative reasons, good or bad, for proceeding to the extremity of taking up arms. The least scrupulous sovereign would be thought just, equitable, and a lover of peace; he is sensible that a contrary reputation might be detrimental to him. The manifesto, implying a declaration of war, or the declaration itself, which is published all over the State, contains also the general orders to his subjects relative to their conduct in the war." Woolsey on Int. Law, § 116.

4. Demand, with War Contingent.—

Declarations of war may be either absolute or conditional. Hostilities result at once from the former and the two nations are regarded as belligerents from the date of the declaration. But the demand of the one power upon the other may be accompanied by a notification that hostilities will be commenced unless satisfaction upon some matter specified be obtained immediately, or within a certain limited time. In this case the war dates from the commencement of hostilities. Sometimes,

The *fact* of war should be certain.¹

When war has become a fact, not only the two contending governments are hostile to each other, but their respective subjects or citizens are deemed to be so. Commerce between contending powers and their allies is suspended.² Not only citizens and subjects of the opposite belligerent power are deemed enemies, but the enemy character is impressed upon all their property. This principle is generally held by the civil law publicists. The rule has been so relaxed in practice that it is not unusual among nations to confiscate property of enemies found on land, though the right exists if the nation waging war chooses to exercise it. So far has the rule been relaxed that some nations hold international law to have been modified in this respect. Certainly it has been so far modified as to render legislation necessary to authorize and direct the courts to take action on these premises. But the general right of a belligerent to cripple an enemy by taking from him the wealth and resources, which

however, it is very difficult in such cases to fix the exact point where belligerent rights begin, and when the duties of neutrals, and the obligations of subjects, incident to the new relations of the two states, have commenced. Halleck's *Int. Law*, p. 355, *citing* Grotius, *De Jur. Bel. ac Pac.*, lib. 3, ch. 3, § 7; Vattel, *Droit des Gens*, lib. 3, ch. 4, § 53; Emerigon, *Traite des Assurances*, ch. 12, §§ 4, 25, etc.

1. War Indicated.—War between independent sovereignties is, and ought to be, an avowed open way of obtaining justice. For every state has a right to know what its relations are towards those with whom it has been on terms of amity,—whether the amity continues or is at an end. It is necessary, therefore, that some act show, in a way not to be mistaken, that a new state of things, a state of war, has begun. Woolsey on *Int. Law*, § 115.

When a sovereign power prosecutes its rights by force of arms against another sovereign power, public war exists. It exists, whether there has been any proclamation of war or not, though many writers have contended that it does not legally exist unless declared by the sovereign. In this they follow Grotius, who says that the law of nations demands such declaration though the law of nature does not. Emerigon, Vattel and Puffendorff support this position, though Bynkershoek takes the opposite view. Other writers, among them Lord Stowell, following Bynkershoek, take the sensible ground that war

may exist, and lawfully exist, without formal declaration by either belligerent.

The existence of war is a fact, and when nations are fighting and warring with each other, it cannot alter that fact. One should show that the conflict has not been previously declared in some form. Waples on *Proceedings*, Rem, p. 379.

2 Commerce Suspended.—War is an end at once to all dealings and communications with each other. It is equally the doctrine of all the authoritative writers on the law of nations and of the maritime ordinances of the great powers of Europe. It has frequently so decided by the courts of the United States, during the Revolutionary war, and, again, during the Supreme court of the United States during the war of 1812. This renders null and void all contracts with the enemy during the war; it renders illegal the insurance of enemy property, prohibits the drawing of bills of exchange by an alien enemy, and makes a subject of the adverse government the purchase of bills on the enemy's country, or the remission and discount of funds there, and the remission of bills to subjects of the enemy. It prohibits endeavors at trade with the enemy, and the intervention of third persons in partnerships, are equally forbidden. No artifice can legalize any transaction of this character, without the express permission of the government. *Int. Law*, p. 358, *citing* Kent,

inews of war, if he deems such course advisable, remains
. And the property of private citizens, which constitutes
health of a nation, is not exempt.¹

ceptions to this rigorous rule have been found in debts due
foreign creditors, vessels and cargoes within the enemy country
have not had time to leave since the commencement of
ilities, public libraries, and other property usually excepted
e publicists.

the general doctrine is that all enemy property is confiscable,
not justifiable without an expression of legislative will.

Rights of Property in Public War.—The right of a nation in
to appropriate to itself property belonging to citizens or
cts of the opposite contending power is based upon the
fiction that the hostility of the owner is imparted to his
erty. Goods are captured, not because they are, by such
guilty or offending things, but because they are hostile
s. Possession or control by an enemy is equivalent to own-
by him, so far as the right of capture is concerned; for
ns at war cannot look nicely into titles and determine them
the municipal law of the opposite belligerent. All prop-
owned or controlled by an enemy, or by his subjects, is pre-
d to strengthen him, and, therefore, it may be taken by his
y weaken him. Aside from modern restrictions of the right,
igerent may, at his option, appropriate to himself any prop-
of an enemy.²

is right exists in a civil as well as in a public war, and with-
nce to property on land or sea; and the right to appropri-

aw, vol. 1, pp. 66, 68; Wheaton
ptures, pp. 220-223; Phillimore
Law, vol. 3, § 70; Bynkershoek,
t. Jur. Pub., lib. 1, ch. 3, etc.

Enemies and Enemy Property.—A
ly declared, or officially recog-
is not merely a contest between
governments of the hostile states in
olitical character or capacity; on
trary, its first effect is to place
individual of the one state in
hostility to every individual of
the other is composed, and these
uals retain the legal character of
es, in whatever country they may
nd. In the next place, all the
ty of the one state, and of each
citizens, is deemed hostile with
t to the opposing belligerent.
important consequences, as to the
of persons and property, are de-
from these principles. We
allude only to the general doc-
of the effects of a declaration of
Halleck's Int. Law, p. 357, citing
ton, Elem. Int. Law, pt. 4, ch. 1,
Wattel, Droit des Gens, liv. 3, ch.

5, § 70; The Hoop, 1 Rob. Rep., p. 198;
Manning, Law of Nations, p. 122;
Kent, Com. on Am. Law, vol. 1, p. 55;
Phillimore on Int. Law, vol. 3, § 67,
etc.

2. "A state, taking up arms in a just
cause, has a double right against her
enemy: First, a right to obtain posses-
sion of her property withheld by the
enemy, to which must be added the ex-
penses incurred in the pursuit of that
object, the charges of war and the rep-
aration of damages, for, were she
obliged to bear those expenses and
losses, she would not fully recover her
property nor obtain her due. Secondly,
she has a right to weaken her enemy,
in order to render him incapable of
supporting his unjust violence; a right
to deprive him of the means of resist-
ance. Hence, as from this source origi-
nate all the rights which war gives us
over things belonging to the enemy, we
have a right to deprive him of his pos-
sessions; of everything which may
augment his strength and enable him
to make war. This every one endeavor

ate it in a war against a domestic or foreign enemy alike, is found in its ownership by an enemy.¹ The right is held to be in accord with a state of war.²

b. Enemy Property Seized on Land.—It is not the practice of modern nations to confiscate property belonging to an enemy's subjects or citizens, found upon land. Distinction is made between that and property captured at sea. The right exists in both cases, but there should be legislative authorization for the exercise of the right with regard to land, in view of the modern modifications above mentioned.³ Whether in a domestic war or insurrection this right shall be exercised is a political question, and therefore dependent upon legislative action.

The Supreme Court of the United States has decided that the property of citizens in armed rebellion may be treated precisely like that of public enemies; that civil wars have the same legal character relative to confiscation as wars between nations; that "all persons residing within the hostile territory, whose property may be said to increase the resources of the hostile power, are liable to be treated as enemies, though not foreigners;" and "that it is unconstitutional to treat the property of domestic enemies differently from that of foreign enemies."⁴

That court recognized the right of confiscating enemy property of insurgents, taken on land, as warranted by the law of nations, and held that the legislative expression of will, by statute during the late war, to exercise that right, was in accord with the law of nations.⁵

ours to accomplish in the manner most suitable to him. Whenever we have an opportunity, we seize on the enemy's property and convert it to our own use; and thus . . . in a word, we do ourselves justice." Grotius, *De Jure Gentium*, lib. 3, ch. 6.

1. *McCulloch v. State of Md.*, 4 Wheat. (U. S.) 413 *et seq.*; *The Santissima Trinidad*, 7 Wheat. (U. S.) 306; *Rose v. Himly*, 4 Cranch 272; *Brown v. U. S.*, 8 Cranch 148; *The Prize Cases*, 2 Black (U. S.) 636; *The Andromeda*, 2 Wall. (U. S.) 404, CHASE, C. J.; *The Venice*, 2 Wall. (U. S.) 258, CHASE, C. J.; *The Sallie Magee*, 3 Wall. (U. S.) 451; SWAYNE, J.; *The Hampton*, 5 Wall. (U. S.) 375; MILLER, J.; *The Ouchita Cotton*, 6 Wall. (U. S.) 521; *The Cotton Plant*, 10 Wall. (U. S.) 577; *vide United States v. Weed*, 5 Wall. (U. S.) 62; *Mrs. Alexander's Cotton*, 2 Wall. (U. S.) 404; *The Hampton*, 5 Wall. (U. S.) 372; *Radich v. Hutchins* (5 Otto), 95 U. S. 210; *Union Insurance Co. v. United States*, 6 Wall. (U. S.) 259; *The Foundry Cases*, 6 Wall. (U. S.) 765; *Morris' Cotton*, 8 Wall. (U. S.) 507; *United*

States v. Hart, 6 Wall. (U. S.) 501; *Semmes v. United States*, 91 U. S. 414; *Miller v. United States*, 11 Wall. (U. S.) 292; *Tyler v. Defrees*, 11 Wall. (U. S.) 331; *Brown v. Kennedy*, 15 Wall. (U. S.) 591; *The Confiscation Cases*, 20 Wall. (U. S.) 116. *Contra, Brown v. Forrest*, 9 Wall. (U. S.) 339; *Miller v. United States*, 11 Wall. (U. S.) 292; *Day v. Micou*, 18 Wall. (U. S.) 291; *Burbank v. Conrad*, 96 U. S. 291.

2. *Ware v. Hylton*, 3 Dal. (U. S.) 227; *Cooper v. Telfair*, 4 Dal. (U. S.) 14; *The Emulous*, 1 Gal. (U. S.) 14; *Thompson v. Carr*, 5 N. H. 51; *Asherton v. Johnston*, 2 N. H. 1; *Brown v. United States*, 8 Cr. 122, 123; *McNeill v. Bright*, 4 Cr. 282, 304; *Gilbert v. Bell*, 15 Mass. 1; *Smith v. Maryland*, 6 Cr. (U. S.) 121.

3. *Brown v. U. S.*, 8 Cranch 121.

4. *The Amy Warwick, etc.*, 2 Wall. (U. S.) 636.

5. The United States Supreme Court said of the Confiscation act of 1862, Stat. at L. 589, that it "was designed to introduce the principle of confiscation of enemy property, seized on land, in

that court had, long before, under the lead of CHIEF JUSTICE SHALL, laid down the doctrine that enemy property found on land at the commencement of hostilities might be seized and confiscated under the law of nations, if the legislative power should authorize the exercise of the right; that "the modern law would seem to be that tangible property belonging to an enemy and found in the country at the commencement of the war ought not to be immediately confiscated." Further, it was said: "The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be adopted which would give a declaration of war an effect in this country it does not possess elsewhere, and which would fetter the exercise of entire discretion respecting enemy's property, which may enable the government to apply to the enemy the rule which he applies to us. If we look to the constitution itself, we find this general reasoning much strengthened by the words of the instrument. That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, and of giving those rights which war confers: but it does not operate, by its own force, any of those results, such as the transfer of property, which are usually produced by ulterior measures of government, is forcibly deducible from the enumeration of powers which accompanies that of declaring war. 'Congress shall have power'—'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' It would be restraining this clause within narrower limits than the words themselves impart, to say that the power to make rules concerning captures on land and water is to be confined to captures which are exterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive it expressly grant to congress, of the power in question, as an independent, substantive power, not included in that of declaring war."¹

Under this rule, the power to decide whether enemy property found upon land shall be confiscated or not in any war waged by the United States, is a political one, and congress must decide the question in any such war.²

found on water. Applying the construction, however, to the property of a new class of enemies instead of to enemies, it was conceived that the reasoning should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea." *Ware v. Hiltion*, 3 Dall. (U. S.) 222, 231; *Cross v. Harrison*, 16 How. (U. S.) 164, 189, 190.

were expressed by JUDGE STORY in the same case. And were held by CHANCELLOR KENT, 1 Kent, p. 59 *et seq.* And the doctrine had been previously avowed by the supreme court. *Ware v. Hiltion*, 3 Dall. (U. S.) 222, 231; *Cross v. Harrison*, 16 How. (U. S.) 164, 189, 190.

². *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 420; *Garcia v. Lee*, 12 Pet. (U. S.) 511; *Foster v. Neilson*, 2 Pet.

Early during the rebellion, the supreme court held the doctrine most emphatically, and maintained its constitutionality, saying that the war between the United States and its citizens in rebellion gave the government the same rights and powers which it could exercise against the public enemy; that "the right of a belligerent not only to coerce the other by direct force, but to cripple his resources by the seizure and destruction of his property, is a necessary result of a state of war."¹

Later in the rebellion the same doctrine was strongly put.

(U. S.) 307; *Taylor v. Morton*, 2 Curt. (U. S.) 454; *United States v. Palmer*, 3 Wh. (U. S.) 610; *Scott v. Jones*, 5 How. (U. S.) 343; *Luther v. Borden*, 7 How. (U. S.) 1; *Clark v. Braden*, 16 How. (U. S.) 635; *Fellows v. Blacksmith*, 19 How. (U. S.) 366; *United States v. Holliday*, 3 Wall. (U. S.) 407; *The Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *Georgia v. Stanton*, 6 Wall. (U. S.) 73; *Miss. v. Johnson*, 4 Wall. (U. S.) 500; *The Protector*, 12 Wall. (U. S.) 700; *Marbury v. Madison*, 1 Cr. (U. S.) 166; *Jones v. Walker*, 2 Paine (U. S.) 688; *Wisconsin v. Duluth*, 2 Dill. (U. S.) 406; *United States v. Baker*, 5 Blatchf. (U. S.) 6; *Van Antwerp v. Hulburd*, 7 Blatchf. (U. S.) 426; *Grossmayer v. United States*, 4 Nott & H. (Ct. of Cl.) 1; *The Hornet*, 2 Abb. (U. S.) 35.

1. *The Amy Warwick*, *Cranshaw Hiawatha*, and *Brillante*, 2 Black (U. S.) 636, 671. And the court but followed the doctrine previously announced, that the property of citizens in rebellion may be treated as that of public enemies, and the rules of public wars applied to civil wars. *Rose v. Himely*, 4 Cranch (U. S.) 272; *The Santissima Trinidad*, 7 Wheat. (U. S.) 306; *Martin v. Mott*, 12 Wheat. (U. S.) 29, 32.

2. "It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which

the adherents of the enemy have the power of devoting to the enemy's service, is a proper subject of confiscation.

"The question, therefore, is, whether the action of congress was a legitimate exercise of the war power. The constitution confers upon congress express power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. On the exercise of these powers no restrictions are imposed. Of course, the power to declare war involves the power to execute it by all means, and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of any enemy, and to dispose of it at the will of the captor. This is always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and

"It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now it is that right, and why is it allowed? It may be remarked that it has no force whatever to the personal property of the owner of confiscated property. The act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the belligerent—a relation in which it has been brought in consequence of its ownership.

"War existing, the United States is invested with belligerent rights in relation to the sovereign powers prevailing. Congress had then full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government. It is true that the war was not between two indepen-

the decisions that followed, property either captured or d, belonging to insurrectionists, and being of some one of classes of property designated by statute to be taken, was ed as enemy property, whether belonging to an insurgent n or to a resident alien aiding the rebellion.¹

Notwithstanding the above decided enunciations that the rules of international law should govern enemy persons and property in domestic wars and rebellions, and that such enemy property is designated by statute should be confiscated pursuant to expression of legislative will, the doctrine was not invariably accepted. It was held that an insurgent enemy, without returning to his allegiance, might respond to monition in a proceeding against his property, and have standing to plead in court;² that property *in rem* condemning enemy property was not final against all the world, including interested nonappearing and deceased persons;³ that the proceedings and judgments were not proceedings, though against property—*in rem* as the statutes provided—but were criminal proceedings against persons to punish them for crimes.⁴ But these decisions cannot change the established law of nations.

Contracts between persons within the Union lines and those in the confederate lines, during the rebellion, were frequently

s. But because a civil war, the government was not shorn of any of its rights that belong to belligerency. There is never a presumption that inhabitants of an enemy's territory are rebels, even though they are not parts in the war, though they are citizens of neutral states, or even sub-citizens of the government prosecuting the war against the state in which they reside." *Miller v. United States*, 11 Wall. (U. S.) 308, 313. *Semmes v. United States*, 1 Otto (91 U. S.) 21. "Properties condemned as enemy to the United States, under the act of congress, become the property of the United States from the date of the decree of condemnation, 12 U. S. 1, § 7. Judgment of forfeiture was rendered in this case on the 5th of May, 1865, and the land in question, from that date, the property of the United States; . . . the title to the land was lost to him [Semmes] when it became vested in the United States." . . . "Beyond doubt, the decree of the district court was correct and correct." . . . "Such proceedings under the confiscation act are justified as an exercise of belligerent rights against a public enemy, and are not, in their nature, a punishment for treason. Consequently,

confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the confiscated property, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights, as against a purchaser in good faith for value. *Miller v. United States*, 11 Wall. (U. S.) 267; *Confiscation Cases*, 20 Wall. (U. S.) 92; *Gay's Gold*, 13 Wall. (U. S.) 351." In accord, see *Tyler v. De Frees*, 11 Wall. (U. S.) 331; *Burbank v. Semmes*, 99 U. S. 138; *The Union Ins. Co. v. United States*, 6 Wall. (U. S.) 759. Compare *Bigelow v. Forest*, 9 Wall. 339; *McVeigh v. United States*, 11 Wall. 259; *Day v. Micon*, 18 Wall. 160; *Claim of Marquard*, 20 Wall. 114; *Wallach v. Van Risnick*, 2 U. S. 202; *French v. Wade*, 102 U. S. 132; *Pike v. Wasel*, 94 U. S. 711; *Burbank v. Conrad*, 96 U. S. 291.

2. *McVeigh v. United States*, 11 Wall. 259; *Windsor v. McVeigh*, 93 U. S. 274; *Gregory v. McVeigh*, 93 U. S. 284.

3. *Bigelow v. Forest*, 9 Wall. 339; *Day v. Micon*, 18 Wall. 160; *Wallach v. Van Riswick*, 2 U. S. 202; *Burbank v. Conrad*, 96 U. S. 291; *French v. Wade*, 102 U. S. 132.

4. The cases last cited.

reprobated by the courts as invalid and inoperative, as being in contravention of international law as well as of the nonintercourse laws of the United States.¹

c. Enemy Property in General.—Enemy property belongs to the capturing sovereign.² As against him, others cannot acquire title to it by illicit transactions.³ Contracts good before the war are suspended by it when the contracting parties become mutually enemies.⁴ Then further dealings are inhibited.⁵ This is true in a civil war, though the contracting parties owe allegiance to the same government.⁶ They cannot contract across military lines.⁷

A neutral may subject his property to confiscation by attempting to bring it out of an enemy's country.⁸ He might suc-

1. Contracts between residents of the loyal States and those of that portion of the country which was in rebellion have been frequently held invalid. *Nobloin v. Milborne*, 21 La. Ann. 641; *Nobloin v. Swords*, 21 La. Ann. 647; *Bank of West Tennessee v. Citizens' Bank*, 21 La. Ann. 18; *Mansfield v. McLearn*, 22 La. Ann. 216; *Billgerry v. Branch*, 19 Gratt. (Va.) 393; *Wright v. Graham*, 4 W. Va. 430; *Patton v. Gilmer*, 42 Ala. 548; *Philips v. Hatch*, 1 Dill. (U. S.) 571. Exception has been made when the transaction was not voluntary on the part of one of the contracting parties. *Hawver v. Seipert*, 4 W. Va. 586. The burden of proof rests upon the party trying to enforce the contract to show that its purpose was not hostile. *Leak v. Richmond County*, 64 N. C. 132. Other exceptional cases: *Kershaw v. Kelsey*, 100 Mass. 561; *Barrell v. Hanrich*, 42 Ala. 60; *Rau v. Boyle*, 5 Bush (Ky.) 253; *Ledoux v. Buhler*, 21 La. Ann. 130.

2. *Effect of War.*—Property taken from an enemy, in a war on land, belongs to the sovereign of the captor. *Cook v. Howard*, 13 Johns. (N. Y.) 276.

3. Parties engaged in trade with the rebels during the late war acquired no rights thereby that could be enforced by the courts. *Marchand v. Coyle*, 18 La. Ann. 632.

4. Contracts are affected by war. A British subject could not recover interest on a debt due him from a subject of the United States during war between them and England, it was repeatedly held. *Hoare v. Allen*, 2 Dall. 102; *Foxcraft v. Nagle*, 2 Dall. 132; *Brewer v. Hastie*, 3 Call. (Va.) 22; *Martin v. The Auditor*, 4 Rand. (Va.) 264; *Bordley v. Eden*, 3 Har. & M. (Md.) 167; *Dickenson v. Le Gare*, 1 Dessau. (S.

Car.) 537; *Higginson v. Air*, 1 D. (S. Car.) 427; *Blake v. Quash*, 3 Cord (S. Car.) 340. But the contracts themselves were not cancelled, and a remedy for their collection could be obtained by treaty after the war. *St. Brailsford*, 3 Dall. 1; *Ware v. Hylton*, 3 Dall. 199; *Dunlap v. Ball*, 2 C. 180; *Higginson v. Mein*, 4 Cranch 180; *Conn v. Penn*, Pet. C. C. 496; *K. Hanson*, 4 Call. (Va.) 259; *Brevint v. Hastie*, 2 Call. (Va.) 22; *Beattie v. Munf.* (Va.) 254; *Commonwealth v. Walker*, 1 Hur. & M. (Va.) 144.

5. Dealings with the insurgent persons within the Union lines were frequently reprobated by the courts as unlawful, during the rebellion. *Reform*, 3 Wall. 617; *The Union*, 5 Wall. 62; *The Gray Jay*, 5 Wall. 342; *The Hampton*, 5 Wall. 630; *The Sea Lion*, 5 Wall. 630, and other cases decided by the Supreme Court. Also, *The Cotton Cases*, 5 Wall. 529; *Blakely v. United States*, 3 Ct. of Cl. 323. Compare *Burbank v. Conrad*, 96 U. S. 291.

6. "A deed executed during the war of 1861-5, within the federal lines by a citizen of the United States, by a person who was within the confederate States and an alien enemy, held, void as a contract between enemies." *Fidelity v. United States*, 3 Ct. of Cl. 25.

7. "During the late civil war a contract entered into between a person residing within the military lines of the United States and another residing within the military lines of the confederate States was null and void." *Hennen v. Gilman*, 20 Ann. 240. Compare *Burbank v. Conrad*, 96 U. S. 291.

8. *Enemy Property.*—It is held that

claim it by establishing the friendliness of his character and
se, but not if he should claim property partly hostile and
friendly.¹ His own neutrality would not avail him if he
member of a partnership which is hostile.² Whether a part-
a sole trader, he would have the presumption against him
he bring property from the enemy's country.³ He could
but it if he voluntarily invested his means there after know-
the commencement of hostilities.⁴

Debts.—Debts due to an enemy are not usually confiscated
e of war. Though the right exists, it is not politic to exer-
; for if one belligerent should do so, the other would re-
in the same way, and the balance of advantage might be
t the party which first began such confiscation. Great
a has been foremost in the relaxation of the practice of
cating enemy's debts. Owing to her extensive commerce,
nceived the relaxation to be beneficial to herself, and she
used stipulations to be inserted in treaties made with the
s that both should refrain from the exercise of the right.
e great commercial powers have generally followed the
ole.⁵

Trade Permits.—Though the subjects of different belliger-
may not lawfully trade with each other during war, it is com-

merican citizen sends a vessel to
my's country to bring out his
property, that property is liable to
, as though belonging to the
The *Rapid*, 8 Cranch 155.
he has his domicile in a foreign
, and war arises between the
States and that country, his
y, shipped before he had knowl-
the war, may be captured by an
cruiser and condemned as
property. The *Venus*, 8
(U. S.) 253; The *Mary* and
1 Wheat. (U. S.) 46; The
schaft, 4 Wheat. (U. S.) 105.
mere act of illicit intercourse
followed by capture during the
, has been *held* not to warrant
nation. The *Thomas Gibbons*,
ch (U. S.) 421. It would have
fferent under the later noninter-
acts, which authorized seizure
as capture.

hen neutral is blended with
property, and a claim for both
with the fraudulent view of cov-
ne latter, both may be condemned
er. The *St. Nicholas*, 1 Wheat.
417. If the neutral constitutes
small part of the cargo on an
s ship bound for the enemy's
y, all the cargo is deemed hostile.
ondon Packet, 5 Wheat. (U. S.)

132. The neutrality of the shipper will
not save a cargo otherwise confiscable.
The *Ann Green*, 1 Gall. 274; The *Francis*, 1 Gall. 445. Nor will the property
of our own citizens, captured in transit
to or from the enemy, be treated as
anything less than enemy property.
The *Rapid*, 1 Gall. 295; The *St. Law-
rence*, 1 Gall. 467; The *Joseph*, 1 Gall.
545.

2. Partnership property in a trading
house in the enemy's country is lawful
prize, though some of the partners may
be neutrals. The *St. J. Indiano*, 2 Gall.
268.

3. The presumption is that shipment
from an enemy's country is hostile.
The *Flying Fish*, 2 Gall. 374; The *Lon-
don Packet*, 1 Mass. 14.

4. It has been *held* that "by investing
his means and participating in the
trade of a belligerent nation, a neutral
affixes to himself the hostile character
of that nation." The *Mary Clinton*,
Blatchf. Prize Cases, 556.

Further, on the right of capture and
its effect upon property, see The *Sarah
Starr*, Blatchf. Prize Cases, 69; *Slocum
v. Wheeler*, 1 Ct. 429; The *Alexander*,
8 Cranch (U. S.) 169; 30 Hogsheads of
Sugar *v. Boyle*, 9 Cranch (U. S.) 196;
The *Divina Pastora*, 4 Wheat. (U. S.) 52.

5. Wheaton's Elements, p. 379.

petent for either of the opposing sovereignties to permit trade by license. This, when done, is usually under limitations. For instance, only certain trustworthy persons are allowed to trade; or only a certain species of trade is permitted; or intercourse is confined to a specified district; or it is limited to certain times. During the great rebellion in this country, certain trade districts were established; the character of the trade in them was prescribed; certain persons were specially authorized; cotton was allowed to be brought within the federal lines under safeguards and restrictions; and a complicated system of trade regulation was prepared by the secretary of the treasury under the authorization of congress.¹

A power which has the right of closing a war and declaring peace may mitigate the rigors of the contest by exercise of license power. Partial intercourse with the enemy, commerce or otherwise, may be deemed expedient, and cautiously granted.

f. Enemy Has No Judicial Standing.—A contract between enemies cannot be enforced in the courts of either country. A suit, the life of a suit, cannot be made upon an enemy defendant who is beyond the military lines within which the plaintiff resides. Notice by publication is not presumed to reach him. Should the defendant really gain knowledge of the existence of a suit against him, he cannot come within the lines to plead. Can he lawfully communicate with an attorney to employ him in the cause. And the principle is well established in international law that an enemy has no standing in the courts of the opposing belligerent. The reason is that it would be repulsive to the principle by which the war itself is justified, to allow an enemy to enter a court which he is fighting to destroy.³ And yet in

1. "Every one is at liberty to renounce his right; a nation, therefore, may lay a restriction on her commerce in favor of another nation, and engage not to traffic in a certain kind of goods, or to forbear trading with such and such a country, etc. And, in departing from such engagements, she acts against the perfect right of the nation with which she has contracted, and the latter has a right to restrain her. The natural liberty of trade is not hurt by treaties of this nature; for that liberty consists only in every nation being unmolested in her right to carry on commerce with those that consent to traffic with her; each one remaining free to embrace or decline a particular branch of commerce, as she shall judge most advantageous to the state." Vattel's Law of Nations (Chitty), p. 146.

2. Trading with the enemy is sufficiently interdicted by international law. Congress, however, has thought proper to express the sovereign intent to apply

the principles governing public war to insurrectionary strife at home. However it attains to such dimensions as to call forth the president's proclamation that a state of insurrection exists, it is only to express such intent, but it forbids commercial intercourse between the insurgents and other citizens so long as such condition of hostility continues," and to declare that all property *in transitu* between the territory occupied by the enemy, and that of the country, and all vessels and vehicles conveying such goods or persons, to or from the rebellious district shall be forfeited. But the president may permit intercourse for certain purposes. *Waples on Proceedings in Insurrection*, act 13th July, 1861, 12 St. 257; 31st July, 1861, *Ib.* 284; Rev. 5301; acts July 13th, 1861, 12 St. 257; 2nd July, 1864, 13 St. at L. Rev. St., § 5304.

3. An enemy has no judicial standing in the courts of the opposite belligerent.

on, after an enemy had been refused entry into a court un-
e should first swear allegiance to the government and thus
nce his enemy character, he was held, upon an appeal of the
entitled to plead.¹ It is believed that though there were
decisions than one to this effect, rendered by the highest
al of this country—and that, too, after they had held that
osition of rebel enemies was precisely that of public ene-
n a war between two belligerent nations—the general rule
ernational law on the subject will not be considered as
ed by the publicists of the world.²

No Trade with the Enemy's Allies.—The rule that enemies
t trade with each other extends to the allies of the respect-
arties. The property of the latter is liable to capture as
precisely like that of the two belligerents. It would re-
a mutual agreement to relax the rule.

Intercourse Under Truce.—There is a degree of intercourse be-
belligerents themselves which is necessary, and, therefore,

For instance, the exchange of prisoners of war has grown
almost a necessary practice in modern warfare. Neither
is obliged to do this by any positive rule of the law of na-
but the practice is both convenient and humane. The
nge is effected under a cartel—a special convention between
nding powers. Good faith between the parties is a matter
tional honor. A breach of it incurs forfeiture of all rights
the cartel, and it is frequently retaliated by reprisals.
st dealing among enlightened nations at war with each other
emed such a matter of course that officers and private
rs are often released upon their own parole to return at call,
e purpose of exchange under the cartel.

*When Neutral May Recover His Property if Wrongfully Con-
d as Hostile.*—When ships taken by an enemy are recap-
salvage compensation is allowed to the captors while the
itself is restored to its owner. It is not allowed for the
ture of neutral vessels and cargoes, as a general rule. The
n is that the neutral owner could have recovered the value
s vessel had she been condemned as prize in the courts of

ord v. Mumford, 1 Gall. 366; The
us, 1 Gall. 563; Johnson v. Goods,
e 639; Crawford v. The Wm.
Pet. C. Ct. 106; Wilcox v. Henry,
69; Bell v. Chapman, 10 Johns.
) 183; Jackson v. Decker, 11
(N. Y.) 418; Griswold v. Wad-
n, 16 Johns. (N. Y.) 479, and the
ous cases there cited.

Compare Windsor v. McVeigh,
S. 274, with the cases last cited.
l correspondence, intercourse, and
ss transactions with enemies are
ited by public law. Maclachlan on
(2nd ed.) 518; Wheaton, Int. Law,
otts v. Bell, 8 Term R. 561; The

Rapid, 8 Cr. (U. S.) 155; The Julia, 8
Cr. (U. S.) 193; Jecker v. Montgomery,
18 How. (U. S.) 113; The Bagaley, 5
Wall. (U. S.) 405; United States v.
Huckabee, 16 Wall. (U. S.) 434; Gris-
wold v. Waddington, 16 Johns. (N. Y.)
479; Dean v. Nelson, 10 Wall. (U. S.)
172; Lasere v. Rochereau, 17 Wall. (U.
S.) 439; Woods v. Wildet, 43 N. Y.
168; United States v. Grossmayer, 9
Wall. (U. S.) 75; White v. Bromley, 20
How. (U. S.) 249; The Hoop, 1 Rob.
196; Exposito v. Bowden, 7 Ell. & Bl.
779; 1 Chitty on C. & M., 379; 1 Duer
on Ins. 419; 3 Phill. Int. Law, 108. *Com-
pare* Burbank v. Conrad, 96 U. S. 291.

the opposite belligerent; therefore he is not pecuniarily benefited by the restitution.

12. Neutral Nations in War.—Neutral States must be equally impartial between belligerents. They must avoid acts of hostility of every kind. They must hold their territory inviolable, not allowing either belligerent to occupy any part of it for war purposes. They should prevent their own subjects or citizens from violating neutrality, as far as possible, though they are not accountable for every unfriendly act of subjects.

They are not bound to restrain their people from engaging in contraband trade, breaking blockade, resisting search, and the like; for the penalty for such hostile acts falls upon those who perpetrate them, by means of the forfeiture of their property when captured and condemned.¹

A neutral vessel may not invariably be condemned as prize for carrying enemy property, though the goods themselves may be condemned.²

Presumption is against goods found on an enemy's ship; but they will share the fate of the ship unless they are proved to be neutral.³

The flag and pass of an enemy must not be used by a neutral ship. They will create such enemy character for her as to subject her to capture as prize; and she cannot be defended by denying the character which the flag and pass professedly give, thus taking advantage of her own fraud.⁴

If a neutral vessel is chartered to an enemy for his private use, she is confiscable. If the owner permits her to become a carrier of military stores to the enemy, she and her cargo become prize on capture. If she knowingly carries enemy dispatches, she does an unfriendly act and becomes liable. If she engages in commerce, not open to neutrals generally, but entirely in the control of a belligerent, she may acquire the hostile character by thus aiding that power. In other words, "where neutrals are granted a special indulgence, are permitted in time of war to engage

1. 1 Duer on Ins., pp. 531, 749, 754 *et seq.*; *The Sheperdess*, 5 Rob. 264; *Medeiros v. Hill*, 8 Bing. 231; *Harrott v. Wives*, 9 Barn. & Cress. 712; *Naylor v. Taylor*, 9 Barn. & Cress. 715.

2. "Whatever may be the true original abstract principle of natural law on this subject, it is undeniable that the constant use and practice of belligerent nations, from the earliest times, have subjected enemy's goods, in neutral vessels, to capture and condemnation as prizes of war. This constant and universal usage has only been interrupted by treaty stipulations, forming a temporary conventional law between the parties to such stipulations. The regulations and practice of certain mari-

time nations at different periods, not only considered the goods of the enemy, laden in the ships of a neutral, as liable to capture, but have done so, confiscation the neutral vessel of which these goods were on board. The contrary rule now prevails. See *Wheaton's Elem. Int. Law*, pt. 1, c. 13, § 1.

For discussion whether free goods and enemy ships may be captured, see Halleck's *Int. Law*, pp. 631-634.

3. 1 Duer on Ins. 534.

4. "If a neutral vessel enjoys the privileges of a foreign character, it must expect, at the same time, to be subject to the inconveniences attending that character." 1 Kent, p. 8.

commerce of the enemy which is purely national, and from which they are excluded in time of peace [such trade] necessarily impresses them with a hostile character."¹

13. The Right of Search.—The belligerent right of search cannot be exercised in time of peace unless authorized by treaty. In time of war, a lawfully commissioned cruiser may visit and search any merchant ship on the high seas without reference to the destination. The exercise of this right is necessary to the practice of maritime captures, the prevention of contraband transportation, and, indeed, to the successful conduct of war. And the exercise implies the right of using lawful force in case of resistance. Neutral vessels have no right to resist. The searching belligerent, however, must not transcend his privilege, but must confine himself to the examination of the vessel and cargo to ascertain her destination, and to learn whether she is about to aid the enemy. There should be no protracted detention of the vessel. Violent resistance of the right of search on the part of a neutral may subject her to confiscation in a prize court. It has been held by eminent writers that even if the neutral vessel is attended by an armed convoy of her own nationality, she and they would yet have no right to resist search. A public vessel—a ship of war—belonging to a neutral, is not liable to be searched on the ocean or elsewhere.

The United States, in treaties with foreign powers, in several instances, have stipulated that—the commander of a convoy stating that the vessel or vessels under his protection have no contraband goods on board—the right of search shall be abandoned. Some publicists contend that the right of search does not exist, under the law of nations, as to neutral merchantmen under armed convoy.

Sailing under an enemy's convoy is good reason for the condemnation of a merchant ship. The cargo, too, has been held confiscable under such circumstances. If the object of taking a convoy is to resist search, that very act has been thought to be hostile, though it would not justify condemnation unless actual resistance should follow.²

1. Halleck's Int. Law, p. 645.

When the United States have recognized war between another state and its colonies they should treat both as belligerents. The Santissima Trinidad, 7 Wheat. (U. S.) 283.

"In the existing war with the so-called Confederate States, the rebels are at the same time belligerents and traitors, and subject to the liabilities of each, while the United States sustain the double character of belligerents and sovereign, and have the rights of both, their rights as belligerents being unimpaired by the fact that their enemies

owe allegiance." The Amy Warwick, 2 Sprague 123; The Lilla, 2 Sprague 177; Monongahela Ins. Co., 5 Chester 43 Pa. St. 491; Cochran v. Tucker, 3 Coldw. (Tenn.) 186.

2. Halleck's Int. Law, ch. 25; 2 Wildman's Int. Law, pp. 40, 119; Kluber, Droit des Gens, § 93; Lawrence's Visitation and Search, pp. 4, 61, 181; Wheaton's Elem. Int. Law, pt. 4, ch. 3; 3 Phillimore, Int. Law, § 326, 328; 1 Kent, pp. 153; 1 Duer on Ins. p. 725; 6 Webster's Works, pp. 329, 335-9; Wheaton's Hist. Law of Nations, p. 706; The Anna Maria, 2 Wheat. (U.

It has been held that a neutral may charge and lade a belligerent armed merchant ship with impunity, though he must not participate in such ship's resistance to capture.¹

If, upon search, the necessary papers are not found, or if papers are discovered, or any requisite thing that should be revealed is fraudulently concealed, or contraband goods are found, under circumstances showing that they are destined for the enemy, the vessel is liable to capture.²

14. Blockade.—Blockade must be established by order of the government, and must be made so effective as to prevent commerce, before neutrals are bound to respect it. A mere declaration without the effectual establishment, is called a "paper blockade," and it may be disregarded with impunity. When a blockade is once established, a temporary suspension would not justify

S.) 327; *The Antelope*, 10 Wheat. (U. S.) 66; *The Marianna Flora*, 11 Wheat. (U. S.) 42; *The Diana*, 1 Dodson 95; *The Louis*, 2 Dodson 238; *The Nereide*, 9 Cranch (U. S.) 427; *The Eleanor*, 2 Wheat. (U. S.) 358; *The Jenne Eugenie*, 2 Mason 439.

"Why was it that navigating under the convoy of a neutral ship of war was deemed a conclusive cause of condemnation? It was because it tended to impede and defeat the belligerent right of search, to render every attempt to exercise this lawful right a contest of violence, to disturb the peace of the world, and to withdraw from the proper forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction." Wheaton's *Elem. Int. Law*, pt. 4, ch. 3.

"It is a clear maxim of national law that a neutral is bound to perfect impartiality as to all the belligerents. . . . He is bound to submit to the belligerent right of search. . . . If he resists this exercise of lawful right, or if, with a view to resist it, he takes the protection of an armed neutral convoy, he is treated as an enemy, and his property is confiscated. Nor is it at all material whether the resistance be direct or constructive. The resistance of the convoy is the resistance of all the ships associated under the common protection, without any distinction whether the convoy belonged to the same or a foreign neutral sovereign; for upon the principles of natural justice, a neutral is justly chargeable with the acts of the party which he voluntarily adopts, or of which he seeks the shelter and protection." *The Nereide*, 9 Cranch (U. S.) 438; STORY J. dissenting opinion.

"The resistance of a neutral ship will undoubtedly reach the property of the owner, and it would, I think, be also to the whole property entrusted to his care, and thus fraudulently attempting to be withdrawn from the operation of the rights of war." *The Clarendon*, 5 Rob. 232, SIR J. SCOTT, J.

1. *The Nereide*, 9 Cranch 438; *The Atlanta*, 3 Wheat. 409. Compare *The Fanny*, 443.

2. "A neutral is bound, not to submit to search, but to have his ship duly furnished with the genuine documents requisite to support her neutral character. The most material documents are the register, passport, sea letter, muster roll, log book, charter party, invoice, and bill of lading. The want of some of these papers is strong presumptive evidence against the ship's neutrality, yet the want of one of them is not absolutely decisive." 1 Kent, p. 157.

"The concealment of papers necessary for the preservation of the neutral character justifies a capture and condemnation into a port for adjudication, though it does not absolutely require a capture." Kent, p. 161. See *The Brothers*, 1 Rob. 131; *The Rising Star*, 2 Rob. 104; *The Anne Green*, 281; *The Pizzaro*, 2 Wheat. (U. S.) 281; *The Polly*, 2 Rob. 362.

The spoliation of papers, taken from them overboard, and the use of false papers, are considered strong positive facts against a neutral ship. *Kingston v. Gilchrist*, 7 Cranch 544; *The Hunter*, 1 Dod. 480; *The Ann and Katy*, 6 Rob. 192; *The Anne*, 1 Gall. 275; *The Sallie*, 1 Gall. 4

neutral in treating it with contempt. His knowledge of the existence of the blockade is presumed by international law.¹

When a blockade is broken by the opposite belligerent, neutrals are no longer bound to regard it. They should not, however, enter the prohibited port while the question of the actual breaking is unsettled. A single breach by the enemy, who successfully runs a blockade, is not such breaking of it as to entitle a neutral to go into and out of the prohibited port.

Intent to violate blockade, if made apparent from the papers found on board of a ship, from the character of the cargo, or from any other source, renders the vessel capturable as prize from the beginning of her voyage. The cargo shares the fate of the ship. Nothing but imperious necessity will justify a neutral in entering a blockaded port without license. She is liable to capture on her return voyage, but not afterwards. The entire cargo becomes good prize upon capture, if only a part of it was put on board with intent to violate blockade, it has been held. When the ship and cargo belong to the same owner, they are condemned together for breach of blockade. By whomsoever owned, they are alike capturable, though there are circumstances under which an innocent owner of a part of a cargo may save it from condemnation. Intent to violate blockade ceases to be cause of condemnation when the blockade is raised before the intent is carried out in practice; also if the intent is abandoned prior to capture.

When a vessel has been captured, she may be condemned as

Alexander, 1 Gall. 536; The Betsy, 2 Gall. 384; The St. Nicholas, 1 Wheat. (U. S.) 417; The Fortuna, 3 Wheat. (U. S.) 245; Phoenix Ins. Co. v. Pratt, 2 Binn. (Pa.) 308; The Vrouw Hermina, 1 Rob. 163; The Jonge Tobias, 1 Rob. 329; The Calypso, 2 Rob. 154; The Rosalie and Betty, 2 Rob. 343; The Emuron, 2 Rob. 9; The Carolina, 3 Rob. 75; The Nancy, 3 Rob. 122; The Phoenix, 3 Rob. 186; The Graaff Bernstorff, 3 Rob. 109; The Convenientia, 4 Rob. 201; The Johanna Thaler, 6 Rob. 72; The Mars, 6 Rob. 79.

Searching neutrals in times of peace, or indeed at any time, for the purpose of impressing seamen, is not countenanced by international law. Daniel Webster, secretary of state, wrote to Lord Ashburton: "The American government is prepared to say that the practice of impressing American seamen from American vessels cannot hereafter be allowed to take place. That practice is founded on principles which it does not recognize, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as cannot be sub-

mitted to. . . . In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them." Letter of August 8th, 1842, Webster's Papers, p. 101.

1. It is now a well settled principle of international jurisprudence, that a lawful maritime blockade of a fort requires the actual presence of the blockading force. A mere proclamation or notification of one belligerent that such a port of the other belligerent will be blockaded at such a time, and thus closed to neutral commerce, is not sufficient to constitute a legal blockade; the force must be actually present at the entrance to the port, or sufficiently near to prevent communication. Nor is the mere presence of a hostile force sufficient, of itself, to make the blockade a legal one; it must not only be actually present, but it must be large enough to prevent communication, or, at least, to render it dangerous to attempt to enter the port. Halleck's Int. Law, p. 539, citing Kent, Com. on Am. Law, vol. 1, p. 144; Duer on Ins., vol. 1, pp 647, 648; Grotius, De Jur. Bel. ac Pac., lib. 3, ch.

lawful prize if her papers are false, concealed or destroyed. is also liable if she has resisted search which is lawful in. The right of search in time of peace is not generally conferred by treaty and confined to merchant ships.

Though a port must be actually blockaded to render it unlawful for a neutral to enter it, yet there may be temporary relaxation without an abandonment of the blockade. For instance the blockading squadron may be suddenly scattered by a storm. Neutral vessels have no right to take advantage of such an accident.

When a port is left unguarded by reason of a storm or other unavoidable mishap, it should have its actual blockade resumed as early as possible, always within reasonable time, since neutrals would be entitled to pass in and out should the delay in resumption be such as to create the presumption that the blockade had been raised. It is not altogether settled, however, that neutrals are obliged to respect a temporary suspension for such cause as any other. If the blockade ceases to exist in fact, it is as though it had been only a paper obstruction from the first, and is entitled to no regard.¹

A blockade is *de facto* when it is established without previous notification. It is *public* when both established and proclaimed. In case of a violation of the former, the belligerent establishing it must prove the existence of the blockade in order to punish a neutral for a breach; in case of the latter, the rule is otherwise as to the burden of proof. The establishment is presumed if the vessel caught in its violation must prove the contrary, or a relaxation of the investment to keep herself from confiscation at a court of nations.²

Dissolution of Blockade.—If the blockading squadron is driven off by the enemy, the restoration of blockade must be notified by a subsequent notification to neutrals and actual re-establishment.

The withdrawal of the blockading force operates as a dissolution of the blockade. If only a part of it is withdrawn, the effect is practically the same, if there is not sufficient force left to prevent the ingress and egress of vessels. A fickle maintenance of the investment—the presence of an adequate force alternated by its absence—would justify neutrals in disregarding it. So, if there should be places unguarded, through which vessels might easily enter, though the main entrance be well invested, the blockade as a whole would be imperfect, and not entitled to

1, § 5; Manning, Law of Nations, pp. 322, 323; Bynkershoek, Quaest. Jur. Pub. lib. 1, ch. 11.

1. The Betsy, 1 Rob. 92; The Mercurius, 1 Rob. 84; The Columbia, 1 Rob. 154; The Frederick Molke, 1 Rob. 73; The Trihelm, 6 Rob. 65; The Hoffnung,

6 Rob. 116; Radcliff v. U. Ins. Johns. Cases (N. Y.) 38; Laine Ins. Co., 2 Johns. Cases (N. Y.)

2. The Neptunus, 1 Rob. 17; Betsy, 1 Rob. 331; The Vrow J. 2 Rob. 109; 1 Duer on Insur. 649.

general respect. Taking goods through the mouth of a blockaded river, by any means, for the purpose of exportation, is a breach of blockade. Though there may be channels of communication which cannot be wholly guarded, neutral commerce cannot be legally carried on through them without violation of the duties of the neutral nation towards the besieging belligerent.¹

As the object of a blockade is to prevent commerce, it is the duty of a neutral to avoid defeating the object. To convey supplies to a belligerent, in defeat of the primary purpose of the blockade, would be a gross violation of duty. It would be assisting the enemy by giving them that which is contraband of war. Such a breach is deemed hostile, subjecting both vessel and cargo to confiscation.²

a. Notification of Blockade.—Neutrals cannot plead ignorance of a blockade after notification. Notice is given by official communication to the different neutral states, or by public proclamation to the world. The particular ports invested, or to be invested, are specified. Either form of notice must be followed by an actual investment of the ports named. If, without formal notice, neutrals have knowledge of the existence of a blockade, they cannot violate it with impunity. Proof of knowledge must be made by the libellant of the vessel charged with breach, if no notice has been given and the existence of the blockade is not notorious, and the investment itself is ineffectual. If the neutral began the voyage without knowledge, it is yet confiscable for continuing if notified on the way.³

b. Breach of Blockade.—Actual running of a blockade is not essential to its violation. An attempt to do so completes the offence. Sailing with the design is a hostile act, rendering the ship confiscable. Sailing with an innocent purpose, and without knowledge, will not save the vessel from liability to forfeiture if, upon arrival at the invested port, she do not desist from her purpose of entering, upon learning there of the existence of the blockade. Sailing with the intent of making a breach renders her liable upon the high seas from the commencement of her voyage.⁴

Intent to make a breach may be inferred from the vessel's clearance to a blockaded port, the character of her cargo and other circumstances. But these are not conclusive, and the vessels may rebut the presumptions thus created. A vessel clearing from a distant port, though laden with supplies such as the invested enemy may greatly need, is not confiscable because of her

1. Halleck's Int. Law, pp. 544-547, and cases cited.

2. 1 Duer on Insurance, p. 656-658; 1 Kent, p. 147; 3 Phillimore, Int. Law, § 298.

3. 1 Kent, pp. 147-8; The Apollo, 5 Rob. 286; The Rolla, 6 Rob. 368; The

Calypso, 2 Rob. 298; Manning's Law of Nations, p. 323; 3 Phillimore, Int. Law, § 302.

4. The Spes and the Irene, 5 Rob. 76; The Shepards, 5 Rob. 262; The Nereid, 9 Cranch (U. S.) 440; Yeaton v. Fry, 5 Cranch (U. S.) 335; Olivera

intent to enter a forbidden port, if really ignorant of the fact that a blockade has been established.¹

Hovering about a port to catch a chance of entering in a friendly, and creates presumption of hostility. To enter, even in ballast, is a breach; for the presumption is that a neutral vessel thus entering means to make her egress laden with goods obtained from the enemy. Only physical necessity—that of escape from a storm, for instance—would justify such ingress.

The declaration of a neutral master, seriously made, that he intended to break a blockade, is evidence against the ship of having intended to enter. It would not be conclusive in the face of other evidence to the contrary. If he persist in attempting to carry out his intent after legal warning, the vessel cannot be exonerated on the plea that she innocently set out upon the voyage.

A neutral vessel may innocently enter when she has a license to do so from the blockading belligerent. A general license for trade with the country, issued before the establishment of a blockade, would not be sufficient. And, as before remarked, a vessel may innocently enter when constrained by necessity, such as want of water or provisions, need of repairing a leak, or absolute necessity for repairs, when there are no other means of relief than that of entering the port.

c. Leaving Blockaded Port.—Egress may be innocent in peculiar circumstances, such as being found within the port at the commencement of hostilities; but should the vessel take out her cargo from the enemy's country, the act would be hostile, and the consequence incurred would be liability to forfeiture. A ship which has entered a port of necessity has the right to clear out again in ballast. So, if she has entered under license, her right to return is implied. So also if she has innocently entered through ignorance she ought to be allowed to leave in the same condition in which she entered; that is, with or without a cargo, though she cannot sell what she took in and take out a new cargo. A neutral vessel that goes out when war is expected between her own country and that of the port she leaves, may take a cargo purchased from the enemy during the blockade with full knowledge of the neutral owners, when the investment is necessary to save the property from confiscation by the enemy in case the war should be inaugurated.²

v. Union Ins. Co., 3 Wheat. (U. S.) 196 n.

1. It seems a just inference from the decisions that where the blockade has been constituted simply by the fact of an investment, although its existence was known at the port of departure previous to the sailing of the neutral ship, she may clear out, provisionally, for the blockaded port; but that, in this, as in former cases, the inquiry upon the result of which the right to complete the voyage must depend, must be made

at a port of the blockading state, and not at a neutral power. I see no reason to doubt that the prohibition to proceed from the mouth of the blockaded port embraces all cases of a previous knowledge from whatever source the knowledge may have been derived; and that its violations are subject to the same penalty. 1 Duer on Insurance, 669, 670.

2. 1 Duer on Ins., pp. 682-3; Hall, Int. Law, pp. 560-2.

A cargo innocently purchased before the establishment of a blockade, though laden upon a vessel which subsequently becomes confiscable herself for bringing it out, may be free from the penalty of forfeiture. But there must be entire good faith on the part of the owners of the cargo.¹

d. Ships in delicto.—Ships violating blockade are deemed *in delicto* throughout the voyage. It is essential to their guilt (or hostility, which is the preferable term) that three things should concur: an actual blockade, knowledge of it, and intent to make a breach.²

The existence of a blockade is a fact made known to neutrals by communication or proclamation, as previously stated. The actual existence is when there is a sufficient force to prevent ingress and egress at the port.

A river at its mouth, a roadstead or part of a coast may, like a port, be blockaded. The amount of force necessary to render the investment valid may be fixed by treaty. France and Denmark agreed that it should require two or more vessels, or a battery of cannon, so placed as to make it perilous to a vessel attempting to pass. Holland and the two Sicilies fixed upon six vessels of war nearly within cannon shot of the invested place, or a battery on the coast, commanding the place, as the minimum of the necessary force. Russia agreed with Denmark, as France had done, that two ships, etc., would be sufficient.³

A vessel laden before the establishment of a blockade may be brought out.⁴ The right is the same when a government closes its own ports.⁵ The closing must be effectual, in order to entitle it to respect, whether it be enforced by land or naval forces.⁶ When effectual, it must be treated in good faith by neutrals; they should not subject themselves to the presumption against them arising from suspicious circumstances.⁷ They cannot defend themselves on the plea that the blockade was not effectively established when it has proved sufficient for their own capture.⁸

It should not be considered a suspicious circumstance when a vessel sails near a blockaded port to make proper inquiries or to obtain necessary relief in distress.⁹ She must be *in delicto* to jus-

1. Halleck's Int. Law, p. 564.

2. 1 Duer on Ins., p. 688.

3. Woolsey's Int. Law, §§ 186-7.

4. A blockade does not deprive a neutral vessel, previously laden, from coming out with her cargo. *Olivera v. Union Ins. Co.*, 3 Wheat. (U. S.) 193.

5. A government may close its own ports. The United States Supreme Court held the right of the government to blockade ports in that portion of the country where the rebellion existed. *The Prize Causes*, 2 Black (U. S.) 635.

6. Batteries on shore may be used to blockade a port though there should be

a naval force to warn friendly vessels, and capture hostile ones. *The Circassian*, 2 Wall. (U. S.) 135.

7. Intent to violate a blockade may be inferred from circumstances. *The Josephine*, 3 Wall. (U. S.) 83; *The Cornelius*, 3 Wall. (U. S.) 213; *The Cheshire*, 3 Wall. (U. S.) 231; *The Admiral*, 3 Wall. (U. S.) 603.

8. The capture of a ship attempting to violate blockade tends to prove that the establishment of the blockade was effective. *The Hallie Jackson*, Blatchf. Prize Cas. 41.

9. A vessel may approach a block-

tify her capture.¹ When a blockade has been raised by the nation which established it, or effectively and permanently broken by the opposite belligerent, neutrals may avail themselves of the changed condition.²

15. Communications Between Belligerents.—Warfare between civilized nations is somewhat relieved by a species of communications. They have to deal with each other when exchanging prisoners, when agreeing upon an armistice, when entering into communications to lessen the rigors of war, and when communicating under flags of truce.

a. Armistice.—The contracting belligerents obligate themselves by a truce, though the individual subjects of neither are said to be responsible for the breach of it without previous notice. It is usual, however, to give notice of the period during which hostilities are to cease, and thereafter the subjects of the contracting powers are responsible—each belligerent punishing its own offending subjects.³

A nation, empowered to declare war and to conclude peace, is equally competent to agree with the enemy upon a temporary truce. This power is frequently exercised by the military or naval officer in chief command acting presumably under the sovereign authority. Such a truce binds the contracting enemies to observe it in good faith and national honor. During the truce the parties may act as though permanent peace had been restored. They are not ordinarily prevented by the terms from collecting provisions and munitions of war, nor even from receiving reinforcements and creating fortifications and repairing those under siege. A besieged place cannot be repaired or strengthened during truce, nor can works to attack it be built or improved during that time; nor can supplies or reinforcements be received by either party in violation of the armistice as usually agreed upon.

Hostilities may be renewed at the termination of the truce.

added port to inquire about the blockade. *The Forest King*, Blatchf. Prize Cases, 45. And she may visit such port when it is necessary in order to obtain supplies for the further prosecution of her voyage. *The Argonaut*, Blatchf. Prize Cases, 62. Compare *The Delta*, Blatchf. Prize Cases, 133; *The Cheshire*, Blatch. Prize Cases, 151; *The Empress*, Blatch. Prize Cases, 175. If she sails for such port without knowing of the blockade, she cannot be confiscated for attempt to enter; nor if she does so to obtain provisions or water. *The Nayade*, 1 Newb. Adm. 366. But for approaching and delivering letters and papers to a person from the shore, when aware of the existence of the blockade, a vessel would be liable to cap-

ture. *The Coosa*, 1 Newb. Adm.

1. To render a ship confiscable violating blockade, she must be caught in the act, or while going to or from the invested port. She cannot be captured and condemned for it having made the round voyage. *Manski v. Plassan*, 20 La. Ann. 90.

2. As a matter of course, the termination of a blockade may be followed by free egress and ingress of vessels. When a government has closed its ports (as during the rebellion) it may open them at will. *The Baigou*, Wall. (U. S.) 474; *The Josephine*, Wall. (U. S.) 83; *The Alma*, 2 Sp. (U. S.) 203.

3. 1 Kent, 160; 3 Phillimore, Int. Law, § 116.

the truce. If no time was specified, notice should be given before a renewal of warfare.¹

b. Capitulation.—When a surrender is made under terms of agreement, it is usually stipulated that the inhabitants of the surrendered place shall be secure, that certain privileges shall be granted to the discomfited troops, etc. The surrendering garrison are often allowed to march out with their arms and colors; officers are allowed to retain their side arms, and the honors of war are accorded. Since these privileges are not matters of right, they must be stated in the terms of the capitulation if the conqueror means to grant them. The commanding officer of each army, or of each naval party, represents his own nation in making the capitulation—that is, the one in command at the place and time. He has no authority to enter into stipulations unknown to the rules and usages of war; nor can he represent his nation in such general matters as the accession of territory.²

c. Passports.—A passport is a written instrument to secure the safe conduct of the bearer. In war, it is given to an alien or even to an enemy, enabling him to travel where otherwise he could not safely go, under the laws of war. It is entirely personal; it cannot be used, without fraud, by one to whom it has not been granted. It may be revoked before the time specified for its termination. An officer in command may grant safeguards for the protection of property and persons within his own lines from disturbance by his own troops.³

d. Cartel.—The ransom or exchange of prisoners is usually effected by an agreement. The respective belligerents mutually protect the agents who, under a flag of truce, carry out the cartel stipulations. Should either belligerent violate the cartel, he would forfeit all his rights thereunder.⁴

When a vessel is employed in effecting such agreement, she bears a flag of truce, and is called a cartel ship. She can bear no arms except a signal gun, nor can she carry any cargo. Both parties are bound to protect her. She may be a merchantman or a ship of war, but she need not be prepared to defend herself against either enemy, since she relies upon the honor of both. She would be liable to condemnation were she to act fraudulently in the interest of either party.⁵

e. Ransom.—In modern civilized warfare, prisoners are not released by the payment of a sum as *ransom*, as was formerly the case. It is common now to release them on their word of honor not to fight again until they are exchanged, and this is called *parole*. The term *ransom* is now mostly applied to property. What is paid for the return of captured property is called *ran-*

1. Halleck's Int. Law, ch. 27.

2. Vattel, Droit des Gens, liv. 3, ch. 16, §§ 237-8; 3 Phillimore, § 122.

3. 1 Kent 163; 2 Phillimore, Int. Law, pp. 28, 29.

4. La Gloire, 5 Rob. 492; The Mary, 5 Rob. 200; The Carolina, 6 Rob. 336.

5. 3 Phillimore on Int. Law, § 111; The Venus, 4 Rob. 355; The Daifjie, 3 Rob. 141; 1 Duer on Ins. 539.

some money. The practice is almost wholly confined to naval fare.¹

Authority to ransom is included in that to capture. It is usually exercised by a ransom bill guaranteeing the safe conduct of the vessel which is the subject of the contract. The effect of the contract is the suspension of hostilities between the parties with respect to the vessel and the transaction.²

16. Contraband of War.—Commerce of certain kinds is prohibited during war because it interferes with the operations of the contest and prolongs it by aiding the enemy. No nation can engage in prohibited commerce without violation of the law, subjecting the vessel to loss of freight and expenses, and to forfeiture if she is owned by the owner of the prohibited cargo.

When the transportation of contraband goods is prohibited by treaty, and the government of the neutral carrier is a party to the agreement, the ship itself is forfeited for violation of the treaty. So, too, if the ship bearing such goods is found with false papers on board or is attempting otherwise to conceal its destination. Misconduct on the part of the officers of the vessel, showing that they knew of the presence of contraband goods on board; knowledge, on the part of the ship owner, of the presence, etc., may involve the ship. Good faith and ignorance on the part of the ship owner, however, and good conduct of the officers will not save contraband goods from confiscation. And even other articles intermixed with the contraband will share the same fate if belonging to the same owner.³

a. Forfeiture.—Liability to forfeiture for carrying contraband of war owned by the owner of the vessel, begins at the inception of the voyage; and the goods themselves are confiscable at that time, whoever may own the vessel. Liability ends upon the completion of the entire voyage, so that neither the vessel nor the proceeds of the contraband cargo can be disturbed after.⁴

If, however, after the inception of the voyage, the international law takes inhibited goods to an enemy is abandoned before the capture of the vessel, the penalty cannot be inflicted.⁵

1. *Maisonnaire v. Keeting*, 2 Gall. (U. S.) 337; *Story, J.*; *Miller v. Resolution*, 2 Dall. (U. S.) 15. "Other maritime nations [other than England] regard ransoms as binding, and to be classed among the few legitimate *commercium belli*. They have never been prohibited in this country, and the act of congress of August 2nd, 1813, interdicting the use of British licenses or passes, did not apply to the contract of ransom." 1 Kent 105; *Brooks v. Dorr*, 2 Mass. 39; *Spafford v. Dodge*, 14 Mass. 66; *Girard v. Ware*, 1 Pet. (U. S. C.) 142; *The Saratoga*, 2 Gall. (U. S.) 164; *Goodrich v. Gordon*, 15 Jo. (Y.) 6.
2. 1 Kent 105; *Wheaton's Elements of Law*, pt. 4, ch. 2, § 28; *Miller v. Resolution*, 2 Dall. (U. S.) 15; *The Hoop*, 169; *Ricard v. Bettenham*, 3 Burr. 100; *The Joseph*, 8 Cranch (U. S.) 100; *The Nancy*, 3 Rob. 127; *The Rob.* 158; *The Christiansberg*, 381; *Carrington v. Ins. Co.*, (U. S.) 521.
3. *Halleck's Int. Law*, 570-571.
4. *The Caledonia*, 1 Wheat. 100; *The Joseph*, 8 Cranch (U. S.) 100; *The Nancy*, 3 Rob. 127; *The Rob.* 158; *The Christiansberg*, 381; *Carrington v. Ins. Co.*, (U. S.) 521.
5. *The Trendesostre*, 6 Rob. 1; *Duer on Ins.*, pp. 629, 571-2.

Transportation of contraband goods from one enemy's port to another is a hostile act incurring the same penalty as original importation. Transporting them in the interest of the enemy, though not to his country, is illegal.¹

b. Contraband Articles.—Implements and munitions of war, naval stores, and whatever strengthens the enemy, are contraband. Under the last designation may be mentioned marine engines, paddle wheels, cylinders, screw propellers, cranks, boilers, horses, wagons, harness, steam machinery, coal, money, etc.²

All articles used in the manufacture of gunpowder, such as sulphur and saltpetre; all articles much in demand during war, such as pitch, tar, hemp and ship timber, copper in sheets, iron in any form suitable for war purposes or easily susceptible of being converted into such purposes, are especially contraband.³

While these and like articles are always contraband, there are others which are not so in themselves, but become so if destined for the enemy's use—such as wheat, corn, rice, flour, meal, hay, fodder, and, in short, all provisions.⁴

An article may be contraband or not; may indeed be contraband in relation to one enemy and not to another, according to the use to be made of it. Gen. Butler declared slaves to be contraband during the war of the rebellion. Considered as property by the insurrectionists, who used them to further their cause, they were indeed contraband in such sense that they could not have been conveyed from Missouri (for instance), which was within the national lines, to any State within the enemy's lines, without violation of the rules governing contraband of war. On the other hand, persons held in slavery by the insurrectionists while being conveyed to a place where they would have their liberty, could not be considered contraband of war. The term is usually applied to merchandise, and denotes something prohibited by *ban*. It is supposed to be derived from the Italian word *contrabando*.⁵

Distinction is made between absolute and conditional contraband of war. Nations often fix by treaty what shall be understood as belonging to the latter. All articles absolutely necessary to the carrying on of war, universally are held to be contraband.⁶

c. Jurisdiction of a Neutral State.—Belligerents have no right

1. The *Commercen*, 1 Wheat. (U. S.) 322.

2. Halleck's Int. Law, pp. 577-582.

3. 3 Phillimore, Int. Law, §§ 229, 251; Wheaton's Elem. Int. Law, pt. 4, ch. 3, § 24; 1 Duer on Ins., p. 636; The *Charlotte*, 5 Rob. 305; The *Staat Embden*, 1 Rob. 26; The *Apollo*, 4 Rob. 158.

4. The *Commercen*, 1 Wheat. (U. S.) 382; The *Edward*, 4 Rob. 68; The *Zel-*

den *Rust*, 6 Rob. 93; The *Ranger*, 6 Rob. 126.

5. Twiss on the Law of Nations, p. 234.

6. "Where the neutral owner knew that his vessel was peculiarly adapted to the purposes of war, and was avowedly going with it to the enemy's country with the intention and expectation of selling it to the enemy to be

to interfere with trade within the jurisdiction of a neutral State. There a neutral may sell even firearms to opposing belligerents provided no favor is shown to either party to the injury of the other. Articles thus sold may become contraband when beyond the neutral's jurisdiction, on the high seas, and destined to the country of one of the belligerents. They would then be capturable by the other. It is not the practice of nations to prohibit merchants to purchase and take away goods of such character to be confiscable by a belligerent should he capture them on the high seas.¹

17. Captures on Navigable Waters.—It is enemy ownership which gives hostile property its character. Whatever is under the control of an enemy is deemed to be owned by him without reference to the nice distinctions of title recognized by municipal law. Property used by an enemy for hostile purposes acquires an enemy character. Property takes its status from that of the owner, or by reason of the hostile usages to which it is subjected.²

Whether property captured upon the sea is lawful prize

employed as a vessel of war, LORD STOWELL had no hesitation in condemning the vessel as contraband of war." *The Richmond*, 5 Ch. Rob. 331. This illustrates "conditional contraband." Further illustration, *The Brutus*, 5 Ch. Rob. appendix, p. 1.

1. "A neutral nation may indeed bind itself by treaty engagements with a belligerent nation not to allow merchants to purchase within its jurisdiction certain articles, if they are to be carried to the ports of the adverse belligerent; but the observance of such treaty engagements will be inconsistent with neutrality unless the neutral nation should apply the same prohibition equally to all merchants intending to carry such articles to the ports of either belligerent." *Twiss on Law of Nations*, p. 296.

"The practice of nations received in Europe at the present day permits a commerce in time of war between neutrals and belligerents. It has only subjected it to certain restrictions with regard to the immediate necessities of war, and in respect of places under blockade. It does not forbid neutrals to sell to the subjects of a belligerent power articles which serve immediately to the purposes of war, when the belligerents purchase the articles in the neutral country, and export them themselves." *Klüber, Droit des Gens*, § 288.

Neutral goods bound to a block port are to be considered as contraband of war, it has been held. *Richards v. Maine Ins. Co.*, 6 Mass. 102. These provisions are contraband if destined for the enemy's military use. *Commercen*, 1 Wheat. (U. S.) 1. *Compare N. Y. Fireman Ins. Co. v. De Wolf*, 2 Cow. (N. Y.) 56.

"The confession of the defendant that he did carry contraband goods on a vessel, and the testimony of the other that the goods carried were contraband by the laws of great Britain were sufficient evidence of the fact that country." *Smith v. Elder*, 3 (N. Y.) 105.

2. Enemy character may thus be attributed either to persons of neutral nationality and to their property, or to property of neutrals in virtue of its origin and the use to which it is applied.

The chief test of the existence of such an identification of a neutral with an enemy state as will entitle it to clothe him with an enemy character is supplied by the fact of domicile.

For, belligerent purposes a person may be said to be domiciled in a country when he lives there under circumstances which give rise to a reasonable presumption that he intends to make his sole or principal residence there for an unlimited time. *Hall on Int. Law*, p. 427.

war or not depends upon its character as hostile or friendly.¹

a. Domicil.—Domicil fixes its owner's status as hostile or friendly. This rule is subject to exceptions. A neutral, domiciliated in an enemy's country, is not deemed hostile if he is preparing to remove, and does actually remove within reasonable time. He should be allowed opportunity to gather up his property and take it out of the country. If, while doing so, he engages in new enterprises, as a resident, his character as hostile is thus established. Whether his ships upon the sea retain their neutral character while he is attempting to remove from the enemy country has been a subject of contention.²

Ministers, consuls and other agents representing their governments in a foreign country are not deemed enemies because of their residence there, after war has been declared against it. Should one of them purchase property, however, for the purposes of trade on his private account, after the commencement of hostilities, such property would be immediately clothed with the enemy character. It would be liable to capture upon the high seas.³

b. Traffic.—Enemy character is imputed to property by the traffic of its owner irrespective of his place of residence.⁴ If he trades under the enemy's license; if he leaves his effects with his partners in business who are domiciliated in the enemy's country; if he is a partner in a firm located there though he himself lives in a neutral country, he is deemed an enemy so far as to communicate hostile character to his property there.

c. Property on the Ocean.—Enemy property found upon the high seas is subject to capture and to condemnation in prize courts, under the rules of international law, without any special expression of legislative will by the capturing power. Cargoes

1. As domicil is acquired for private purposes of business or pleasure, and the consequences to a man of its possession by him flow, not from an attitude of hostility on his part, but from the accidental circumstance that his conduct is of advantage to a belligerent, he is not tied down to the domicil in which he is found at the beginning of war. So soon as he actually removes elsewhere, or takes steps to effect a removal in good faith and without intention to return, he severs his connection with the belligerent country. He thus recovers his friendly character, and with it recovers also the rights of a friend. Hall on Int. Law, p. 430.

2. *Wilson v. Marryatt*, 8 Term 31; *The Venus*, 8 Cr. (U. S.) 288; *Bentzon v. Bogle*, 9 Cr. (U. S.) 191; *The Anne Greene*, 1 Gall. (U. S.) 284; *The Dos Hermanos*, 2 Wheat. 76; *The Nereide*, 9 Cr. (U. S.) 388; *The Diana*, 5 Rob. 60; *The Harmony*, 2 Rob. 322; *Mc-*

Connell v. Hector, 3 Bos. & Pull. 114; *The Bernon*, 1 Rob. 103; *Elbers v. Ins. Co.*, 16 Johns (N. Y.) 128; *The Ann*, 1 Dod 221; *The Venus*, 8 Cr. 279; *La Virginie*, 5 Rob. 98; *The Joseph*, 1 Gal. (U. S.) 545; *The St. Lawrence*, 1 Gal. (U. S.) 467.

3. *The Indian Chief*, 3 Rob. 27; *The Josephine*, 4 Rob. 25; *The Dree Gebroeders*, 4 Rob. 232; 1 Kent's Com. 44; 1 Wheat. Int. Law, 282; *Albrecht v. Sussinan*, 2 Ves. & Beames, 323; *Arnold v. United Ins. Co.*, 1 Johns. Cases (N. Y.) 363.

4. A vessel engaged in unlawful trade with the enemy is liable to capture and condemnation at any time during the voyage in which the offence is committed, but not after the voyage is completed. If, however, the voyage is continuous and entire, although consisting of separable parts, she is liable to capture while any portion of it remains to be performed, even where the

in transit from a neutral to a belligerent country, or from the latter to the former, are capturable if they belong to an enemy or if they are to be his upon their arrival. But if they are shipped from an enemy country to a neutral one, pursuant to a contract of sale made prior to the commencement of hostilities, they belong to the neutral consignee as soon as they are delivered to the master of the ship, and are therefore exempt from capture. If, however, any right of property is left in the hands of the consignor, the rule is otherwise. During the transit, no communication between such consignor and consignee can affect the character of the cargo. The rule is: "Once hostile, always hostile to the end of the voyage." Even though the owner should cease to be an enemy, he cannot immediately change the character which has been impressed upon his property while it is on the sea.¹

It cannot be changed by sale to a neutral, if there is a reservation of right to resume ownership at the close of the war, or if the enemy retains a lien upon the things sold. This is the rule with respect to the sale of ships and other vessels.²

d. Hostile Flag and Pass.—A ship becomes hostile so soon as she hoists the enemy's flag. The rule is the same if she sails under his pass. The cargo does not necessarily take character from the flag.³

part in which the offence was committed has been completed. This point has been fully discussed and decided in the supreme court of the United States. Halleck's Int. Law, p. 505, citing Wildman, Int. Law, vol. 2, pp. 20, 23; Duer on Insurance, vol. 1, pp. 570, 571; The Joseph, 8 Cranch (U. S.), pp. 454, 455.

1. Transfer *in transitu* being legitimate in time of peace, transfers effected up to the actual outbreak of war are *prima facie* valid: where, however, it appears from the circumstances of the case that the vendor has sold, to the knowledge of the purchaser, in contemplation of war, the contract is invalidated, notwithstanding that the purchaser may have been in no way influenced in buying by a wish to assist the vendor. The transaction is held to be in principle the same as a transfer *in transitu* effected during the progress of war.

"The nature of both contracts," says LORD STOWELL, "is identically the same, being equally to protect the property from capture during war, not indeed in either case from capture at the present moment, but from the danger of capture when it is likely to occur. The object is the same in both instances, to afford a guarantee against

the same crisis. In other words, the goods are done for the purpose of eluding belligerent right, either present or expected. Both contracts are made with the same *animo fraudandi*, and are in my opinion justly subject to the same rule." Hall on Int. Law, p. 100, citing The Jan Frederick, 5 Rob. 137.

2. Sale by an Enemy to a Neutral.—The sale of a ship by an enemy to a neutral is null by public law, unless there be a stipulation that the contract shall be revoked at the close of hostilities, or if the vendor retain a lien upon the vessel for the price; and also, where the enemy vendor retains control of the vessel. Waples on Proceedings in Rem, p. 396, citing The Noydt G. 2 Rob. 137; The Sechs Geschw. 4 Rob. 100; The Vigilantia, 1 Rob. 16; The Embden, 1 Rob. 16; The Jan Frederick, 5 Rob. 137.

3. Change of Flag.—A ship which is previously neutral becomes immediately hostile the moment she hoists the enemy's flag, or sails under his flag. And the general rule is that the goods, laden in time of peace, follow the fate of the vessel.

The cargo, however, does not necessarily change character with the vessel when she dons the enemy's flag. Goods, laden in time of peace,

Cargo.—Goods laden before the commencement of war, belonging to an innocent owner, are not affected, unless put on board in contemplation of approaching hostilities, and of their conveyance under such flag.

Goods may have the enemy character impressed upon them by the nature of the commerce in which they are employed. If they are produced in a hostile country, they are there subject to the enemy, and assume the character of the country. They may be captured in transit during war, though shipped before the commencement of hostilities.¹

Neutral Ship Liable.—A neutral's vessel, loaned to a belligerent, may be captured while used by the latter. A ship is lawful subject of prize when found with military enemies on board as passengers, but not for conveying enemy civilians from one neutral port to another without hostile intent. Knowingly conveying public despatches of a belligerent renders a neutral ship capturable, though she would not be liable for innocently conveying a passenger with such despatches in his pocket.²

out contemplation of war, do not become hostile by reason of the breaking out of war, though the ship does if her owner thus becomes a belligerent by his nationality; provided, however, the neutral character of the owner of the goods has not been changed. Of course the goods, under such a flag, would be confiscable, if laden in view of approaching hostilities, and with knowledge that the enemy's flag was to be raised over them.

Simulated papers are evidence of the hostile character of a cargo, nominally neutral, though it be laden before the declaration of hostilities, in case the vessel bearing it should become hostile by such declaration. *Waples on Proceedings in Rem*, 397, citing *The San Jose Indiano*, 2 Gal. (U S) 285; *The Princessa*, 2 Rob. 49; *The Susa*, 2 Rob. 256; *The Anna Catharina*, *The Vigilantia*, 1 Rob. 13; *The Vrow Elizabeth*, 5 Rob. 5; *Sleight v. Rhineland*, 2 Johns. (N. Y.) 531; *Barker v. Phoenix Ins. Co.*, 8 Johns. (N. Y.) 321; *The Ann*, 1 Dod. 221; *The Success*, 1 Dod. 132.

1 Any attempt by a subject to import goods from the enemy's country without the license of his own government is a violation of duty on his part, and involves his property so employed in the penalty of confiscation. It is not necessary that these goods should be the fruits of any purchase, barter, contract or negotiation in the enemy's country after hostilities had com-

menced. The sailing of the vessel with the goods on board after the party had a knowledge of the war, completes the offence, stamps the cargo with an illegal character, and subjects it, during its transportation, to a rightful seizure. The propriety of strictly adhering to this rule is vindicated by *JUDGE STORY*, with his usual ability, in the case of *The Rapid*, where the question is fully discussed. *Halleck's Int. Law*, p. 499, citing *Duer on Insurance*, vol. 1, pp. 556-559; *The Lady Jane*, cited 1 Rob. Rep. 202; *The William*, cited 1 Rob. Rep. 214; *The Juffrow Louisa Margaretha*, cited 1 Rob. Rep. 202; *The St Phillip*, cited 8 Term Rep. 556. etc.

2. Use of a Neutral Vessel by an Enemy. If the owner, nominally neutral, of a vessel allows a belligerent to use her, both she and he are deemed of hostile character in case she be captured while in such use. He cannot be heard to defend her, not even upon the plea of duress. Conveyance of military belligerents, even without knowledge of their character, by the master of a vessel has been held to render her lawful prize, though she and her owner had been previously neutral. The rule does not extend to the conveyance of enemies not military, as mere passengers from neutral port to neutral port, without knowledge of their character and without design to aid the enemy.

The conveyance of public dispatches of a belligerent, by the master of a

e. Sailing Under Cartel.—Ships conveying prisoners of war, for exchange, or engaged in any other service, under cartel, are not capturable as prize, either on the direct or the return voyage, so long as they are true to their trust.¹

Right to Capture.—The right to take prizes is one of the rights of national law; and cannot be created by statute. Nations may make what they term prize laws, but they are merely regulative provisions. Methods of capture must be according to international usage, but methods of distributing prizes after condemnation may well be determined by statute. Any particular government may restrict some of its international rights by statute, but cannot enlarge those rights.²

In this country we have statutes, directory and regulative, for judicial proceedings in prize cases, taking testimony, admission, distribution, appeal, etc. Naval captures on land and in waters not navigable have been thus regulated.³

f. Neutral Ships Having Knowledge of the War.—With respect to a nominally neutral ship, with knowledge on his part, renders both ship and cargo confiscable; but a passenger on board might be the bearer of such official communications without involving such consequences. Waples on Proceedings in Rem, p. 398, citing *The Phoenix*, 5 Rob. 20; *The Vrow Anna Catharina*, 5 Rob. 167; *Bentzon v. Boyle*, 9 Cr. (U. S.) 191; *The Carolina*, 4 Rob. 256; *The Orozembo*, 6 Rob. 430; *The Friendship*, 6 Rob. 420.

The circumstances of the capture of *Slidell* and *Mason*, and the correspondence thereon, may be referred to as an illustration, though Captain Wilkes did not capture the neutral ship with them.

The Atlanta, 6 Rob. 440; *The Caroline*, Id. 461.

1. Ships under cartel are exempt from capture, since, otherwise, prisoners could not be conveyed by sea from one enemy's country to another for exchange. And the exemption continues with the cartel on the return voyage. Should a cartel ship violate her trust by engaging in trade, she would at once become confiscable. Waples on Proceedings in Rem, p. 405, citing *The Daifgie*, 3 Rob. 139; *La Gloria*, 5 Rob. 192; *The Mary*, 5 Rob. 200; *The Venus*, 4 Rob. 355; *The Carolina*, 6 Rob. 336.

2. There cannot be the slightest doubt that for a century past the views of statesmen and jurists, both on the continent of Europe and in America, have been pronounced, with increasing emphasis, in favor of the prohibition of the capture of private property at sea, unless such property happens to be contraband of war or engaged in an attempt

to break blockade. The one ship treaty with Prussia, negotiated by Franklin in 1785, the rejected motion of the French Assembly in 1793, the isolated judgments of one or two writers of no great distinction, have been the springs of a mighty current of opinion, which has shown its force in modern times by the prohibition of captures in the Seven Weeks' War, 1866, the treaty of 1871 between the United States and Italy, the repeated decision of the Institute of International Law, and the almost unanimous voice of the great continental jurists. In 1856, the new Declaration of Paris, had not the opposition of Great Britain caused the rejection of the American proposition in 1823. Having agreed to give up for ever the right of capturing enemy goods under a neutral flag, our statesmen declined to go further along the concession to commerce. The inevitable result of their action was on the part of the United States the declaration. But, though unwilling to pledge themselves, they regarded as a dangerous measure, they have not given up their traditional policy of endeavoring to secure exemption from capture of property at sea; and in this the sympathy and support of the great continental states of Europe and the doubtful exception of England. Lawrence's Essays, p. 279.

3. We have an example of a directory and regulative one in the Prize Act of 1864; of a directory, regulative

edge that hostilities have been declared or actually exist, a neutral vessel cannot set out upon a commercial voyage to one of the belligerent countries.¹ Though licensed by one belligerent, she may be captured by the other.² She would be involved with hostile cargo if attempting to save it fraudulently.³ Cleared from one neutral port to another, she and her cargo would be confiscable if the clearance to the neutral port was done in fraud while the real destination was the port of the enemy.⁴ Such action would render her enemy property.⁵

Congress applied the rules, applicable to foreign enemies and their property, to domestic enemies during the rebellion.⁶

g. Recapture.—Recapture from an enemy is governed by different laws in different countries. The rule of reciprocity as to the restitution of the property of friendly nations, recaptured from an enemy, prevails among the most enlightened nations. The rule in this country is that vessels and cargoes belonging to residents of the United States which have been taken by an enemy and recaptured before condemnation as prize, shall be restored to their owners. One-eighth of the value must be paid to naval captors when the recapture is by them; or one-half, if the vessel was armed; one-sixth if she was unarmed and was the property of the government, and was recaptured by private vessel; one-twelfth if she belonged to the government, was unarmed, and was recaptured by a naval ship, etc.⁷

strictive one, in the confiscation sections of the Confiscation act of 1862. The legislative power, in furthering the prosecution of war, whether public or civil, need not direct the capture of naval prizes (since that usage generally prevails among nations), but it is always found necessary to enact regulations for governing the exercise of the right. That power should, however, direct the capture or seizure, for confiscation purposes, of hostile private property found on land, if such is the sovereign will, since such confiscations are contrary to modern usage among nations. And if less than all hostile property found on land is meant to be condemned, the statute must be restrictive, so as to limit the seizures and confiscations to such property as the sovereign will has elected to take. In all cases, it is found necessary that the statute should be regulative of the proceedings. Waples on Proceedings in Rem, p. 407.

1. A vessel was *held* to be good prize of war, captured while bringing a cargo of enemy goods from a belligerent's country, to which she had sailed after knowledge of the war. The St. Lawrence, 8 Cranch (U. S.) 434.

2. A ship sailing with an enemy's license is confiscable. The Ariadne, 2 Wheat. (U. S.) 143; The Hiram, 1 Wheat. (U. S.) 440.

3. The ship of a neutral owner is confiscable if he has lent his name fraudulently to save the cargo. The Fortuna, 3 Wheat. (U. S.) 236.

4. Trade with the enemy's country during war renders ship and cargo confiscable, though a neutral port be the ostensible destination, and fraudulently made to give neutral color to the voyage. Jecker v. Montgomery, 18 How. (U. S.) 110.

5. Property ostensibly neutral, if seized while it is being used to violate neutral duties, is quasi-enemy property and therefore confiscable. Maissonnaire v. Keating, 2 Gall. (U. S.) 339.

Bearing despatches to the enemy renders the ship confiscable. The Tulip, 3 Wash. (U. S.) 181.

6. The act of congress authorizing the seizure and confiscation of vessels belonging to the citizens of states in insurrection is "within the legislative competency of congress." The act of July 13th, 1861; The Ned, Blatchf. Prize Cases 119.

7. Wheat. Elem. Int. Law, p. 443.

18. Prize—Captures of by Public Vessels.—It is the duty of ships of war to make captures. When more than one take a prize, capture is said to be joint. All ships of war of the same bell, and within sight at the time of the capture, are deemed joint captors. Prior or subsequent service will not entitle the ship rendering it to a share in the prize, since it has no effect upon the actual capture.

A capturing fleet is considered a single body, and the members of it entitled to their share of the prize money. But vessels constituting a fleet, though temporarily associated, do not necessarily all share in a prize; only those actually or constructively making the capture are thus entitled. Even a vessel belonging to the fleet but temporarily detached at the time of the capture would lose her interest therein. But any material aid given entitles a ship to recompense in prize money. Though one ship may be in the rear while other ships are chasing an enemy vessel and finally capturing her, they are considered as supporting the forward ships, and entitled to share in the prize. Ships and allies are joint captors.¹

Captures made by boats and tenders are presumably made for the ships to which they belong. Captures made by non-commissioned vessels called privateers, entitle such vessels to be considered as the principals, though public ships may have assisted as joint captors.²

a. Bringing Prizes in.—The captor must bring his prize into port and surrender it to the jurisdiction of the proper court without delay. Nothing but necessity would justify the selling the prize elsewhere and the submission of the proceeds to the adjudication of the court. Some of the officers of the capturing vessel, or it may be some of the crew, or even passengers found on board, also all the papers of the captured vessel, and, of course, the cargo, are brought in, under charge of a prize master, and delivered to the executive officer of the court, who, in this country, is the United States marshal of the district in which the port is situated. The persons brought in are to be used as witnesses responding to the interrogatories *in preparatorio*, and their papers are to be examined as evidence. The respective rights of captors and joint captors; of all vessels and persons entitled to share in the prize, are passed upon in the court. The statutes of each country regulate the terms of the distribution.

The captors acquire no right of property in the ships and

1. 3 Phillimore on Int. Law, §§ 399, 401; 2 Wildman on Int. Law, 330-9; Talbot v. Three Brigs, 1 Dal. (U. S.) 95; The Galen, 2 Dod. 19; The Santa Brigada, 3 Rob. 52; La Flore, 5 Rob. 238; The Drei Gebroeders, 5 Rob. 339; L'Amitie, 6 Rob. 261; The Jan Frederic, 5 Rob. 120; The Robert, 3 Rob. 194; The Lord Middleton, 4 Rob.

153; The Spankler, 1 Dod. 35; Neimen, 1 Dod. 9; The Union, 1 Dod. 346; The Rattlesnake, 2 Dod. 33; The Financier, 1 Dod. 61; The Heron, 2 Dod. 96; The William T. Edw. 6.

2. 2 Wildman's Int. Law, 33; Halleck's Int. Law, 737-740, and there cited.

goes they take. That right vests in their government—the sovereign. What they get—usually a moiety—is bestowed upon them by their government. And every sailor entitled to prize money receives it as an extra reward for services—not as property interest—acquired in the prize by the capture. All right to prize money claimed by any captors, from the commander of a squadron to a common sailor, is liable to forfeiture for improper acts connected with the capture and the conduct of the vessel to the court for adjudication. Whenever there is forfeiture, the amount forfeited goes to the government.¹

The prize master, after delivering his ship, cargo, documents and prisoners to the court, should make oath that the papers are as he found them, or he should explain any changes in them. Bulk must not be broken between capture and delivery.²

b. Prize Adjudications.—Vessels and cargoes captured at sea are tried in admiralty courts on the prize side. Such courts sit as international tribunals when trying prizes. They have jurisdiction over the property captured anywhere on navigable waters and brought within their respective districts. The testimony upon which they pass judgment is preserved so that any nation may afterwards review it, so that if injustice has been done to any power or its subjects, the matter may form a subject of negotiation and arbitration. Such courts, therefore, while sitting to try prizes, are properly called courts of nations, though they are wholly created and constituted by their own country.

c. Jurisdiction.—A prize may not be taken into any country for adjudication; the country of the captor has exclusive jurisdiction. One reason of this is that that country is responsible to other nations if the prize be unlawfully condemned. Another reason is that that country is interested in the prize as well as the captors, who are subjects thereof; and only in that country should distribution be made between the various claimants for prize money.

There are exceptions to the rule that the prize must be adjudicated in the country of the captor. If the capture is made within the bounds of a neutral state, or by a vessel fitted out there, the prize may be adjudicated there. This is to enable it to vindicate its neutrality by refusal to condemn, and by an order of restoration of the prize to the rightful owner, if the capture was unlawful. A neutral state not interfering in a war, and standing impartial between belligerents, should take cognizance of captures

1. *The Arabella and Madeira*, 1 Gall. Montgomery, 13 How. (U. S.) 516.
 (U. S.) 368; *The Susannah*, 6 Rob. 48;
The Falcon, 6 Rob. 194; *L'Ecole*, 6
 Rob. 220; *La Dame Cecile*, 6 Rob 257;
The Pœnona, 1 Dod. 25; *The George*,
 1 Wheat. (U. S.) 408; *The George*, 2
 Wheat. (U. S.) 278; *The Bothnea*, 2
 Wheat. (U. S.) 169; *The Experiment*,
 8 Wheat. (U. S.) 261; *Jecker v.*
 2. *Wilcox v. Union Ins. Co.*, 2 Binn.
 (Pa.) 574; *The St. Lawrence*, 2 Gall.
 (U. S.) 19; *The Brutus*, 2 Gall. (U. S.)
 526; *Bingham v. Cabot*, 3 Dall. (U. S.)
 19; *Kean v. Brig Gloucester*, 2 Dall.
 (U. S.) 36; *Hill v. Ross*, 3 Dall. (U. S.)
 331; *Penhallow v. Doane*, 3 Dall. (U. S.)
 54; *The Louis*, 5 Rob. 146.

made within its territory, and decide upon prizes without favoring either party, thus maintaining its own neutral character.¹

The judicial power extends to all cases of admiralty and maritime jurisdiction in the United States by constitutional provision. The state courts have no jurisdiction in prize. This constitutional power cannot be delegated to a court in another country, nor can our federal courts sit beyond our national territory. Condemnation of a prize in a neutral port, when the capture was not made in the country of the court, would not be entitled to respect. This is a generally received doctrine. No belligerent can confer power upon a prize court sitting in a neutral country to decide upon the ownership of vessels captured within the belligerent's territory.²

Territory under military occupation by a belligerent is temporarily a part of his country, and captures made within it may be adjudicated in prize courts in his own country. The enemy cannot object to this, and neutral nations have the opportunity of reviewing the testimony as in other international courts.³

The jurisdiction of a prize court sitting in a belligerent country is over property brought into court after capture in war on the high seas, in foreign harbors, and on foreign land, by the navy of the belligerent power. It also embraces captures made on navigable waters of his own country, and also to prizes and embargoes made in war or in prospect of it. Surrenders to naval forces are subject to this jurisdiction. All maritime captures and incidental matters involving pecuniary questions growing out of naval warfare come within the jurisdiction.⁴

d. Prizes in Court.—Prize property must be in court to give jurisdiction. The statutes of a country may lawfully prescribe which of its national courts shall have authority; and it is up to them to do so. The proceeding is *in rem*, and, therefore, the presence of the property is essential to the jurisdiction. Constructive presence gives jurisdiction when an intangible interest is proceeded against. If a prize, under pressure of necessity, is carried into a neutral port and sold, the proceeds must be actually brought into a court of the captor's country and deposited in its registry for adjudication. The exceptions to the general rules sometimes stated by writers, and even in decisions, are both rare and doubtful.⁵

1. *L'Invincible*, 1 Wheat. (U. S.) 238; *The Estrella*, 4 Wheat. (U. S.) 298; *La Amistad de Rues*, 5 Wheat. (U. S.) 385; *The Santissima Trinidad*, 7 Wheat. (U. S.) 284; *La Concepcion*, 6 Wheat. (U. S.) 235; *Talbot v. Jansen*, 3 Dall. (U. S.) 133; *The Brig Alert and Cargo v. Blas Moran*, 9 Cranch (U. S.) 359.

2. *The Betsy*, 3 Dall. (U. S.) 6; *The Flad Oyen*, 1 Rob. 136; *The Heinrich and Maria*, 4 Rob. 45.

3. *Jecker v. Montgomery*, 13 L. (U. S.) 515; *Cross v. Harrison*, 16 L. (U. S.) 165.

4. 1 Kent 35; *The Two Friends*, Rob. 237; *The Peacock*, 4 Rob. 198; *The Emulous*, 1 Gall. (U. S.) 563.

5. *Hudson v. Guestier*, 4 Cranch (U. S.) 293; *Williams v. Arrmold*, 7 Cr. (U. S.) 523; *The Arabella and Mac*, 2 Gall. (U. S.) 368; *The Falcon*, 6 Rob. 198; *La Dame Cecile*, 6 Rob. 21; *Phillimore on Int. Law*, § 361-5;

The prize being in custody, the court may order its sale before adjudication, if it is necessary, to prevent deterioration, to change a perishable commodity, or a sinking ship, into imperishable cash to be adjudicated upon in its stead. And it may sell a condemned prize though an appeal from its judgment be pending.¹

e. Monition.—Since the judgment is *in rem*, and it is to conclude all the world, general notice must be given to all by published monition, so that all interested persons, except enemies, may appear and claim.²

The reason an enemy cannot respond to monition addressed to all the world is found in the impracticability of permitting him to appear, and in the manifest inconsistency and absurdity of allowing him to come and ask justice of a tribunal which he is fighting to destroy. He can neither appear personally nor by proctor.

What then is the object of the monition? It is to invite persons not enemies to appear and claim their interest. It is not usual in prize causes to allow mere lien holders to make claim, but any country may grant that right to them. A neutral may appear and claim ownership and deny the hostile character of the vessel captured as the property of an enemy.

f. Bonding Prizes.—After an appeal from the decree of restitution; after the preparatory testimony has proved insufficient for condemnation, and the captors have been permitted to offer further proof; and when the claimant shows that the property is of peculiar value to him beyond what it would bring in market overt, and in no other cases, he may be allowed to give bond and take possession of the property. Under any of the three circumstances stated, the court may allow him to take possession by depositing the sum at which the prize has been appraised.³

Sale.—The sale is by the marshal, through the prize auctioneer, after due publication. The statutes allow the war or navy de-

ning's Law of Nations, p. 382; 1 Kent, 103, 358.

1. The Nereide, 1 Wheat. (U. S.) 171; The Concord, 9 Cranch (U. S.) 387; The Maria, 4 Rob. 348; The Rendsberg, 6 Rob. 142; Smart v. Wolff, 3 Durn. & East. 323.

2. 3 Phillimore on Int. Law, § 470 *et seq.*; 2 Wildman on Int. Law, 378; The Betsy, 1 Rob. 93; The Mentor, 1 Rob. 181; The Conqueror, 2 Rob. 303; The Der Mohr, 3 Rob. 129; The George, 3 Rob. 212; The Huldah, 3 Rob. 239; The William, 4 Rob. 215; The Susanna, 6 Rob. 48; The Adeline, 9 Cranch (U. S.) 244.

3. *Bonding.*—Claimants cannot bond prizes, except in the following cases:

1. Where there has been a decree of restitution and the captors have appealed.

2. Where the court, after a full hearing on the preparatory proofs, has refused to condemn the property, and has given the captors leave to take further proof.

3. Where the claimant satisfies the court that the property has a peculiar and intrinsic value to him, independent of its market value.

In any one of these three cases the court may, in its discretion, allow the claimant to take the property, on stipulation, deposit, or other security, if satisfied that the interests of others will not be prejudiced. The amount of deposit or stipulation is the appraised value of the property; and the nearest assistant treasurer is the proper custodian of such deposits. Waples on Proceedings in Rem, p. 412.

partment to have the prize turned over to it upon deposit of its value.¹

g. Naval Captures on Land.—Enemy property captured on land, or upon waters not navigable, by one of our naval vessels is not maritime prize. If it is enemy property, and belongs to any class which statutes of the United States have declared subject to seizure and capture, it may be liable to condemnation; but its capture by a naval vessel on land or on navigable waters would not render it naval prize under the prize legislation of Congress.²

h. Prize Statutes.—The right to take prizes is under the law of nations; it cannot be originally created by the statute of one nation. Prize statutes are directory of the method of condemnation and distribution in matters not established by a general system of international rule. They may be restrictive since a state, at its option, may exercise less than its full right.

The prize legislation now in force in the United States, in consonance with international law, regulates capture, judicial proceedings, judgment, execution, distribution, and other subordinate matters.³

It is required that prizes be taken under the authority of the United States or subsequently adopted by that authority. The adoption, actual or presumptive, retroacts to the capture, rendering it valid *ab initio*. The direction for conveying the prize to the court does not materially modify the method heretofore described, the usual one under international law. The court must be the one most conveniently reached from the place of capture. The captor may be instructed to take it to some other place. The secretary of the navy has power to instruct (and it is his duty to do so) when the prize itself cannot be brought in, and is subsequently sold and appraised; that is, when the interests of the captor, or of the government, require it to be passed upon in some court. Actual delivery of the prize to the court not being possible by reason of its condition, it may be sold and the proceeds brought in and regularly accounted for.⁴

1. Provisions Relative to Sale and Distribution—Sale of prizes, *pendente lite*, shall be made:

1. When found liable to deteriorate, perish, or depreciate in value.

2. When the costs of keeping are found disproportionate to the value; and, may be made,

When all the parties in interest who have appeared in the cause agree thereto, after the return day on the libel.

After condemnation, prizes must be sold, simply because the statute so requires, unless accepted by one of the departments at the appraised value. The war or navy department may retain a condemned prize, but the act

requires the deposit of the value that the moiety may be due to the captors. Appeal does not prevent sale. The prize auctioneer must sell, under the direction of the court. *Waples on Pro. in Rem.*

2. *Mrs. Alexander's Cotton* (U. S.) 404; *The Andromeda* (U. S.) 481; *The Florida*, 101

3. U. S. Rev. St., §§ 4613-4614, constituting title, liv. 54, which is wholly made up from the Prize Act of June 30th, 1864, 13 St. at L. 31. The title applies to naval prizes—naval captures. The latter are governed by other provisions.

4. See the Naval act, July 17,

i. Testimony in Preparatorio.—When a prize is captured, some of the captured officers are kept on board the vessel and brought in with her to the court for examination. They are required to answer prepared questions—a long list of them. These interrogatories are the same in all prize cases in this country, and the fate of the vessel depends upon the answers and the ship's papers found on board.¹ The court, however, may grant an order for "further proof" upon the application of the libellant sustained by affidavit. If the ship has been taken from possession of any enemy, there is presumption of her enemy character; and if claimants allege her to be friendly, the burden of proof is on them.² Her enemy character alone is sufficient to condemn her.³ If that character is plainly shown in the first instance, further proof should not be allowed.⁴

Further proof is generally allowed under the following circumstances:

1. If the captured master does not honestly answer the questions *in preparatorio*. 2. If the ship was bought in the enemy's country. 3. If the consignor and consignee are not named in a shipment claiming to be from neutral to neutral. 4. Where the ship's papers are defective or are suppressed. 5. If the voyage itself was suspicious and apparently fraudulent.

The testimony taken in prize cases is preserved that any nation feeling itself aggrieved by the judgment may investigate it.

The capturing governments' right to the prize does not date from the judgment condemning it, but from the time it became enemy property, on the broad principle that the property of a national enemy, at the time of the legal commencement of hostilities, assumes the hostile status.⁵

Also the Confiscation acts of August 6th, 1861, 12 U. S. St. at L 319, and of July 17th, 1862, 12 U. S. St. at L. 589; *Mrs. Alexander's Cotton*, 2 Wall. (U. S.) 404. What is necessary to condemnation of a naval prize is its enemy character. *The Andromeda*, 2 Wall. (U. S.) 481; *The Florida*, 101 U. S. 37. See *The Venus*, 2 Wall. (U. S.) 258. But enemy's property, seized or captured, when not naval prize, should be described in the libel so as to bring it under the particular statute declared upon.

Further, as to captures by the navy upon inland waters, see *The Hampton*, 5 Wall. (U. S.) 372; *The Washita Cotton*, 6 Wall. (U. S.) 521; *United States v. Weed*, 5 Wall. (U. S.) 62; *The Cotton Plant*, 10 Wall. (U. S.) 577; *The Steamer Homeyer*, 2 Bond (U. S.) 217.

1. *Wheaton on Captures*, 494; *The Frances*, 1 Gall. (U. S.) 614 and 8 Cr. (U. S.) 348; *The Diana*, 2 Gall. (U. S.) 93.

2. *The Resolution*, 2 Dal. (U. S.) 19; *The Magnus*, 1 Rob. 31; *The Twee Juffrowen*, 4 Rob. 242.

3. *The Elsebe*, 5 Rob. 173; *The Nelly*, 5 Rob. 219; *The Alexander*, 8 Cr. (U. S.) 169; *The Julia*, 8 Cr. (U. S.) 181; *The Thomas Gibbons*, 8 Cr. (U. S.) 421; *The Joseph*, 1 Gall. (U. S.) 545.

4. *The Adriana*, 1 Rob. 313; *The Romeo*, 6 Rob. 351; *The Sarah*, 3 Rob. 330.

5. *Rose v. Himley*, 4 Cr. (U. S.) 272; *The Santissima Trinidad*, 7 Wheat. (U. S.) 306; *Brown v. United States*, 8 Cr. (U. S.) 121; *The Andromeda*, 2 Wall. (U. S.) 481; *The Venus*, 2 Wall. (U. S.) 258; *The Sallie Magee*, 3 Wall. (U. S.) 451; *The Hampton*, 5 Wall. (U. S.) 375; *The Amy Warwick*, *The Crenshaw*, *The Hiawatha*, and *The Brilliance*, 2 Black (U. S.) 636; *McCullock v. State of Maryland*, 4 Wheat. (U. S.) 413; *The Ouchita Cotton*, 6 Wall. (U. S.) 521; *The Cotton Plant*, 10 Wall. (U. S.) 577; *Union Ins. Co. v. United*

19. Treaty of Peace.—The contending powers usually close the war by entering into a treaty in which they mutually declare hostilities to be at an end and agree upon the terms under which peace is proclaimed. The treaty is made by representatives of the two nations—ambassadors, ministers, commissioners or arbitrators by any name, who subscribe to negotiations subject to the ratification of their respective governments. The high contracting parties are bound, from the time of the negotiation, to maintain national honor; and from the time of the ratification by the compact itself. Subjects of belligerents are bound from the time when they have notice of the treaty. Restoration of property, acknowledgment or relinquishment of damages, reparation for fortifications, and whatever else may be the subject of the treaty must be performed in accordance with its letter and spirit. To violate one article of the national contract is to transgress the whole. It abrogates the treaty and justifies a renewal of hostilities by the injured party. The wrong-doing nation, however, cannot take advantage of his own act and claim that the treaty has been abrogated.¹

The interpretation of peace treaties does not differ from that of others. It is done by arbitrators mutually agreed upon, or by some friendly power to which the parties submit the question of dispute.²

Neutral nations may become parties to a treaty of peace, joining with the late belligerents.³

States, 6 Wall. (U. S.) 765; United States *v.* Hart, 6 Wall. (U. S.) 772; Morris' Cotton, 8 Wall. (U. S.) 507; Slidell's Land, 20 Wall. (U. S.) 92; Conrad's Lots, 20 Wall. (U. S.) 117; Miller *v.* United States, 11 Wall. (U. S.) 292; Semmes *v.* United States, 1 Otto (U. S.) 21; Osborne *v.* United States, 1 Otto (U. S.) 474; Grotius, *De Jure Gentium*, lib. 3, ch. 6; *Id.*, ch. 2, § 2; Vattel's *Droit des Gens*, liv. 2, ch. 5, 2, §§ 81, 82; Bynkershoek, lib. 1, ch. 7; Puffendorf, lib. 1, 8, ch. 6; Martens' *Law of Nations*, lib. 8, ch. 3, § 9.

1. War is terminated by the conclusion of a treaty of peace, by simple cessation of hostilities, or by the conquest of one, or of part of one, of the belligerent states, by the other.

The general effect of a treaty of peace is to replace the belligerent countries in their normal relation to each other. The state of peace is set up, and they enter at once into all the rights and are bound by all the duties which are implied in that relation. It necessarily follows that, so soon as peace is concluded, all acts must cease which are permitted only in time of war. Hall on *Int. Law*, p. 482.

2. The same thing is true of treaties of peace as of all other conventional treaties; that they are of no validity where the government exceeds its constitutional powers in making them. Besides this, there is a moral restriction, which nations have been allies in war. A treaty of alliance requires the parties to co-operate in war until a certain end is gained, nothing but an extreme necessity, such as the hopelessness of future exertion, can authorize one of the parties to make a peace with the common enemy. Even if the treaty of alliance for the purposes of war is definite, it is dishonorable for one above all for a principal party, to desert his confederates and leave them at the mercy of the foe. Allies may reserve each his own peace and obtain special concessions, but they are bound in good faith to act together, and to secure another, as far as possible, against a power which may be stronger than any of them separately. Woolsey on *Law*, § 151, citing Vattel 4, 2, §§ 117, 118.

3. The Crimean war was fought for the object, among others, of taking the destinies of the subject Christian populations of Turkey in Europe out of

20. Offences Against Nations—Piracy.—Piracy is robbery upon the seas. It is a crime against all nations—all mankind.¹ Any nation may, therefore, capture a piratical ship and bring it with the criminals on board to be disposed of by judicial order in the court of any country.² Distinction has been drawn between piracy under the law of nations and piracy under the statute of a particular nation. In this country the definition of the crime in the law of nations has been adopted. The constitution of the United States confers upon congress the power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations;" and congress has defined piracy to mean what the law of nations declares it.³ The act of congress on the subject makes no exceptions in favor of privateers. Commissioned cruisers are usually understood to be excepted, however. They would be treated as pirates in the absence of their commissions.⁴

A piratical vessel has no national character, and she may be captured by anybody, anywhere, and condemned in a court of any country.⁵

A vessel built or fitted for piratical purposes is liable to seizure and condemnation. Even though intended to be used as a privateer in a war between two nations at peace with our own, and to sail under a commission from one of them, she would be liable to condemnation for being fitted out for such purpose in this country.⁶

An attempt to commit the crime is deemed the consummation of the crime itself.⁷ The concurrent jurisdiction of all nations over piracies is not such as to authorize a trial in a court of nations

hands of Russia alone, and confiding them to European control. Among the powers who negotiated and signed the treaty of Paris, of 1856, which closed the war, were Austria and Prussia. They had not been belligerents, but they were allowed to become parties to the treaty in their quality of great powers. In the same way England, France, Germany and Austria took part in the settlement of eastern affairs made in 1878 by the treaty of Berlin, though none of them had been engaged in the previous war between Russia and Turkey. Lawrence's Essays, p 225.

1. With piracy, however, the law of nations has to do, as it is a crime, not against any particular state, but against all states and the established order of the world. Piracy is robbery on the sea, or by descent from the sea upon the coast, committed by persons not holding a commission from, or at the time pertaining to, any established state. It is the act (1) of persons who form an organization for the purposes of plun-

der, but who, inasmuch as such a body is not constituted for political purposes, cannot be said to be a body politic; (2) of persons who, having, in defiance of law, seized possession of a chartered vessel, use it for the purpose of robbery; (3) of persons taking a commission from two belligerent adversaries. The reason for ranking these latter among pirates is that the *animus furandi* is shown by acting under two repugnant authorities. Woolsey on Int. Law, § 137.

2. The *Marianna Flora*, 11 Wheat. (U. S.) 1.

3. Const., art. 1, § 8, clause 10; 1 Stat. at L., ch. 36, § 8; The *United States v. Palmer*, 3 Wheat. (U. S.) 610.

4. *United States v. Klintock*, 5 Wheat. (U. S.) 144.

5. *United States v. Pirates*, 5 Wheat. (U. S.) 184.

6. *United States Rev. Stat.*, § 4296; *United States v. Pirates*, *infra*.

7. *United States v. Brig Malek Adel*, 2 How. (U. S.) 210.

as in case of prize. Each nation may condemn a piratical vessel, in its own courts. The ship is tried, not as an enemy, but as a guilty thing. It is tried in the admiralty, but captured upon water, but tried on the instance side of court.

The pirate cannot claim any rights as an enemy, on the ground that he is defined, in international law, as the enemy of all nations. He is simply a prisoner, to be tried in a criminal court. A piratical ship is simply offending property, to be confiscated on the instance side of the admiralty, as above remarked. It is not treated as a prize; testimony *in preparatorio* is not taken, and is preserved for the inspection of any nation that may deem itself aggrieved. Under a United States statute, however, distribution to the captors is made as in case of prize.¹

21. Slave Trading.—Slave trading consists in being employed in the trade; receiving persons on shipboard at sea or in a country, to be held or sold as slaves; or taking any person on board and transporting him to any place for the purpose of selling him as a slave. Our admiralty courts have jurisdiction over prisoners accused of this crime and brought before them, and the offence may have been committed in a foreign country, for the reason that the offence is against international law, and against all mankind, and may be punished by any nation. The jurisdiction may be condemned, and his vessel confiscated, anywhere, for the jurisdiction of all nations is concurrent. All the great powers have recognized this jurisdiction. Eight nations united in the treaty of Paris to suppress the slave trade. Its suppression was declared to be authorized by public law in the congress of Aix la Chapelle a year later (1815), and three years after this was reaffirmed by the congress of Aix la Chapelle, and four years later (1819) by the congress of Verona, and it is now generally held by all civilized nations. In 1845 the British parliament held that the courts of Admiralty had jurisdiction over Brazilian slaves.

Slave trading is deemed piracy, and has been declared so by all international conventions. The older publicists were divided as to whether slavery could exist consistently with the law of nations; but it has long been well established that slave trading is a crime against international law.

Slavers are tried on the instance side of admiralty courts, precisely as pirate ships are tried. It is not as a court of prize that the admiralty adjudicates upon slavers. Distribution is made as in case of prize, in this country, because it is so prescribed by statute in cases where the capture is by the United States. When slave trading vessels are not thus captured, but seized by civil persons, private or official, that rule of distribution is not applied.

Slave traders themselves are tried like other criminals.

1. The Palmyra, 10 Wheat. (U. S.) 1.

circuit courts of the United States, which have no original prize jurisdiction.

The United States statutes against slave trading are in accord with international law. There may be said to be six offences imputed to vessels for which they may be condemned under our slave trade laws.¹ 1. Receiving persons at sea or in a foreign country, to be sold or held as slaves. 2. Receiving anywhere and transporting a person to be sold as a slave, if done by a citizen of the United States.² 3. Hovering on our coasts or our inland waters with a person on board to be landed for sale as a slave.³ 4. Sailing from the United States to engage in the trade.⁴ 5. Being built, fitted, prepared, or laden within the United States for the purpose.⁵ 6. Any part of a slave trading vessel owned by a citizen or resident of this country is forfeitable if his interest is held for the unlawful purpose of slave trading.⁶

Wherever the word "person" occurs in the statute it is qualified by the word "colored," so that word should be supplied wherever it occurs in the foregoing paragraph. But international law makes no distinction among races with reference to the crime of slave trading. Negroes are more frequently mentioned than other persons in treaties to suppress the trade, because they mainly have been the victims of the traffic.

A vessel was condemned for this offence though she had not taken persons on board to be transported and sold as slaves.⁷ Transportation completes the crime without sale.⁸ A ship was forfeited for transporting two slaves shipped with the knowledge of the captain,⁹ by the supercargo.

A vessel may be condemned as a slave trader when she has been prepared for the illicit traffic, before she has engaged in it. And intent to engage in the trade may be inferred from circumstances.¹⁰

1. Rev. Stat., § 5553.

2. Rev. Stat., § 5554.

3. Rev. Stat., § 5555.

4. Rev. Stat., § 5551.

5. Rev. Stat., § 5551.

6. Rev. Stat., § 5556.

7. *The Alexander*, 3 Mason (U. S.)

175.

8. *The Catharine*, 2 Paine (U. S.)

721.

9. *United States v. Smith*, 4 Day (Ct.) 121; *The Porpoise* (U. S.), 2 Curtis (U. S.) 307.

10. *The Wanderer*, 1 Sprague (U. S.) 515; *The Slaver Reindeer*, 2 Wall. (U. S.) 383; *The Emily and Caroline*, 9 Wheat. (U. S.) 381; *The Plattsburgh*, 10 Wheat. (U. S.) 133; *The Slaver Kate*, 2 Wall. (U. S.) 350; *The Slaver Sarah*, 2 Wall. (U. S.) 366; *The Slaver Weathergage*, 2 Wall. (U. S.) 375; *The Slaver Reindeer*, 2 Wall. (U. S.) 383.

See further, *The Bark Isla de Cuba*, 2 Cliff. (U. S.) 205; *The Isla de Cuba*, 2 Sprague (U. S.) 26; *The Schooner Anne and Cargo*, Taney (U. S.) 413; *The Brig Caroline*, 7 Cranch (U. S.) 496; *The Antelope*, 10 Wheat. (U. S.) 66.

Authorities.—Vattel's *Law of Nations*, 7th Am. ed.; Grotius' *De Jur. Bel. ac Pac.*; Bynkershoek's *Quaest. Jur. Pub.*; Burlamaqui's *Droits de la Nat. et des Gens*; Wolfius' *Jus Gentium*; Puffendorff's *De Jur. Nat. et Gent.*; Hautefeuille's *Des Nations Neutres*; Marten's *Droit des Gens*; Manning's *Law of Nations*; Bowyer's *Public Law*; Wheaton's *Elements of International Law* (8th ed. by Dana); Wheaton, with Lawrence's *Notes*; Boyd & Wheaton's *Int. Law*; Wildman's *Int. Law*; Leiber's *Political Ethics*; Phillimore's *Int. Law*; Sprague's *Int. Law*;

INTERPLEADER—(See EQUITY; EXECUTION; JOINDER)

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1. Definition.—Interpleader is a mode of compelling more persons, who severally claim the same thing, debt from the party liable therefor, to litigate the title thereto themselves, the party liable having incurred no indebtedness to any of the claimants, and being merely in the position of a stakeholder, without interest in the matter himself.¹

2. Jurisdiction.—This remedy was employed to a limited extent at common law,² but much more freely in equity.³ In

Polson's Law of Nations; Heffter's Int. Law; Ward's Law of Nations; Twiss's Law of Nations; Woolsey's Int. Law (5th ed.); Bar's Int. Law; Duer on Marine Insurance; Kent's Commentaries (13th ed.); Story's Conflict of Laws (8th ed., Biglow); Wharton's Conflict of Laws (2nd ed.); Halleck's Elements of Military Art and Science; Halleck's Int. Law; Hall's Int. Law; Gardner's Inst. Int. Law; Lawrence's Essays (2nd ed.); Field's Int. Code (2nd ed.); Pomeroy's Lect. on Int. Law; Upton's Mar. Warfare and Prize (2nd ed.); Waples on Proceedings in Rem, bk. 4, Things Hostile.

1. The effect of an interpleader may sometimes be attained by other means; *e. g.*, where executions had issued against the defendants, and counter claims were made by a third party, and the defendants, to avoid a sale, paid the money to the sheriff with notice not to pay it over, the plaintiffs ordered the money into court and ruled the claimant to show cause why they should not receive it. It was held that the court, being legally in possession of the fund, was bound to decide its ownership as on an interpleader. *Pennypacker's App.*, 57 Pa. St. 114.

Interpleader should not be confused with the intervention of third parties in a suit, of their own motion, to protect their own interests. See *infra*, n. 7, and JOINDER.

2. Use at Common Law.—Its chief use was in the action of detinue, as where a chattel had come into a man's possession by accident, or where two parties concurred in the bailment of a deed, but brought several actions therefor; or where the deed was claimed by the heir

who was entitled to the land by the bailor. Where debt was brought by one of the parties depositary was entitled to sue by the process called *ga. sol.* whereby he could give notice to the other depositor, in such a case, the garnishee, a third party, to appear and be substituted for the defendant. The interpleader was used where two writs of *quod damus* were brought for the same land; or where two writs of *ward* were brought for the same wardship; or where two writs of *office* in different parts of the same office had each been issued to be heir of a tenant to the use of the same. *Reeves's Hist. Eng. Law* (2nd ed.), Br. Abr., tit. Enterpleader.

In *Pennsylvania*, the absence of a court of chancery led in early times to the use of interpleaders in common law actions, a third party being brought in by rule or *sci. fa.*, on the suggestion of the defendant, to become a party to the suit; or on suggestion he could be brought in voluntarily, without order of court. *Heller v. Jones*, 4 Binn. (Pa.) 100; *v. Roberts*, 4 Raw. (Pa.) 100; *v. Clingen*, 9 Pa. St. 49, 51; *Church*, 65 Pa. St. 9.

3. Use in Equity.—It is the chief use of the interpleader. *CHIEF BARON GILBERT* (F. C. ch. 4, p. 47) to be the same as *tertius interveniens* of the Roman law, "which in both laws is where a person comes to remove either the plaintiff or defendant; as if a man as a third party brings his bill against the mortgagee to redeem, and another person, claiming a right to redeem, prefers his bill, both to remove the first plaintiff and to redeem from the defendant."

times, it has been made available in England¹ and the United States² in any form of action where the circumstances call for

mortgagor brings his bill against the mortgagee to redeem, an alienee of the mortgagee may bring his bill, both to remove the defendant and to receive the money on the redemption."

The use of bills of interpleader was extended to all cases where the same thing, debt or duty was the subject of more than one claim. Mitford's Equity (5th ed.) 141; Cranshaw v. Thornton, 2 M. etc. 1, 21; Burton v. Black, 32 Ga. 53.

The equity originates in the double claim made on the defendant and the inadequate protection afforded him at law. Oil Run etc. Co. v. Gale, 6 W. Va. 525. The fact, therefore, that both the claims are legal does not preclude the party from resorting to equity. Lowndes v. Cornford, 18 Ves. 299.

Nor that one is legal and the other equitable. Duncey v. Angore, 2 Ves. Jr. 312; Lanston v. Horton, 3 Beav. 464; Slavey v. Sidney, 18 M. & W. 801; Burton v. Black, 32 Ga. 53; Whitney v. Cowan, 55 Miss. 626; Lorzier v. Ackerman, 2 N. J. Eq. 325; Yates v. Tisdale, 3 Edw. (N. Y.) 71.

The extensive statutory use of interpleader in actions at law has in modern times greatly diminished the necessity for bills of interpleader. (See Adams' Equity, 7th Am. ed., *203.) Except where no action has yet been brought, but one is merely threatened. Chamberlain v. O'Connor, 1 E. D. Sm. (N. Y.) 665; s. c., 8 How. (N. Y.) 45; Beck v. Stephani, 9 How. (N. Y.) 193; Paterson v. Perry, 14 How. (N. Y.) 505.

In *Pennsylvania*, the remedy in equity is *held* peculiarly applicable to cases where there are several independent claimants. Penn Mut. Ins. Co. v. Watson, 2 Weekly Notes (Pa.) 485; Wilbraham v. Horrocks, 8 Weekly Notes (Pa.) 485.

And in general where the statutory remedy might be substituted for that by a bill of interpleader (or a code action in the nature thereof), the two are regarded as concurrent. Bd. of Educ. v. Scoville, 13 Kan. 17.

1. Statutory Interpleader in England.

—By St. 3 & 4 Will. 4, ch. 58, § 1, a defendant in assumpsit, debt, detinue or trover could apply for an interpleader. By St. 23 & 24 Vict., ch. 126, § 12, this privilege was extended to defendants in other forms of action also, though if the

stakeholder had not been sued, his only remedy lay in equity. Parker v. Linnett, 4 Dow. 562. It was at first *held* that an equitable claim was not the subject of an interpleader summons. Hurst v. Sheldon, 13 C. B., N. S. 750. But the practice was afterwards settled the other way. Rusden v. Pope, L. R., 3 Ex. 267; Bk. of Ireland v. Perry, L. R., 7 Ex. 14; Duncan v. Cashin, L. R., 10 C. P. 554; Engelbach v. Nixon, L. R., 10 C. P. 645. By rule 2 of order 1 of the rules of the supreme court of 1875, the practice under the above acts was made applicable to all actions and in all divisions of the high court of justice. It is now governed by order 57 of the rules of 1883, and by 22 & 23 Vict., ch. 126, § 17, being substantially the same as before, except that the same form of remedy is used whether suit has been brought or not.

2. In *America*.—The statutory interpleader is practically the same whether adapted to a common law system of pleading or enacted as part of a code of practice. In states which retain a separate system of procedure in equity, a bill of interpleader must be filed where the stakeholder has not yet been sued.

In *Alabama*, the statutory interpleader is applicable to cases where the defendant in an action could have filed a bill of interpleader in equity. Johnson v. Maxey, 43 Ala. 54.

In *Pennsylvania*, the act of 11th March, 1836, § 4 (P. L.), 77; 2 Pur. Dig. 1360, pl. 37, provides that the defendant, in any action for the recovery of money, or of any goods, chattels, or the value thereof in damages, which "shall have lawfully come into his hands or possession," may, before plea, disclaim all interest in the subject matter of the action, offer to bring the same into court, and suggest, by affidavit, that the right thereto is claimed by a third person, and the court may thereupon order an interpleader.

It has been *held* of the almost identical local act of 27th March, 1848 (P. L.), 265, that the words "shall have lawfully come," etc., refer only to goods and chattels and not to money. Bechtel v. Sheaffer, 21 Weekly Notes (Pa.) 65; s. c., 11 Atl. Rep. 889.

An attachment execution was at one time *held* not to be an action within the

its application, even to try the title to goods levied upon sheriff.¹

3. Parties.—Anyone threatened with separate liability claims which are substantially one and the same, can have interpleader;² and as the remedy exists exclusively for the

meaning of the act. *Snyder v. Wetherly*, 1 Phila. (Pa.) 325. But the contrary view is now taken. *Pratt v. Kratz*, 2 Weekly Notes (Pa.) 521; *Wasserman v. Bank*, 3 Weekly Notes (Pa.) 475.

Trover is an action within the act, if the defendant came by the goods lawfully, and if he offer to bring them into court or dispose of them as the court shall order. *Tierman v. Stille* (Pa.), 1 Tr. & H. Prac., § 493.

By the *New York* code, § 820, "A defendant against whom an action to recover upon a contract, or an action of ejectment, or an action to recover a chattel, is pending, may, at any time before answer, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering possession of the property, or its value, to such person as the court directs. The court may, in its discretion, make such an order."

This provision of the code is, as to actions already begun, a substitute for the old action of interpleader, and is governed by the same principles. It appeals to the equitable discretion of the court, and the application should not be granted where the third party's claim appears, on the face of the papers, to be frivolous and invalid. *Pusket v. Flannelly*, 60 How. (N. Y.) 67.

Where no action is pending, resort must be had to an action in the nature of a bill of interpleader. *Beck v. Stephani*, 9 How. (N. Y.) 193.

1. Sheriff's Interpleader.—In *England*, this was provided for by Stat. 3 and 4, Will. 4, ch. 58, § 6. It is now regulated by rules 2 and 3 of order 57 of the rules of 1883. Application may now be made when "claim is made to any goods or chattels taken or intended to be taken in execution under any process or to the proceeds or value of any such goods or chattels by any person

other than the person against whom the process issued."

This practice has been adopted in one form or another, through the United States.

In *Pennsylvania*, for instance, act of April 10th, 1849, § 9 (P. Pur. Dig. 750, pl. 56, closely follows the English act, so that an interpleader may be asked for before actual judgment. *Phillips v. Reagan*, 75 Pa. St. 381. *Day v. Carr*, 7 Exch. 883. A plaintiff in the execution (that is, the claimant) may perhaps insist on his own security, on an actual inventory. *Phillips v. Reagan*, Pa. St. 381.

The sheriff is entitled to interpleader though he has levied on the property. He is not bound to discharge his own responsibility, whether the property is real or personal. *McWilliams*, 2 Weekly Notes 353.

The act does not apply to different plaintiffs requiring the sheriff to levy on the same goods or chattels against different defendants. *Tr. & Ha. Prac.*, § 1136.

Nor to the case of property under distinct executions against the same defendant, in which case the sheriff is entitled, apart from the act, to compel the judgment debtors to plead and settle their respective claims. *Lawson v. Jordan*, 297.

Nor where the sheriff levies on the property of a third person, as where he levies on the real estate of a tenant. *Maurer v. Sheaffer*, Pa. St. 339.

In *North Carolina*, such interpleader cannot be granted before sale. *White*, 65 N. Car. 225.

By the *New York* code, §§ 820 and 821, the sheriff does not apply for interpleader, but may, in his discretion, empanel a jury to try the validity of the claim.

2. Instances.—Where different persons claimed, some by special assignment, others under an assignment, due on an insurance policy issued by their debtor, since insolvent, the insurance company filed a bill of interpleader.

tection of a person so situated, he alone can apply for the interpleader, whether at law or in equity.¹ Only those who have a

to determine the rights of the respective parties. *Spring v. S. Car. Ins. Co.*, 8 Wheat. (U. S.) 268.

Where a person sues for money deposited in a bank by him as agent for the trustees of a corporation, and other parties claim to be the trustees, the plaintiff may be required to interplead with them. *Ware v. Western Bk. (Pa.)*, 1 Trou. & Ha. Prac., § 496.

Where a dividend due on certain shares of stock, originally held in trust, fraudulently transferred by the trustee, and through *mesne* transfers to a third party, is claimed both by such party and the *cestui que trust*, the corporation can have a bill of interpleader to determine who is entitled to the dividend, but not whether the corporation is liable for permitting the transfer. *Mills v. Townshend*, 109 Mass. 115.

An interpleader will be decreed for the relief of a judgment debtor who has been summoned as garnishee of the debt under an attachment execution against the creditor. *Webster v. McDaniel*, 2 Del. Ch. 297.

Pending an action by a husband and wife against the maker of a note payable to the wife, the money due was attached in the maker's hands by the husband's creditors, claiming that the note was fraudulently made payable to the wife, and the maker was allowed a bill of interpleader. *Fahie v. Lindsay*, 8 Oreg. 474.

Where an attorney holds money of his client, claimed by two creditors and disclaimed by the client, an interpleader lies. *Flammis v. L'Engle*, 19 Fla. 800.

The attorney for several creditors obtained from the debtor an assignment of insurance policies then payable to him, and agreed in writing to pay the claims represented by him, and to pay over the residue to the attorneys of certain other creditors. Before this was done he was garnished by still other creditors, whose claims were not recognized by the attorneys to whom he was to pay. Whereupon he was allowed an interpleader against them and the other creditors. *Moore v. Barnheisel*, 45 Mich. 500.

Where a county treasurer had issued a large number of notes, but only those issued within the limits of his authority were valid, and the county supervisors

admitted their liability on the valid notes, their bill against the holders of the notes was *held* a bill of interpleader. *Saratoga Co. Sup. v. Seabury*, 11 Abb. N. C. (N. Y.) 461. See also *Mitchell v. Hayne*, 1 Sim. & St. 63; *Hastings v. Cropper*, 3 Del. Ch. 165; *Perkins v. Trippe*, 40 Ga. 225; *Bd. of Educ. v. Scoville*, 13 Kan. 17; *School Dist. v. Weston*, 31 Mich. 86; *Rohrer v. Turrill*, 4 Minn. 407; *Hyman v. Cameron*, 46 Miss. 725; *O. W. Ditch Co. v. Larcombe*, 14 Nev. 53; *Leddell v. Starr*, 20 N. J. Eq. 274; *Atkinson v. Mauks*, 1 Cow. (N. Y.) 691; *Bedell v. Hoffman*, 2 Pal. (N. Y.) 199; *Cady v. Porter*, 55 Barb. (N. Y.) 463; *B. & O. R. Co. v. Arthur*, 10 Abb. N. C. (N. Y.) 147.

1. In a few States, the rule given in the text is not followed. The *North Carolina* code, § 189, provides that the court may by interpleader determine any controversy, where it can be done without injury to the rights of other parties. Under this, it has been *held* that in a supplemental proceeding to subject a fund to the payment of a judgment, a new claimant may, of his own motion, come in and interplead. *Munds v. Cassidey*, 98 N. Car. 558.

In *New Hampshire*, it is *held* that where a debtor could file a bill of interpleader to determine the conflicting claims of creditors, one of the latter can file it in his own behalf. *Webster v. Hall*, 60 N. H. 7.

But as a general rule, the intervention of third parties is a practice wholly distinct from interpleader. See JOINER.

In *Pennsylvania*, a claimant cannot intervene under the interpleader act, if the defendant or garnishee has not asked for an interpleader. *Allison v. Elbertson*, 1 Weekly Notes (Pa.) 388.

In *Michigan*, where a bill of interpleader was filed against two persons, one of whom disclaimed all right to the fund, a stranger sought to be admitted, on petition, to contest the interest of the remaining defendant. It was *held* that there was no practice which would allow him to get into the cause by petition; that the bill could not be amended so as to reach him, because it was filed to guard against known, not unknown, claims. *M. & O. Plaster Co. v. White*, 44 Mich. 25.

claim upon him, and whose claims conflict, can be made defendants,¹

1. *Varrian v. Berrien*, 42 N. J. Eq. 1. Where the money due on a mortgage was claimed by an alleged agent under a power of attorney from the owner of the mortgage, and the owner's daughter declared that her mother was of unsound mind when she executed the power, and the mortgagor filed a bill of interpleader against the alleged agent and the daughter, it was held that the owner and her daughter were the proper parties, for if the alleged agency was inoperative for the cause stated, the alleged agent was a stranger to the complainant. *Blake v. Garwood*, 42 N. J. Eq. 276.

It must be certain that the parties sought to be made defendants are *in rerum natura*. *Metcalf v. Hervey*, 1 Ves. 248.

In *England*, an interpleader will not be granted where the crown is a party to the proceedings. *Candy v. Mangham*, 1 D. & L. 745.

The plaintiff must admit a title as against himself in all the defendants. Hence, where he is confessedly a wrongdoer as against some of them, or where the matter to be determined involves the question of whether or not he is a wrongdoer, he cannot maintain an interpleader. *Tyus v. Rust*, 37 Ga. 574; *Mt. Holly etc. Tpke. Co. v. Ferree*, 17 N. J. Eq. 117; *United States v. Vietor*, 16 Abb. (N. Y.) 153; *Quinn v. Green*, 1 Ired. Eq. (N. Car.) 229.

Where A, a bailee, agreed to sell the goods for C, a third party, on a written order from B, the bailor, and did so, retaining the proceeds for a debt owed him by C, but B had revoked the order verbally before the sale, though he did not do so in writing till afterwards, an interpleader was refused, for if C's title were good at the time of the sale, B had no claim against A, while if A sold the goods wrongfully for C's account, the court could not aid him. *Hatfield v. McWhorter*, 40 Ga. 269.

Agents, Tenants, etc.—An agent or attorney, sued by his principal, cannot compel him to interplead with a third party, nor can a tenant compel his landlord to interplead with a stranger. The title of a principal or landlord cannot be controverted in this way. It would be exceedingly vexatious and unjust to allow a tenant to put his landlord on the same footing as a stranger.

Nickolson v. Knowles, 5 Mad. 47; *Cook v. Rosslyn*, 1 Giff. 167; *Crane v. Burntrager*, 1 Cart. (Ind.) 165; *W. V. Can. Co. v. Comegys*, 2 Cart. (Ind.) 469; *Snodgrass v. Butler*, 54 Miss. 45; *Dodd v. Bellows*, 29 N. J. Eq. 127; *Marvin v. Elwood*, 11 Pai. (N. Y.) 365; *Delaney v. Murphy*, 31 Supr. Ct. (N. Y.) 503.

If, however, after the tenancy or agency is created, the landlord or principal transfers his interest to, or creates an interest in, some other person, a claim by such person may give rise to an interpleader. *Dungey v. Angove*, 2 Ves. Jr. 303; *Cowtan v. Williams*, 9 Ves. 107; *Shulter v. Harvey*, 65 Cal. 158.

Hence an attorney who has collected money may have an interpleader in respect of the same against defendants who set up a derivative claim from the person for whom it was collected. *Gibson v. Goldthwaite*, 7 Ala. 286.

Or if rent is claimed by both the devisee and the heir of the lessor, the tenant can have an interpleader. *Badeau v. Tyler*, 1 Sand. (N. Y.) 270.

A sub-tenant, moreover, can maintain interpleader in case rent is demanded by both the original lessor and the original lessee. *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515. See also *Adams v. Beach*, 1 (Phila.) Pa. 99.

An executor or administrator is bound to protect the legatees and distributees; hence he cannot have an interpleader against a legatee and one claiming by a title paramount to the testator's. *Adams v. Dixon*, 19 Ga. 513. Or against the creditors and distributees of an intestate, and an adverse claimant of the assets of the estate. *Blue v. Watson*, 59 Miss. 619.

But he may have an interpleader against legatees whose claims conflict. *Crosby v. Mason*, 32 Conn. 482. See also *Osborne v. Taylor*, 12 Gratt. (Va.) 17. Or where the description of a legatee in a will is in some respects applicable to different persons, each of whom claims the legacy. *Morse v. Stearns*, 131 Mass. 389.

A bailee sued by his bailor cannot compel the latter to interplead with a stranger. *First Nat. Bk. v. Binninger*, 26 N. J. Eq. 345.

Nor a debtor his creditor and a third

and all such should be made so¹.

4. Circumstances.—The party seeking the interpleader must be in danger of having to discharge his liability at least twice over.² All the parties against whom he seeks relief must claim of him

party claiming by title paramount, adversely to the creditor, such third party having no privity with the debtor. *Bost. Bk. v. S. W. & B. Lumb. Co.*, 132 Mass. 410.

An insurance company cannot compel an assignee for value of the policy to interplead with a subsequent assignee for creditors and the insolvent assignor, who wrongfully refuse to consent to the payment of the sum insured to the first assignee. His title is superior to theirs. *Desborough v. Harris*, 3 De G. M. & G. 439, overruling *Fenn v. Edmonds*, 5 Hare 314.

1. The attachability of a note payable outside the jurisdiction of the court issuing the writ is an open question in some States. Hence, in such States, if the maker of a note is garnished, he can have an interpleader against the attaching creditor and an assignee with notice of the attachment. *Fitch v. Brower*, 42 N. J. Eq. 300.

Foreigner Outside the Jurisdiction.—It was formerly held in England that there could be no interpleader if one of the claimants were a foreigner residing outside the jurisdiction of the court. *Patorni v. Campbell*, 12 M. & W. 277; *Lindsey v. Barrow*, 6 C. B. 291. Now, this is no ground for rejecting the application, though it may be a reason for making such claimant give security for costs or barring him altogether. *Attenborough v. St. Kath. Docks*, L. R., 3 C. P. D. 450; *Belmonte v. Aynard*, L. R., 4 C. P. D. 221; *Credit Gerundense v. Van Weede*, L. R., 12 Q. B. D. 171.

2. The plaintiff need not actually have been sued by both parties, nor, in fact, by either. *Strange v. Bell*, 11 Ga. 103; *Newhall v. Kastens*, 70 Ill. 156; *Richards v. Salter*, 6 John. Ch. (N. Y.) 447.

The criterion is simply whether there be the slightest doubt or risk arising from conflicting claims. The fact that a stakeholder might by great attention and caution make himself secure does not disqualify him from filing a bill of interpleader. *Nelson v. Barker*, 2 H. & M. 334.

There must, however, be some risk. Hence one who can by ordinary diligence inform himself, to which of the claim-

ants payment should be made, or in any way avoid the double claim, cannot maintain interpleader. *Sulzbacker v. S. & L. Bk.*, 52 N. Y. Super. Ct. 269; *McDonald v. Allen*, 37 Wis. 108.

Nor can one who denies that the defendants have any valid, legal or equitable claim against him compel them to interplead. *Hellman v. Schneider*, 75 Ill. 422.

Illegal claims are not the subject of an interpleader; *e.g.*, it will not be granted in favor of the holder of stakes on an illegal race. *Applegarth v. Colley*, 2 Dow. (N. S.) 223.

If the claim has already been paid to one party, a demand by another party is no ground for an interpleader. *Tiernan v. Rescaniere*, 10 G. & J. (Md.) 217; *Am. Tel. Co. v. Day*, 52 N. Y. Super. Ct. 128; *Phila. S. F. Soc. v. Clarke*, 15 Phila. (Pa.) 289.

So if judgment has been recovered on the claim. *Cornish v. Tanner*, 1 G. & J. 333; *Un. Bk. v. Kerr*, 2 Md. Ch. 460; *McKinney v. Kuhn*, 59 Miss. 186; *Cheever v. Hodgson*, 9 Mo. App. 565; *French v. Robschard*, 50 Vt. 43.

But if the suit be allowed to go to verdict merely to ascertain the amount recoverable, that is no bar to an interpleader. *Hamilton v. Marks*, 5 De G. & Sm. 638.

Nor is a judgment a bar, if it be appealed from. *Griggs v. Thompson*, 1 Geo. Dec. 146.

It is immaterial that one claim is legal and the other equitable. *Newhall v. Kastens*, 70 Ill. 156.

Interpleader Not Allowed for Other Purposes.—A filed a bill of interpleader, alleging his indebtedness to B for certain goods, and that two parties claimed the money. On decree, he paid the money into court. He afterwards filed a supplemental bill stating that it had been decided in an action at law that the goods belonged to C, and praying that C be made a party defendant. It was held that as A had no right to an interpleader unless he were indebted to B he could not use the proceeding to determine whether he owed B anything or not, and the supplemental bill was dismissed. *Wolf's App.* (Pa.), 7 Atl. Rep. 163.

the same thing, debt or duty,¹

1. *Turner v. Kendall*, 3 M. & W. 171; s. c., 2 D. & L. 197; *Hayes v. Johnson*, 4 Ala. 267; *Adams v. Dixon*, 19 Ga. 513; *Burton v. Black*, 32 Ga. 53; *Rohrer v. Turrill*, 4 Minn. 407; *Yarborough v. Thompson*, 11 Miss. 291; *Cannon v. Kinney*, 1 Sm. & M. Ch. (Miss.) 525; *Tpke. Co. v. Ferree*, 17 N. J. Eq. 117; *Atkinson v. Manks*, 1 Cow. (N. Y.) 691; *Badeau v. Rogers*, 2 Pai. (N. Y.) 209; *Aymer v. Gault*, 2 Pai. (N. Y.) 284; *Yates v. Tisdale*, 3 Edw. (N. Y.) 71; *Prov. Bk. v. Wilkinson*, 4 R. I. 507.

When the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; for no dispute can arise as to identity of matter. But where the subject in dispute is a *chose in action*, which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made by the defendants are of different amounts, they never can be identical." Equality in amount is *prima facie* evidence of identity, but it is far from conclusive. *Glyn v. Duesbury*, 11 Sim. 139.

Instances of Different Subject Matter.—Where an auctioneer was sued for breach of warranty of a horse sold by him, and the original owner claimed the purchase money from him, interpleader was not allowed. *Wright v. Freeman*, 48 L. J., C. P. 276.

So, where an auctioneer, by direction of the owner, had sold to two persons successively, receiving a deposit from each, he was not allowed a bill of interpleader against the owner and the two purchasers; because, though there was one question in common between the purchasers, viz., which was to be the purchaser of the estate, their claims against the auctioneer were for two different things, viz.: by each for his own deposit. The bill was, therefore, dismissed as against the second purchaser, with costs, and it was decreed that the seller and the second purchaser should interplead as to the first deposit. *Hogart v. Cutts*, Cr. & Ph. 197.

It has even been *held*, where a purchaser of tea was sued by the seller for the price, and was also sued in trover, by one alleging himself to be the real owner, not to be a case for interpleader, for one party was seeking to recover the price of the goods, the other, damages for their conversion. *Slaney v.*

Sidney, 14 M. & W. 800. Enactment of rule 3 of the rules of 1883 this case would now be followed, the criterion being substantial identity of the subject, not the form of action.

The purchaser of mortgage for part cash and part to maintain interpleader against different persons, one holding gage note and the other purchase money note, the note not being for the same debt. *Son v. Seavey*, 74 Ala. 243.

Interpleader will not lie against parties demanding repayment of taxes paid under protest, or holding municipal orders for amounts paid. *Wallace v. Mich.* 159.

Where a company issued certificates of stock on a forged attorney, and the owner of the forged certificates brought suit, the company could not maintain interpleader against the owners of the certificates; the claims of the owners to be recognized as stockholders being identical. *Am. Tel. & C. Co. v. N. Y. Super. Ct.* 128.

Claims Not Necessarily Coextensive.—In *Attenborough v. Docks*, L. R., 3 C. P. D., it was *held* in the common pleas that the remedy of the plaintiff claimant must be coextensive with the remedy against the defendant to admit of an interpleader. The remedy was reversed in the court of error (same vol., 450); *BRETT, L.* "I do not think that the statement merely where the opposing claims are coextensive; I think that the wider construction." Of such a case, "in whatever case ultimately be made, care will be taken to preserve any claims for which the plaintiffs fancy themselves entitled to." Per *BRAMWELL, J.*

Interpleader as to Part of Claim.—Another application of the modern doctrine allows a defendant an interpleader as to part of his claim, while he defends as to the rest. *Reading v. School Board*, Q. B. D. 686. The English courts formerly the other way. *Hayne*, 2 Sim. & St. 63; *Campbell*, 12 M. & W. 277; *Sidney*, 14 M. & W. 800.

adversely to each other,¹ and he must be ignorant or in doubt as to the validity of their respective titles.² He must not have acknowledged the title of either claimant,³ and must claim no interest in the matter himself,⁴

American rule seems to remain so still. *Nelson v. Goree*, 34 Ala. 565; *Chamberlain v. O'Connor*, 8 How. (N. Y.) 45; *Bird v. Neff* (Pa.), 1 Tr. & Ha. Prac. § 497.

1. **Separate Liability to Both Claimants.**—An interpleader will not be granted where the claims, though arising from the same subject matter, are not necessarily adverse, but might both be valid, as where the defendant had sent the plaintiff a blank acceptance in payment of a debt, and the latter never received it, and it came into the claimant's hands in the form of a bill properly endorsed, taken *bona fide* for value. *Farr v. Wood*, 2 M. & W. 844.

So, where a life insurance company had issued a policy on the life of A, payable to B, but allowed A without B's consent, to surrender the policy and take a new one payable to C, after A's death the company could not make B and C interplead, the question of its liability to both being involved. *Nat. L. I. Co. v. Pingrey*, 141 Mass. 411. To the same effect, *Cochrane v. O'Brien*, 2 Jo. & Lat. 380; *Randall v. Lithgow*, L. R., 12 Q. B. D. 525.

2. *La. St. Lot. Co v. Clark*, 16 Fed. R. 20; *Pfister v. Wade*, 56 Cal. 43; *Strange v. Bell*, 11 Ga. 103; *Dreyer v. Ranch*, 42 How. (N. Y.) 22; s. c., 10 Abb. N. S. (N. Y.) 243; 4 Da. (N. Y.) 434; *Bell v. Hunt*, 3 Barb. (N. Y.) 391.

3. The most familiar illustrations of this rule are found in the cases of tenants, agents, bailees, etc., which have been noticed, *ante*, p. 498, n. 1.

The rule was formerly given a much wider application than is now the case in *England*, and was usually expressed thus: "The party seeking relief must have incurred no independent liability to either claimant. *Adams' Eq. *204*; *Bispham's Eq.*, § 421. It was laid down by LORD CHANCELLOR COTTENHAM, in *Crawshay v. Thornton*, 2 My. & Cr. 1, "that where the party seeking to interplead had entered into any contract with or lay under personal obligation towards either claimant, he would not be allowed to do so. This doctrine was followed in the common law courts (see *James v. Pritchard*, 7 M. & W. 216; *Patoni v. Campbell*, 12 M. & W. 277; *Lindsey v. Barrow*, 6 C. B. 291; *Hor-*

ton v. Earl of Devon, 4 Ex. 497; *Turner v. Mayor*, 13 M. & W. 171) with but very few exceptions (*Johnson v. Shaw*, 4 M. & G. 916; *Crellin v. Leland*, 6 Jur. 733) until 1860, when the Common Law Procedure act, § 12, provided that interpleader might be granted, "although the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of each other." This provision (re-enacted in rule 3 of order 57 of the rules of 1883) "was intended to do away with the effect of." *Crawshay v. Thornton*, which is now no longer law in any court in England. See remarks of BLACKBURN, J., in *Meynell v. Angell*, 32 L. J., Q. B. 14; and of BRAMWELL, L. J., in *Attenborough v. St. Kath. Docks Co.*, L. R., 3 C. P. D. 450.

Hence where a defendant was sued for work done by the plaintiff, with whom he had contracted, and a third party claimed that the plaintiff was his agent in contracting and doing the work, an interpleader was granted. *Meynell v. Angell*, 32 L. J., C. B. 14.

And where the defendants were sued for the detention of wine for which they had given dock warrants, endorsed for value by the plaintiff, and the wine was claimed by a third party. *Attenborough v. St. Kath. Docks Co.*, L. R., 3 C. P. D. 450. To the same effect *Best v. Hayes*, 1 H. & C. 718; *Evans v. Wright*, 13 W. R. 468; *Tanner v. European Bk.*, L. R. 1 Ex. 261.

In *America*, the doctrine of *Crawshay v. Thornton* seems to be still regarded as law. *Bechtel v. Sheaffer*, 21 Weekly Notes (Pa.) 65. It was, however, *held* in that case that where a contract relation existed between the stakeholder and one of the claimants, by the terms of which the former was bound to pay money to the latter, this fact alone would not necessarily deprive the former of his right to an interpleader.

4. *Killian v. Ebbinghaus*, 110 U. S. 568; *Long v. Barker*, 85 Ill. 431; *Snodgrass v. Butler*, 54 Miss. 45; *Anderson v. Wilkinson*, 10 Sm. & M. (Miss.) 601; *Dohnest's App.*, 64 Pa. 311.

Hence there can be no interpleader

except for charges and costs.¹

5. Practice—1. Generally.—An interpleader is applied for by bill if in equity; by motion if at common law; or by such other form of application as may have been authorized by law. Application should be made before or immediately after the applicant has been sued, without waiting until there is a verdict and judgment against him.² It must state the applicant's rights,³ and the claims against him which constitute the reason for the interpleader.⁴ It must allege his ignorance as to the validity of these claims, or at least that he is in such doubt that he cannot

at the instance of a party who admits a liability for the principal sum demanded only, but not for the interest. *Bridenburg Mfg. Co. App.*, 106 Pa. St. 275.

An insurance company had cancelled certain policies at the request of the insured, and issued them anew to other beneficiaries, claims being presented upon both new and old policies. It was held to have such an interest in the defeat of one of the claimants as to incapacitate it from maintaining interpleader. *Conley v. Ala. G. C. I. Co.*, 67 Ala. 472.

It is no objection that the plaintiff in the interpleader has an interest in the success of one of the parties, as; *e. g.*, where it would increase his own chance of success in a suit which might be brought in regard to other property. This is only an interest in the question, not in the particular suit. *Gibson v. Goldthwaite*, 7 Ala. 281; *Oppenheim v. Wolf*, 3 Sand. Ch. (N. Y.) 371; *McHenry v. Hazard*, 45 Barb. (N. Y.) 657.

It necessarily follows from this requirement of absence of interest that a definite claim must be admitted to be due. The court cannot be called upon to settle by interpleader the amount of the claim. *B. & O. R. Co. v. Arthur*, 90 N. Y. 234.

In *Connecticut*, this has been allowed, however, no demurrer having been taken. *Cons. Pres. Soc. v. Staples*, 23 Conn. 544.

And in any case, if the parties can agree on an amount, that is sufficient. *Finlay v. Am. Exch. Bk.*, 11 How. (N. Y.) 468.

1. A party claiming a lien on goods, irrespective of the rights of different parties claiming the goods, can demand an interpleader. *Cotter v. Bk. of Eng.*, 3 Moore & S. 180; *s. c.*, 2 Dow. 728; *Attenborough v. St. Kath. Docks, L. R.*, 3 C. P. D. 450.

But it is otherwise if the lien at-

tached only in respect of one of the parties claiming the goods. *Braddick v. Smith*, 2 Moore & S. 131; *s. c.*, 9 Bing. 84.

It has been held that an auctioneer sued for the deposit, by both his principal and the purchaser, could not have an interpleader so long as he claimed a right to deduct his commission. *Mitchell v. Hayne*, 2 S. & S. 63; *Moore v. Usher*, 7 Sim. 384; *Bignold v. Audland*, 11 Sim. 24; *Jacobson v. Blackhurst*, 2 J. & H. 486. But in *Best v. Hayes*, 32 L. J., Ex. 129; *s. c.*, 3 F. & F. 113, the judges refused assent to this doctrine, though the case was decided on another point.

2. See *supra*, n. 10.

This fact should appear in the affidavit. *Frost v. Heywood*, 1 Dow. (N. S.) 801.

In *Pennsylvania*, an interpleader cannot be granted under the statute until after statement (formerly declaration) filed, nor can it be applied for after plea. 1 Tr. & Ha. Prac., § 496.

3. Story's Eq. Pl., § 292.

A bill which so states the plaintiff's rights as thereby to negative all interest on his part, makes a sufficient statement. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82.

The bill must show the parties defendant to be *in rerum natura*. *Metcalf v. Hervey*, 1 Ves. 248.

4. The claims should be specifically set forth, so as to show that they are of the same nature and character, and a fit subject for a bill of interpleader, otherwise the bill is demurrable. Story Eq. Pl., § 293.

Hence, where the bill stated that one of the defendants claimed as administrator and also as interested in the estate, but did not state what the interest was, nor how it was obtained, the bill was dismissed. *Varrian v. Berrien*, 42 N. J. Eq. 1.

A bill which shows a doubtful ques-

safely recognize either of them.¹ The interpleader must be distinctly asked for, as, also, if the proceeding be in equity, or of that nature, an injunction against actions at law.² The applicant must offer to pay or deliver the subject matter of the claims into court;³ or to dispose of it as the court may direct;⁴ and he must make affidavit that he is not colluding with either of the claimants.⁵

tion between the defendants, about which the plaintiff should not be compelled to act at his peril, states their claims sufficiently. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82.

1. See *ante*, p. 501, *n.* 2.

An allegation that the plaintiff "is informed" of a certain claim by one of the defendants, but "is uncertain as to the fact," is fatally defective. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82.

In *New York*, an allegation of the defendant's doubt as to the rights of the plaintiff and the third party is not indispensable. *Tanton v. Groh*, 4 Abb. Dec. (N. Y.) 358.

2. *Story Eq. Pl.*, § 297.

3. In view of this requirement it is perhaps superfluous to state that the property in dispute must be in the possession of the party seeking the interpleader. He must be an actual, not a theoretical, stakeholder.

Where an interpleader is asked for, the better practice is to order the money to be paid into court, but if the defendant has distinctly offered to do so, the court can frame an interpleader without such order. *Bechtel v. Sheaffer*, 21 Weekly Notes (Pa.) 65.

The fact that the money is not paid into court with a bill of interpleader, nor offered to be paid, is not ground for demurrer, but the court should refuse to allow the plaintiff to proceed until he pays in the money. *Blue v. Watson*, 59 Miss. 619.

A bill which offers to pay what is due is not bad because the plaintiff brings into court less money than is in fact due. *Ketcham v. B. B. Coal Co.*, 88 Ind. 515.

Where money has been paid into court on the filing of a bill of interpleader, the court must dispose of it, although, as between the defendants in the bill, each is *in pari delicto* to an extent which would preclude the court from passing upon their rights in a suit instituted by one of them. *Gilmore v. Devlin*, 4 MacA. (D. C.) 306.

An affidavit by a defendant that the money in controversy is claimed by a

person not a party to the suit, and payment into court, form a conclusive admission of all material allegations of the complaint, and the plaintiff is entitled to the amount paid in though he may have suffered a nonsuit or have had a verdict against him or judgment on a verdict in his favor may have been arrested. *Johnson v. Maxey*, 43 Ala. 521.

If a suit for the same cause of action be pending in another State, the defendant, though admitting his liability, will not be required to make payment into court as a condition of his being exonerated from costs. *Barry v. Equit. L. A. Soc.*, 14 Abb. (N. S.) 385, *n.*

4. Where land is in controversy, the plaintiff should execute deeds of the same, ready for delivery to either claimant. Where this is not done, and the bill offers to deliver a deed, the court will order the deed to be made, and filed with the court clerk. *Farley v. Blood*, 30 N. H. 354.

5. *Collusion*.—Where the defendant had collected certain dividends at the request of his nephew, the claimant, it was held that he had placed himself in the position he then occupied, with a view to his nephew's interest, and the rule for an interpleader was discharged. *Belcher v. Smith*, 9 Bing. 82; *s. c.*, 2 Moore & S. 184.

So where the defendant had so far identified himself with the claimant's interests as to take an indemnity from him for not delivering the property to the plaintiff, it was held that he must be content with that. *Tucker v. Morris*, 1 Dow. 639.

But in *Thompson v. Wright*, L. R., 13 Q. B. D. 632, these cases were held not to apply where the objection came from the party who gave the indemnity, and it seems to have been the opinion of the judges that the act of taking an indemnity would not usually be a collusion.

The Affidavit.—It should be entitled in the original clause. *Periente v. Pennell*, 7 Scott N. R. 834.

Where there are several plaintiffs,

If any of the defendants fail to interplead, judgment may be entered against them by default.¹ At the hearing it is usual to determine merely whether an interpleader will lie; and if it is granted, to discharge the plaintiff from all liability on his making payment into court, the issue between the defendants being reserved for a later hearing.² If the defendants agree that the bill is properly filed, the same results follow.³ The inquiry as to the rights of the claimants is usually confined to ascertaining which one has the exclusive proprietary interest in or right of possession of the thing in controversy.⁴ Costs are not a matter of right, but rest in the discretion of the court.⁵

the affidavit must be made by all of them. *Nelson v. Barker*, 2 H. & M. 334.

A bill unaccompanied by such an affidavit is demurrable. *Blue v. Watson*, 56 Miss. 619.

The affidavit cannot be contradicted after the order to interplead has been made. *Fahie v. Lindsey*, 8 Oreg. 474.

In *Kentucky*, the affidavit is held to take the place of the formal pleading required in equity. It should state absence of collusion and readiness to pay the money as the court may direct. *Starling v. Brown*, 7 Bush. (Ky.) 164.

1. Such default amounts to a confession that he has no claim, and prevents the plaintiff from disputing the claim of the other party. *Cogswell v. Armstrong*, 77 Ill. 139.

So at law, if the claimant fail to propound his claim, the plaintiff can take the money out of court. *Johnson v. Maxey*, 43 Ala. 521.

2. A decree that the bill is properly filed is the only decree that the plaintiff is interested in obtaining. *Atkinson v. Manks*, 1 Cow. (N. Y.) 691.

A decree in an interpleader suit, appointing a trustee to receive a fund, and referring the claims upon such fund to an auditor for determination, is necessarily an interlocutory decree subject to revision and alteration, and any phraseology which tends to give it the effect of a final decree settling the rights of the parties is to be rejected. *Owings v. Rhodes*, 65 Md. 408.

The whole controversy may, however, be submitted to one trial, including as well the issue between the plaintiff and defendants as those between the several defendants. *Cullen v. Dawson*, 24 Minn. 66.

If sufficient appear on the pleadings to decide the case, the court will do so; otherwise it will frame an issue or order

a reference to a master. *Farley v. Blood*, 30 N. H. 354.

The bill is ripe for hearing when the facts are found or agreed upon. If they are not, the court will frame a hearing or find the facts at its own discretion. *Goddard v. Leech*, *Wright* (Ohio) 476.

After payment has been made into court, and the defendants have interpleaded, the plaintiff cannot further interfere in the case. *St. L. L. I. Co. v. Alliance etc. L. I. Co.*, 23 Minn. 7.

But until he has fully rendered the thing or duty required of him, he continues a substantial and necessary party. *George v. Pilcher*, 28 Gratt. (Va.) 299.

3. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100.

Where one defendant demurs and the other confesses, this is not a relinquishment of the latter's right in favor of the demurrant. The court, on sustaining the bill, should order payment into court, and the framing of an issue between the defendants. *First Nat. Bk. v. W. Riv. R. Co.*, 46 Vt. 643.

4. But where the defendants consent to interplead, and do not object to a decree to that effect, the court, having the fund under its control, may, at the final hearing, fasten upon it, in whole or in part, any equitable lien or trust which one of the parties may have established, though the proprietary legal title is in the other. The court should so shape its decree and distribute the fund as to do complete equity between the parties. *Whitney v. Cowan*, 55 Miss. 626.

5. Costs will not be allowed the plaintiff if the bill be filed unnecessarily. *Bedell v. Hoffman*, 2 Pai. (N. Y.) 199.

It is fair that the plaintiff should have his costs, because he has no interest in the issue; and also that the winning party in the interpleader should have

2. *In Sheriff's Interpleader.*—To warrant the application, an actual claim must have been made,¹ as the mere existence of a lien is insufficient.² The sheriff's application should be accompanied with a schedule of the goods, which schedule is amendable.³ The sheriff must act promptly in applying for the rule.⁴ If, on the return of the rule, either or both of the parties fail to appear, the court will make such order as the case requires.⁵ It is within the court's discretion to award or refuse an issue.⁶ When the issue is framed, and the claimant's bond has been approved, the sheriff gives him possession,⁷ but if he has already sold the goods, the sheriff will be directed to pay the proceeds into court.⁸ A verdict and judgment on the issue are final and conclusive on the parties and their privies as to the questions decided.⁹

costs from the loser. It is otherwise with a bill in the nature of an interpleader. *Laing v. Zeden*, L. R., 9 Ch. App. 736.

A sheriff's interpleader is no exception to this rule. *Haines v. Heppe*, 20 Weekly Notes (Pa.) 502. See also *Pennypacker's App.*, 57 Pa. 114.

1. *Bently v. Hook*, 2 Dow. 339.

An action of trespass against the sheriff is a sufficient claim. (Pa.) 1 Tr. & Ha. Prac., § 1137.

If the claim be made by affidavit, it need not be sworn to by the claimant himself. *Webster v. Delafield*, 7 C. B. 187.

The claimant should aver that he had title at the time of the delivery of the execution to the sheriff. *Lafferty v. Cormick*, 1 Weekly Notes (Pa.) 267.

But he need not set forth the source of his title. *Kurtz v. Malony*, 1 Weekly Notes (Pa.) 84.

If the defendant in an execution for a personal debt, claims to hold the goods solely as trustee, an interpleader will be granted. *Fenwick v. Laycock*, 2 A. & E. N. S. 108.

If the plaintiff abandon his process in favor of the claimant, this does not affect the sheriff's rights. *Baynton v. Harvey*, 3 Dow. P. C. 344.

2. The sheriff must sell subject to the claimant's rights, if any. *Brice v. West End P. R. Co.*, 4 Weekly Notes (Pa.) 139.

A claim that the goods are partnership property is treated in the same way. *Holmes v. Mentze*, 4 A. & E. 127.

3. 1 Tr. & Ha. Prac., § 1137.

4. *Mutton v. Young*, 4 C. B. 371.

The sheriff need not wait till an ac-

tion has been brought against him. *Green v. Brown*, 3 Dow. P. C. 337.

The fact that the goods are in the possession of a stranger is no ground for delay. *Allen v. Gibbon*, 2 Dow. P. C. 292.

Nor need the sheriff apply first to the different parties for an indemnity first. *Crossly v. Ebers*, 1 Har. & W. 216.

But if he has already exercised a discretion his application comes too late. *Crump v. Day*, 4 C. B. 760.

5. If the plaintiff fail to appear, the court will order the sheriff to withdraw from the possession of the goods, and also that the plaintiff take no proceedings against the sheriff in respect of the execution. *Doble v. Cummins*, 7 A. & E. 580.

If the claimant abandons, the sheriff may still show that the goods belong to a third person who has not joined issue under the interpleader. 1 Tr. & Ha. Prac., § 1139.

If neither party appear, the sheriff will be ordered to sell enough of the goods to satisfy his charges, and to abandon the rest. *Eveleigh v. Salisbury*, 3 Bing. N. C. 298.

6. And a discharge of the rule, and order on the sheriff to proceed and sell, do not prejudice the claimant's rights. *Bain v. Funk*, 61 Pa. St. 185; *Hanbest v. Larzelere*, 15 Weekly Notes (Pa.) 190.

7. *Darby v. Waterlow*, L. R., 3 C. P. 453. But they are still considered in the custody of the law, and, pending the issue, are not subject to another execution. 1 Tr. & Ha. Prac., § 1143.

8. *Barker v. Dynes*, 1 Dow. 160.

9. And if the issue be decided against the claimant, the sheriff will

6. **Bill in the Nature of a Bill of Interpleader.**—Equity recognizes many cases where a *party in interest* is entitled to seek relief for himself by a bill, in the nature of a bill of interpleader, to ascertain and establish his own rights, where there are other and conflicting rights between third persons.¹

INTERPOSE.—To present or put forward as an obstruction or interruption.²

proceed to sell the goods, even if in the hands of a vendee of the claimant. *Bain v. Lyle*, 68 Pa. 60.

1. Story Eq. Pl., § 297 b; Story Eq. Jur., § 824; *Schneider v. Seibert*, 50 Ill. 284; *Heath v. Hurless*, 73 Ill. 323; *Stevens v. Warren*, 101 Mass. 564.

E. g., if a plaintiff be entitled to equitable relief against the owner of property, the legal title to which is in dispute between two or more persons, he may file a bill in the nature of a bill of interpleader. *M. & H. R. Co. v. Clute*, 4 Pa. (N. Y.) 384.

So where one is assessed at different amounts for the same personal property by the assessors of different taxing districts. *Thompson v. Ebbets*, Hop. (N. Y.) 272.

So where a purchaser under contract has entered into actual possession, and made improvements, and it is necessary to settle the right to the unpaid purchase money as between the vendor and his assignee, and creditors seeking to avoid the assignee's title. *Parks v. Jackson*, 11 Wend. (N. Y.) 442, 450.

So in the case of personality. *Darden v. Burns*, 6 Ala. 362.

So where a mortgagor wishes to redeem, and the title to the mortgage money is claimed by different parties. *Mitchell v. Hayne*, 2 S. & S. 63; *Bedell v. Hoffman*, 2 Pa. (N. Y.) 199.

So where a reward has been offered for money stolen, proportionate to the amount recovered, or for evidence to secure a conviction, and there are several claimants, some of whom have brought suit. *City Bk. v. Bangs*, 2 Pa. (N. Y.) 570; *Fargo v. Arthur*, 43 How. (N. Y.) 193.

In an action to have an instrument, alleged to have been obtained from the plaintiff by fraud, delivered up and cancelled, it appeared that two persons claimed the instrument by independent assignments, and had begun suits upon it against the plaintiff. It was *held* that, the fraud being proved, he should be relieved from the obligation in a suit against both plaintiffs. *McHenry v. Hazard*, 45 N. Y. 580.

Where the purchaser of a farm, upon which there was an attachment in favor of a creditor of a former owner, gave the vendor a note for part of the purchase money, the note to be void in case the attachment should be valid, and the attaching creditor obtained judgment and levied execution on the land, the holder of the note was *held* entitled to file a bill in equity against the maker and the attaching creditor, to compel them to effect a determination of their respective rights. *Hodges v. Griggs*, 17 Vt. 280.

The relief sought by such a bill must be strictly equitable relief. *Killian v. Ebbinghaus*, 110 U. S. 568, reversing 1 Mack. (D. C.) 247; *M. & H. R. Co. v. Clute*, 4 Pa. (N. Y.) 384; *Parks v. Jackson*, 11 Wend. (N. Y.) 442; *McHenry v. Hazard*, 45 N. Y. 580.

And will not be given where the plaintiff has failed to fulfil his legal obligations in the matter. *Dohnert's App.*, 64 Pa. St. 311.

Authorities.—All standard treatises on equity; English authority—*Cabane on Interpleader*.

2. In holding that by the *New York* statute of 1850, ch. 172, contracts of corporations whereby they agree to pay more than seven per cent. upon money borrowed are legal and binding upon them, and that therefore the guarantors of such contracts are liable upon their contracts of guaranty. *DAVIS, J.*, said: "In my judgment these cases turn altogether upon the construction to be given to that act, and I refrain, therefore, from the consideration of any other proposition. The act of 1850 is entitled, 'An act to prohibit corporations from interposing the defence of usury in any action. The first section, which is the only one necessary to be referred to in these cases, is in these words: '§ 1. No corporation shall' hereafter interpose the defence of usury in any action.' (Sess. Laws, 1850, ch. 172, p. 234.) Plain as the language of this section may appear to be, it is on its face suggestive of several constructions. In a strictly

INTERPRETATION.—(See also ALTERATION OF INSTRUMENTS; AMBIGUITY; AUTHORITY; BILLS OF LADING; BONDS; BY-LAWS; CODICILS; CONFLICT OF LAWS; CONSTITUTIONAL LAW; CONTRACTS; COVENANTS; DEEDS; INTENT; INTERPRETER; LAW; MORTGAGES; PENALTIES; STATUTES; TRUSTS; WILLS; WORDS; WRITTEN INSTRUMENTS.)

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1. **Definition.**—Interpretation is the act of making intelligible what was before not understood, ambiguous, or not obvious. It is the method by which the meaning of language is ascertained.¹

narrow sense, to *interpose a defence in an action* is to plead it or to set it up by answer. In that sense the section would be construed simply to debar a corporation from thereafter pleading usury as a defence, thus reducing it to a rule of pleading, but operating effectively to prevent proof of usury under the settled rule which excludes the evidence whenever the fact is not pleaded. In that view it would apply only to pleas or answers thereafter to be interposed, and not to issues already joined. But the courts have not hesitated to reject this construction, and to hold that to interpose the defence of usury within the meaning of the act was to set it up or insist upon it in any manner at any stage of the action; and so have rejected it as a defence on the hearing of appeals where it had long before been pleaded, and its effect on the case depended upon the application of the law to conceded facts. It was thus *held* to be retrospective; and to prohibit any step subsequently to its passage, by a corporation defendant, which amounted to

an assertion of usury in defence of its obligations." *Rosa v. Butterfield*, 33 N. Y. 665.

1. There is no distinction in law between the meaning of the term "interpretation" and the term "construction." Jones on the Construction of Commercial and Trade Contracts, p. 3: "Throughout the present volume interpretation and construction are used as synonymous words."

Abbott in his law dictionary, under "interpret," says: "The words 'interpretation' and 'construction' are used interchangeably by many law writers, but some authorities warrant a distinction."

Dr. Lieber (Leg & Pol. Hermen) defines interpretation as the art of finding out the true sense of any form of words; that is, the sense which their author intended. Professor Parsons (2 Contr. 491, n. (a)) says that interpretation properly precedes construction, but it does not go beyond the written text "

It is evident, therefore, that the sub-

2. Rules of evidence govern in determining what is the matter to be interpreted. The matter to be interpreted must either be in writing or not in writing. If it is not in writing and there is a dispute as to its terms, testimony must be adduced to show what the true terms of the contract are. In adducing this testimony, the rules of evidence about capacity, relevancy, hearsay, best evidence, etc., are applied.¹ If the matter is in writing, it must be proved to be the writing in question. The identity of the parties is sometimes a necessary matter to be proved. If a letter or word is indistinct, testimony as to handwriting by those familiar with it and by experts is competent.² In exceptional cases,

ject of interpretation runs through every branch of the law, and that it cannot well be treated of under one head. Reference should be made to the article on the subject about which particular information is desired.

Kent says: "The rules which have been established for the better interpretation of contracts are the conclusions of good sense and sound logic applied to the agreement of the parties. Their object is to ascertain with precision the mutual understanding of the contract in a given case." Kent's Com., vol. 2, p. 553.

Jones on the Construction of Commercial and Trade Contracts, p. 6: "A large portion of the agreements which come before the courts for construction are ambiguous in their meaning, because of the nature of language. The uncertainty, inexactness and ambiguity inherent in words themselves, the foresight and discrimination necessary in order to combine them so that the language employed will clearly express the intention which the parties desire to disclose, the difficulties which come from the ignorance of men, the carelessness with which they use language, and the complexity of the agreements which they attempt to embody in words, all make it evident that the language alone will not always disclose the will of the parties. In such case the aim of construction is to obtain the real sense in which the words were used, and the effort to do so is made in every way which the law deems advisable, considering always the good of the many."

"With the view of clearly understanding the subject under discussion, it is essential to distinguish between mere *legal presumptions* and *rules of construction*; because while the former may be rebutted, and if rebutted, sup-

ported also, by parol testimony, no evidence can be received on either side, if the court by construction can arrive at a conclusion respecting the meaning of the instrument. Yet, important as it is to mark this distinction, it is by no means easy on all occasions to do so; and the difficulty is increased by the loose manner in which the word "presumption" has occasionally been used. . . . Among the rules of construction which have been occasionally mistaken for legal presumptions may be mentioned the one now clearly established, which awards to a stranger legatee as many legacies as are bequeathed to him by separate instruments, unless the instruments themselves contain *intrinsic* evidence that the legacies were not intended to be cumulative, or unless the double coincidence of the same amounts and the same expressed motives appearing in each instrument, induces the court to presume that repetition, and not accumulation, was intended. Extrinsic evidence cannot be received to impugn this rule; for to admit it would be to construe a writing by parol evidence." Taylor on Evidence, § 1113; 2 Parsons on Contr., n. (a), p. *491; Lee v. Bain, 4 Hare 216.

1. "Evidence," says Greenleaf, "includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." Greenleaf on Evidence, § 1.

"For the proof of a contract made by word of mouth is a part of the general law of evidence." Anson on Contracts, p. 231.

2. In regard to the proof of the formal execution of deeds, bills of exchange, and other written documents, it was formerly the right of the adverse party to require precise proof of all signatures and documents making part of the chain

proof is allowed of writings lost or destroyed.¹ If there is an ambiguity in the writing apparent or patent on the face of the instrument, parol evidence is inadmissible to show what was the true intention.² Evidence explaining what is written is admissible, but not to show what was intended to have been written.³ (See AMBIGUITY.)

3. Effect of Admissibility of evidence outside of instrument, upon interpretation. It is an elementary rule of our law that oral evidence shall not be given to add to, subtract from, alter or vary any description of written contract.⁴

of title in the party producing them. But the great and unnecessary expense of this course, as well as the inconvenience and delay which it occasioned, have led to the adoption of salutary rules restricting the exercise of the right to cases where the genuineness of the instrument is actually in controversy, being either put in issue by the pleadings or by actual notice given pursuant to the rules of the court. 2 Greenleaf on Evidence, § 16.

Where a signature is disputed and another signature is offered in proof as a standard, the court should first find, as a fact, that the latter is genuine, and then submit it to the jury in comparison with the one in contention. *Rowell v. Fuller*, 59 Vt. [1887] 688.

Upon the trial of an issue as to the genuineness of a certain handwriting, other instruments admitted to be genuine, but not otherwise relevant, may be received in evidence for the purpose of comparison. *Morrison v. Porter*, 35 Minn. 425 [1887]; *McKay et al. v. Lasher*, 42 Hun [1886] N. Y. 272.

"Opinions are to be given by experts as well on the question of handwriting as on any other questions. Persons, other than experts, are to testify to facts not opinions. If one, who was not an expert, were permitted to give his opinion as to genuineness of handwriting, based merely on the comparison, at the trial, of the disputed writing with one proved to be genuine, he would be usurping the duty of the jury." See articles 51 and 52, title EVIDENCE, p. 81, vol. 7, of this work; title HANDWRITING, vol. 9.

1. To let in oral evidence of the contents of a lost paper, it is sufficient if the witness can state the substance of its contents. *Camden v. Belgrade*, 78 Me. [1886] 204.

A mere search for a lost paper is not enough to render secondary evidence of its contents admissible. The search

must be diligent, and must be at every place where the paper would be likely to be found. *Singer Mfg. Co. v. Riley*, 80 Ala. [1886] 314.

A search for a letter received by a firm since dissolved, which did not include an inquiry of the principal member of the firm, was held insufficient to admit secondary evidence of its contents. *Hill v. Aultman*, 68 Iowa 630 [1886].

Plaintiff testified that he received a letter, and sent it to a friend in another State, and that all that he knew about it afterwards was that his friend wrote that he had mislaid the letter and could not find it. It was held that the plaintiff might testify to the contents of the letter. *Stevens v. Miles*, 142 Mass. 571 [1886]. (See § 16). See title, LOST INSTRUMENTS.

2. In *Vandevort v. Dewey*, 42 Hun N. Y. [1886], at p. 271, it was said: "The defect in the lease is in the omission to insert in the blank the amount that was to be paid to the defendant to terminate the lease at the decease of Dewey. This defect is a patent and not a latent ambiguity, and consequently cannot be corrected by parol evidence. 2 Pars. on Cont., 557, 563; *The Blossburg & Corning R. Co. v. The Tioga R. Co.*, 1 Keyes (N. Y.) 486." See AMBIGUITY; EVIDENCE.

3. Where, in a deed, a name is sometimes written Eliza, and sometimes Elizabeth, parol evidence is admissible to show that one person only was meant. *Hanrick v. Patrick*, 119 U. S. 156.

So, in a bill of sale where property was described as the "Wolfe houses," it was held that parol evidence was admissible on the question of whether a certain barn was embraced in the description. *Claffey v. Hartford F. Ins. Co.*, 68 Cal. 169 (1887). See article on EVIDENCE, vol. 7 of this work, for full discussion. Also Greenleaf on Evidence; Taylor on Evidence.

4. *Hubbard v. Marshall*, 50 Wis. 322.

But it is also a well established rule, that where all the terms have not been put into writing, evidence of supplementary terms is then admissible, not to vary but to complete the writing.¹

Evidence of a verbal agreement collateral to the written undertaking is admissible if not contrary to the meaning of the writing.

The effect, therefore, of the admission of evidence outside the instrument is to enlarge to that extent the matter to be interpreted.

4. The law of the land to be construed with every matter. Everybody is presumed to know the law; hence all writings and all contracts must be interpreted in accordance with it.² No writing or contract of any description can be valid if contrary to good morals or public policy.³ Where public policy is opposed

"If the parties have reduced their contract, and the whole of it, to writing, and the instrument is free from ambiguity or uncertainty, the courts have universally applied the rule and excluded parole testimony to vary the terms of the contract."

Whitford v. Laidler, 94 N. Y. 145. "Upon the interpretation of contracts the language of the instrument itself must determine, unless some ambiguity appears upon its face, or unless phrases of doubtful meaning are employed therein, requiring explanation, in which case resort may be had to parole evidence and proof of the attendant circumstances to discover the real meaning and intent of the parties."

See also Kendell v. Harriman, 75 Me. 497; Gross v. Ellison, 136 Mass. 503; Brunhild v. Freeman, 77 N. Car. 128; Taft v. Schwab, 80 Ill. 289; MacLeod v. Skiles, 81 Mo. 595; Merriam v. Pine City Lumber Co., 23 Minn. 314.

In Gilbert v. Moline Plough Co., 119 U. S. (1886), at p. 493, the court said: "The court held that the letter of credit was complete within itself and that the defendants could not import into it by parole any additional agreement as to the time and character of the credit to be given to Gillman, and instructed the jury to that effect. This is the principal error relied upon to reverse the judgment, which we think is no error."

1. Brown v. Bowen, 90 Mo. (1886) 189. "The rule which prohibits the introduction of parole contemporaneous evidence does not apply when the original contract was verbal and entire, and a part only was reduced to writing. 1 Greenl. Ev., § 284a; Rollins v. Clay-

brook, 22 Md. 405; Moss v. Green, 41 Mo. 389. Nor where a district collateral contemporaneous agreement, independent of and not varying the written agreement, is offered in evidence, though it relates to the same subject matter. Bonney v. Morrill, 57 Me. 368; Bashor v. Forbes, 36 Md. 154.

Nor does the prohibitory rule apply when a complete contract in writing is entered into, which is subsequently varied by a parole agreement. Bunce v. Beck, 43 Mo. 266. See articles on EVIDENCE and WRITTEN INSTRUMENTS in this work.

2. Balto. & Susq. R. R. Co. v. Faunce, 6 Gill (Md.) at p. 79: "The law properly and consistently withholds its aid when parties ask to enforce an illegal contract—all are presumed to know the law, and if a contract be made to violate it, whether it be a contract to perpetrate a crime *malum in se*, such as murder or arson, or to violate a municipal enactment, such as the act prohibiting the issue of small notes, and a remedy is sought either to enforce such contract or to obtain compensation for a breach of it, the parties are properly told the law will neither assist you to coerce another to violate its provisions nor suffer you to recover against another for refusing to do so."

3. Anything which is in violation of positive statutes, or anything immoral, or which will retard progress, or may be a bad precedent, is against public policy. The following examples illustrate it, but do not, even in a small degree, touch upon all matters which have been held to be against public policy.

A contract to waive all damages for

to private rights, the latter must yield; but a very plain case is necessary to justify holding the matter to be against public policy. If there are two interpretations of the same thing, the one legal and the other illegal, the legal is to be preferred.¹ It is the law in force at the time the writing was entered into and not later enactments, which governs in interpretation.²

5. **The intention of the parties**, if legal, governs. If the language of the instrument is free from doubt, there is no need to apply the rules of interpretation.³ Every paper is written to accomplish a purpose; if that purpose is expressed clumsily, it is the task of interpretation to discover and unravel it. "Greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent." *Ford vs. Beech*, 11 Q. B. 866.⁴

injuries resulting from criminal negligence was, in *Cook v. Western & Atlantic R. R. Co.*, 72 Ga. 48 (1885), held void as against public policy.

Where, in a contract for the sale of wheat, it is the mutual understanding and intention of the parties that the transaction shall be closed by a settlement of differences in the value of the article sold according to the fluctuations of the market, and not by its delivery, such contract is one of wager, and is void as being against public policy. *Cockrell v. Thompson*, 85 Mo. 510 (1885). On same subject see *McCormick v. Nichols*, 19 Ill. App. 334; *Lyons Bank v. Oskaloosa Packing Co.*, 66 Iowa 41; *Stewart v. Schall*, 65 Md. 289; *Beadles v. Ownby*, 16 Lea (Tenn.) 424.

A secret partnership agreement to stifle or diminish competitive bidding on public works is void. *Hunter v. Pfeiffer*, 108 Ind. 197 (1885).

An agreement by one rival candidate for a public office to pay to the other, in case of his own election, one-half the net profits of the office for the term is against public policy, and will not be enforced. *Glover v. Taylor*, 38 La. An. 634. See **CONTRACTS** in restraint of trade, etc.; **GAMBLING CONTRACTS**, vol. 8 hereof; **ILLEGAL CONTRACTS**, vol. 9.

1. In *Clay v. Allen*, 63 Miss. 426, it was said that where it is doubtful whether a contract for the delivery of cotton was a gambling contract in futures or a legal contract, the presumption is in favor of its legality. See 2 *Parsons' Contracts*, p. 500.

2. In *Gunn v. Barry*, 15 Wall., U. S., (1872) 610, in discussing the pro-

vision of the constitution prohibiting legislation impairing the obligation of contracts, the Supreme Court said: "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, provided the change involves no impairment of a substantial right. If the . . . act fall within the category last mentioned it is to that extent utterly void." See also *Caldwell v. Carrington*, 9 Pet. (U. S.) 86; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, 206; *The Miantinomi*, 3 Wall. Jr. (U. S.) 46; *O'Kelly v. Williams*, 84 N. Car. 281; *Gilliland v. Phillips*, 1 S. Car. 152. In *Lessley v. Phipps*, 49 Miss. 790, there is a very able opinion reviewing a great many cases on the subject.

For instances in which the general law has been deemed to form part of a contract, etc., see *State v. Allis*, 18 Ark. 269; *Webster v. Rees*, 23 Iowa 269; *Rogers v. Allen*, 47 N. H. 529; *Smith v. Elliott*, 39 Tex. 201.

3. "Technical rules of construction are not to be resorted to where the meaning of the parties is obvious." *Noyes v. Nichols*, 28 Vt. 159.

4. "The intention of the parties is to prevail, if not incompatible with some rule or maxim of law; this is considered as the polar star in expounding." *Howard v. Rogers*, 4 H. & J. (Md.) 278, 281; *Church v. Hulbart*, 2 Cranch (U. S.) 187; *Bradley v. Steam Packet Co.*, 13 Pet. (U. S.) 89; *Mauran v. Bullus*, 16 Pet. (U. S.) 528.

In *Field v. Leiter*, 118 Ill. (1886) 17, 26, it is observed: "There are a few rules of construction commonly ob-

The courts will not make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words. It is the common intention of the parties, and not that of either individually, which is to be ascertained.¹ Great regard must be given to the objects which the writing was to accomplish.² When the language of a writing is ambiguous, the practical interpretation put upon it by the parties is entitled to great, if not controlling, influence.³

6. The condition of the parties and surrounding circumstances to be considered. He who interprets should as far as possible put himself in the position of the parties at the time the writing was executed.⁴ This is only another way of saying that the intention

served in construing all written instruments, whether specialties, simple contracts or wills. One is, it is the duty of the court, where it is practicable to do so, to discover and give effect to the intention of the parties so that performance of the contract or other instrument may be enforced according to the sense in which it was mutually understood at the time it was made, and greater regard is to be had to the clear intent, when ascertained, than to any particular words which may have been used in the expression of that intent." See also *Whitehurst v. Boyd*, 8 Ala. 375; *Steele v. Branch*, 40 Cal. 3; *Brown v. Slater*, 16 Conn. 192; *People v. Gosper*, 3 Neb. 285; *Den v. Camp*, 19 N. J. L. 148.

1. *Brunhild v. Freeman*, 77 N. Car. (1878) 128, 130. "The defendant chiefly relied upon his honor's refusal to give the following charge: 'That the question was not what the plaintiff thought, but what the defendant thought, and if the defendant did not intend to assume the payment of the \$400 save upon a delivery to him of the eight notes, the plaintiff could not recover.' His honor very properly refused to so charge, but did charge that it was not what either thought but what both agreed." *Briggs v. Vanderbilt*, 19 Barb. (N. Y.) 222; *Rogers v. Broadnax*, 27 Tex. 238.

2. *Robinson v. Fiske*, 25 Me. 401, 405. "Every contract must have an interpretation governed in some measure by the subject matter to which it relates; and at the same time with reference to any known usage connected therewith. If a surveyor be hired to survey a lot of boards, it is expected he will do something more than merely ascertain the number of feet each board may contain. He would be ex-

pected to ascertain whether they were of one class or another, whether they were clear, refuse or merchantable. . . . This results from the nature of the employment, and is in accordance with a well known usage." *Strong v. Gregory*, 19 Ala. 146; *Conwell v. Pumphrey*, 9 Ind. 135; *Springstreen v. Sawson*, 32 N. Y. 703; *Lacy v. Green*, 84 Pa. St. 514.

3. In *Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 54, MR. JUSTICE NELSON said: "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one." *Mathews v. Danahy*, 26 Mo. App. 460; *Butler v. Moses*, 43 Ohio St. 166; *Fogg v. Fire Ins. Co.*, 10 Cush (Mass.) 337; *Lyles v. Leshner (Ind.)*, 7 W. Rep. 51 (1887).

But where the meaning of the instrument is clear, and the parties have put an erroneous construction upon it, such conduct does not control the interpretation. *Citizens' Fire Ins. Co. v. Doll*, 35 Md. 89.

4. *Balto. & Ohio R. v. Brydon*, 65 Md. 198, 215 (1885). "We cannot form a just opinion of the rights of the parties under this contract, unless we take a view of the circumstances under which it was made. We must consider

of the parties should govern. Regard must be given to the occasion which gave rise to it, the relative position of the parties, and their obvious designs as to the object to be accomplished. But if the meaning and intention of the parties cannot be ascertained from the language of the instrument when thus illustrated, it is void for uncertainty.¹ Where there are two interpretations, that one will be followed which is consistent with the conduct of all the parties.² In all cases attention must be given to the subject matter in the light of contemporaneous facts and circumstances.³

7. The whole writing should be considered in determining the meaning of any or of all its parts. This is evidently a fundamental rule of interpretation, and the mere statement of it should be sufficient to convince all of its truth and great importance.⁴

the subject matter of the agreement and the knowledge of it which the parties possessed; the objects which they sought to accomplish and the inducements which they had for dealing with each other as they did. 'Courts, in the construction of contracts, look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described.' *Nash v. Towne*, 5 Wall. 683."

Pratt v. Canton Cotton Co., 51 Miss. 470; *Lacy v. Green*, 84 Pa. St. 514; *Pollard v. Maddox*, 28 Ala. 321; *Robinson v. Stow*, 39 Ill. 568; *Karmuller v. Krotz*, 18 Iowa 352; *Sumner v. Williams*, 8 Mass. 214; *Dodge v. Gardiner*, 31 N. Y. 239.

1. In *Brown v. Slater*, 16 Conn. 192, at 196, it is said: "If by this is only meant that parol evidence of intention is not to be given to explain a contract ambiguous on its face, it is correct." *Fruin v. Crystal R. R. (Mo.)*, 4 West. Rep. (1886) 606, 608.

"Surrounding circumstances are to be considered only when the meaning of the instrument is affected with uncertainty. *Kimball v. Brawner*, 47 Mo. 399. When the terms are clear and unambiguous, the party can relieve himself of the liability they impose by proving fraud or mistake, or that by custom they were used in these contracts in a sense different from their

ordinary import. . . . It was the duty of the court to construe the contract in this instance by its terms, there being no testimony tending to prove that the words 'solid rock' were used in any other than their plain and popular sense."

2. "In order to arrive at the intention of parties to a written instrument, the court must view it by the light of surrounding circumstances, and if the conduct of all the parties is consistent with one construction of the agreement and wholly inconsistent with another, the former must be preferred, even though the latter is the more natural." *Price v. Evans*, 26 Mo. 30.

3. *Phelps v. Bostwick*, 22 Barb. (N. Y.) 314, 317. "Whether the defendant was a mere depositary of the \$200 specified in his receipt, or had an interest in the money, was a question of fact upon the true construction of the receipt, in view of the extrinsic circumstances existing at the time it was given. Such facts are always admissible in evidence, not to contradict the instrument, but to aid in its interpretation. Contracts must always be construed in reference to the subject matter to which they relate, and in the light of the contemporaneous facts and circumstances."

4. *Jones on Construction of Commercial and Trade Contracts*, § 210. "It does not, however, need argument to sustain it, for to disregard certain portions of a contract and to exclusively follow others when the object to be attained is the discovery of the intent of the parties to the entire contract, would be apparent folly."

Smith on Contracts, p. 542. "In the first place, it is the most important of all the rules of construction that the whole of the agreement is to be consid-

As one sentence may vary the meaning of another sentence, so the true meaning of a paragraph may depend upon the proper interpretation of another paragraph. The intentions of the writer have not been expressed until he has entirely finished, hence to interpret those intentions reference must be had to the whole writing. Agreements made at the same time between the same parties and in relation to the same subject will be held to constitute but one contract, though contained in several instruments.¹ Where a reference is made to another paper, and it is clear that that paper was considered by them at the time of contracting and was an inducement for that act, that paper will become a part of the contract.²

ered. This is so reasonable and clear that no explanation is required of it, for obviously it cannot be the intention of the parties to an agreement with stipulations or qualifications, that some of them should be altogether disregarded and a part of the agreement magnified into an equality with the whole; but, on the contrary, such meaning is to be given to particular parts as will, without violence to the words, be consistent with all the rest, and with the evident object and intention of the contracting parties."

Parsons on Contracts, vol. 2, p. 502. "The same parties make all the contract and may be supposed to have had the same purpose and object in view in all of it, and if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others." *Stewart v. Lang*, 37 Pa. St. 201; *Rose v. Roberts*, 9 Minn. 119; *Varmin v. Thurston*, 17 Md. 470, 496. See also *Goosey v. Goosey*, 48 Miss. 210; *Salmon Mfg. Co. v. Portsmouth Co.*, 46 N. H. 249.

1. *Gaffney v. Hicks*, 131 Mass. 124. "A conveyed to B by deed certain land subject to two mortgages, then overdue, both of which mortgages, and the notes secured thereby and interest thereon, the said grantee by the acceptance of this deed assumes and agrees to pay and save one harmless therefrom, the same forming a part of the consideration." Contemporaneously with the execution of this deed, B agreed in writing, under seal with A, to save A harmless from certain promissory notes, amounting to a certain sum, and, upon payment of that sum by A at any time within one year, to reconvey to A the land in question free from all encumbrances, except the two mortgages named in the

deed from A to B. During the year, the holder of the second mortgage foreclosed the mortgage and sold the land for a sum insufficient to pay that mortgage. *Held*, in an action by A against B for the balance due on the second mortgage, that the deed and the agreement to reconvey, taken together, constituted a third mortgage on the land, from which A was entitled to redeem upon the payment to B of the amount secured thereby, and that the action could not be maintained." See also *Wilson v. Randall*, 67 N. Y. 338; *Livingston v. Story*, 11 Pet. (U. S.) 386; *Galena R. R. v. Barrett*, 95 Ill. 467; *Ganimon v. Freeman*, 31 Me. 243; *Cummings v. Antes*, 19 Pa. St. 257; *Kenyon v. Nichols*, 1 R. I. 411; *Reed v. Field*, 15 Vt. 672; *Casey v. Holmes*, 10 Ala. 776; *Odiorne v. Sargent*, 6 N. H. 401.

2. *William Edwards v. Farmers' Ins. Co.*, 74 Ill. 84, at 86. "The policy refers to the application for a 'more particular description' of the property insured and by apt words makes it a part of this contract of insurance. The application having thus been made a 'part of the policy,' the two instruments must be construed together." See also *Wilson v. Randall*, 67 N. Y. 338; *Smith v. Turpin*, 22 Ohio St. 478.

From the fact that two instruments were executed by the same parties on the same day, it does not necessarily follow that they were both executed at the same time, and were a part of the same transaction. *Mann v. Witteck*, 17 Barb. (N. Y.) 388.

In *Jones*, § 12: "In order to determine whether writings refer to one transaction, the nature and terms of the contract, the circumstances surrounding the parties, the subject matter of their agreement, and all appropriate

It may be identified by parol evidence.¹ If possible, effect should be given to every expression in the contract; for people are not supposed to use language for an idle purpose.²

8. **Words are to be understood** in their literal meaning. Words have certain definite meanings, and when people desire to convey an idea they intentionally select their words to accomplish that purpose. This rule cannot be better expressed than by quoting the language of LORD ELLENBOROUGH, in *Robertson v. French*, 4 East 137. Words in a contract "are to be understood in their plain, ordinary and popular sense unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words."³ But to add to the difficulty of interpretation, the same words have various meanings. POLLOCK, C. B., in *Reg. v. Skeen*, Bell, C. C. 97, 134, said: "There is no word in the English language which does not admit of various interpretations."⁴

When words have acquired an exact and technical meaning in any trade or business, and are used in a contract relating to such trade or business, they will be given that meaning and not the meaning the words have in a more popular use.⁵

extrinsic matters, must be considered."

1. *Ex parte* Washington Park, 52 N. Y. 131.

2. See 1 Addison on Contracts, 181; *Coyne v. Weaver*, 84 N. Y. 386; *Washburn v. Gould*, 3 Story (U. S.) 162; *Smith v. National L. Ins. Co.*, 103 Pa. St. 177.

In *Barhydt v. Ellis*, 45 N. Y. 107, the court said: "Effect must be given, if possible, to every part of an agreement, and it is only when there is an inconsistency or repugnancy which is totally irreconcilable, that a discrimination will be made as to which part will be made to yield to the other."

3. *Rubey v. Coal & Mining Co.* [1886], 21 Mo. App. 159, 167. "The terms of every written instrument are to be understood in their plain, ordinary and popular sense unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out, that, in the particular instance and in order to effectuate the immediate intention of the parties they must be understood in some other and peculiar sense." *Greenl. Ev.*, § 278; *Burnham v. Banks*, 45 Mo. 350; 2 *Phillips Ev.* 632." After quoting the above rules the court held that the word "equipment" used by a mining company

included mules among the means of operating the mine.

Dwight et al. v. Germania L. Ins. Co., 103 N. Y. [1886] 341, 347. "Such contracts are open to construction like all other contracts needing interpretation. . . . In *Parkhurst v. Smith* (Willes, 332), WILLES, J., says: 'I admit that though the intent of the parties be never so clear it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them.'" The court also quotes a passage in Addison on Contracts, p. 165, to the same effect.

4. In *Bouvier's Law Dictionary*, under the head of Construction, will be found a very long and complete list of words whose meanings have been passed upon by the courts.

5. Jones on Construction of Commercial and Trade Contracts, §§ 54-68, treats thoroughly of this subject.

Note to p. 99: "The object is to get at the real effect to the parties of the terms used, and if they have acquired secondary meanings in connection with particular kinds of transactions it is as important to have them translated as if the contract were in a foreign language." *Carver's Carriage of Goods by Sea*, § 169. So in *Smith v. Clayton*, 29 N. J. L. 357, where evidence was improp-

The rules of grammar will be upheld and applied, unless it is clear that all the parties to the transaction used the words or expressions incorrectly.¹

9. Written Words Control Printed.—In case of conflict or repugnance between the printed and the written parts of an instrument partly printed and partly in writing, the invariable rule of interpretation is that the written part shall prevail.²

But if by any possible construction the written and printed parts can be reconciled, such construction must be adopted; and the surrounding and particular circumstances of such case will be

erly given as to the ordinary meaning of the word 'grain,' the New Jersey supreme court said: 'The word is not a technical term, the signification of which is only known to those of the trade. In such a case, parol evidence is admitted of necessity for the same reason that an interpreter must be employed to translate a paper written in an unknown tongue, and it has always been admitted. *Sleight v. Hartshorne*, 2 Johns. (N. Y.) 542; *Gobert v. Busby*, 3 Sim. 34; *Mechanics' Bank v. Columbia*, 5 Wheat. (U. S.) 336; *Smith v. Wilson*, 3 Barn. & Ad. 728; *Richardson v. Watson*, 4 Barn. & Ad. 789. An usage may be shown by parol evidence, and some of the cases go so far as to permit evidence that an English word, not a term of art or peculiar to a particular trade or occupation, has a peculiar provincial signification different from its natural meaning, as that a dozen means thirteen."

1. "The law prefers a construction according to the strict, accurate and precise use of language." Jones on Construction of Commercial and Trade Contracts, p. 302. See also Parsons on Contracts, vol. 2, p. 591; Addison on Contracts, vol. 1, p. 182. But the intention of the parties is to be given effect.

2. Where a printed form of instrument is used with blanks to be filled in with writing, the written part will control in construing the instrument. *Am. Express Co. v. Pinckney*, 29 Ill. 392. BREESE, J.: "The principle applicable in all such cases is, that a writing must be construed according to the clear intent of the parties, if that can be collected from the face of the instrument. . . . In a case where the agreement is partly written and in part printed, the preference is always given to the written part. What is printed is intended to apply to large classes of con-

tracts and not to any one exclusively; the blanks are left purposely that the special statements or provisions should be inserted, which belong to the particular contract and not to others, and thus to discriminate this from others. So LORD ELLENBOROUGH *held*, in the case of *Robertson & Thomasson v. French*, 4 East 360, when he said that words superadded in writing are entitled, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects."

Clark v. Woodruff, 83 N. Y. 518. "Resort may also be had to the further rule that in the interpretation of the language of an instrument, greater weight should be given to the written than to the printed words, where they lead different ways and tend to contrary results. The language of printed blanks is easily assumed to be appropriate without careful examination, while the written words more safely and more nearly indicate the intention of the contracting parties."

1 Addison on Contracts, Abbott & Wood ed., 1888, p. *181; 2 Parsons on Contracts, 516; *Harper v. N. Y. City Ins. Co.*, 22 N. Y. 441; *Report N. Y. Civil Code*, § 816; *Rush v. Carpenter*, 54 Iowa 132; *Joyce v. Realm Ins. Co.*, L. R., Q. B. 580; *Cushman v. N. W. Ins. Co.*, 34 Me. 487; *Russell v. Bondie*, 51 Mich. 76; *Germania Ins. Co. v. Sherlock*, 25 Ohio St. 33; *Alsager v. St. Katharine's Dock Co.*, 14 M. & W. 796; *Weisser v. Maitland*, 3 Sandf. (N. Y.) 322.

looked to in order to bring them into accord.¹

In regard to public contracts prepared by the government on printed blanks, it has been held that the unchanging printed portion should receive a uniform and unvarying construction.²

10. Words Construed Most Strongly Against the Party Using Them.

—Another well settled rule of construction is that in cases of doubt the words of an instrument are to be construed most strongly against the person using them; or, as it is sometimes otherwise expressed, the construction of an instrument is to be *fortius contra proferentem*.³

1. *Miller v. The H. & St. J. R. R. Co.*, 90 N. Y. 430; *ANDREWS, CH. J.*: "It is no doubt a principle of construction that in case of repugnancy between written and printed clauses of an instrument, the written clauses will prevail over the printed. But this is a rule that is only resorted to from necessity when the printed and written clauses cannot be reconciled, and in that respect is like the rule applied in the construction of wills, where two clauses are repugnant and irreconcilable, in which case the first will be rejected and the subsequent clause will be regarded as indicating the final intention in the absence of any other clue to the interpretation. . . . The construction is to be made upon a consideration of the whole instrument, and not upon one or more clauses detached from the others; and this principle applies as well to instruments partly printed and partly written as to those wholly printed or wholly written." *Shepherd v. Naylor*, 71 Mass. 591; *Chadsey v. Guion*, 97 N. Y. 333.

2. *Yates v. United States*, 15 Ct. of Claims, 120.

3. "It is a salutary rule, applicable, as we think, to all such instruments as those above set forth, that a written instrument is to be construed most strongly against the maker; that when he has used in its language of doubtful or double import, it is to be taken in its strongest sense against him; and that if it is capable of two constructions, it should receive that which is most unfavorable to him." *Livingston v. Arrington*, 28 Ala. 424.

"So, in questions of doubt, it is equally well settled that the contract is to be construed most strongly against the party who stipulates the payment of a debt, or the performance of a duty." *Evans v. Sanders*, 8 Port. (Ala.) 497; *Union Bank v. Guice*, 2 La. An. 249; *Hoover v. Miller*, 6 La.

An. 204; *Noonan v. Bradley*, 9 Wall. (U. S.) 394; *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *Marion v. Stone*, 2 Cow. (N. Y.) 781; *Pike v. Munroe*, 36 Me. 309.

"But this rule is one of *dernier resort*, applicable only where the language of the instrument will equally admit of either of two or more interpretations; in such a case that effect will be given which is most unfavorable to the grantor." *Falley v. Giles*, 24 Ind. 119; *Adams v. Warner*, 23 Vt. 395.

"Nor does it seem that it is permitted to affect the construction when a third party would be thereby injured." 2 Pars. Contr. 510.

This rule is applicable also to cases where by the terms of an instrument an election of one of two things is given to one of the parties. In such cases the instrument will be construed in favor of the party having the election. *Story on Contr.* (5th ed.), § 815; *Edis v. Bury*, 6 B. & C. 433; *Miller v. Thompson*, 4 Scott N. R. 204; *Block v. Bell*, 1 Mood. & Rob. 149.

Exceptions in carrier's contracts exempting them from liability, will in cases of doubt be construed against the interests of the carrier. *Nicholas v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 370; *Mynard v. Syracuse, Bingh. & N. Y. R. R. Co.*, 71 N. Y. 180; *Georgia R. R. Co. v. Gann*, 68 Ga. 350.

"The reason of the rule *contra proferentem* is that men may be supposed to take care of themselves, and that he who gives and chooses the words by which he gives, ought to be held to a strict interpretation of them rather than he who only accepts. But the reason is not a very strong one, nor is the rule of special value." 2 Pars. Contr. 508.

It is reasonable to conclude that where one of the parties to a contract,

11. The Province of the Court and Jury in Duty of Interpretation.—The general rule is well settled that the construction or interpretation of all written instruments belongs to the court alone.¹ (See *CONTRACTS*, p. 867.)

12. The Practical Interpretation Put Upon an Instrument by the Parties Themselves, Entitled to Great Weight in Cases of Doubt.—In cases where the language used by the parties to an instrument is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation put upon it by the parties themselves, as shown by their acts and conduct, is entitled to great, if not con-

in describing his own obligations, uses language susceptible of more than one interpretation, the person with whom he is contracting will understand this language in the sense which is most favorable to his own interests. Jones on Interpretation of Commercial and Trade Confs., p. 315.

The opposite rule holds in the interpretation of public instruments. In the case of *Jackson v. Reeves*, 3 Cal. (N. Y.) 293, where a grant of lands under a patent was susceptible of two constructions, it was held that that construction which was most favorable to the government must be adopted. *Mohawk Bridge Co. v. Utica & S.R.R. Co.*, 6 Pai. (N. Y.) 554.

A government contract which was suggested by an officer of the government, and signed by another officer of the government, without being signed by the contractor on the other side, and which is obscure in its terms, is to be construed against the interests of the government. *Garrison v. U. S.*, 7 Wall. (U. S.) 688.

STORY, J., in delivering a dissenting opinion in respect to the construction of public grants, says: "It is a well known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails in cases of grants by the king; for where there is any doubt, the construction is made most favorably for the king, and against the grantee. The rule is not disputed."

In construing an ambiguous contract for carrying the mails, prepared at the post office, and leaving to the contractor no choice as to form or phraseology, that construction should be adopted which favors the contractor, as, for instance, where the question is whether additional service can or cannot be demanded without additional compensa-

tion. *Otis v. U. S.*, 20 Ct. of Cl. 315.

1. *Neilson v. Harford*, 8 M. & W. 806, 823: "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject by means of a bill of exceptions, for redress in a court of law; but a misconstruction by the jury cannot be set right at all effectually." *Rogers v. Colt*, 21 N. J. L. 659; *Brown v. Hatton*, 9 Ired. L. (N. Car.) 319; *Mason v. Rowe*, 16 Vt. 525; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *Brown v. Orland*, 36 Me. 376; *Rapp v. Rapp*, 6 Pa. St. 45; *Arnold v. Bailey*, 24 S. Car. 494; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; *Levy v. Gadsby*, 3 Cranch (U. S.) 180; *Globe Works v. Wright*, 106 Mass. 207; *Emery v. Owings*, 6 Gill (Md.) 191; *Hooper v. Webb*, 27 Minn. 485; *McAvoy v. Long*, 13 Ill. 147; *Lewiston v. Junction R.R. Co.*, 7 Ind. 597; *Worcester Med. Inst. v. Harding*, 65 Mass. 285; *Southain v. Miller*, 85 Ind. 161.

"The meaning of words and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are *prima facie* matter of law to be construed and passed upon by the court. *Brown v. Brown*, 49 Mass. 573.

"It is well settled that questions as to

trolling, weight.¹ This rule, though, does not mean that an er-

the meaning of particular words used in a special sense in a written instrument, are for the jury." *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

In cases where an instrument is to be construed by a foreign law, it is for the jury to find the existence of the law as a fact, but it is the duty of the court to construe and apply it. *Ames v. McComber*, 124 Mass. 85; *Ingraham v. Hart*, 11 Ohio 255.

"It is the province of the court to construe, interpret and determine the legal effect of all contracts. When the contract is in writing, and its execution duly proved, the court must determine the legal effect of the language used. When it is verbal, the question of what the terms of the contract are, as established by the evidence, is for the jury. In the latter case, the court must still determine the legal effect, and his instructions to the jury must necessarily be based upon facts assumed and upon the existence of which the jury are to find from the evidence." *Barton v. Gray*, 57 Mich. 622.

"It would be a dangerous principle to establish, where parties have reduced their contracts to writing, and defined their meaning by plain and unequivocal language, to subject their interpretation to the arbitrary and capricious judgment of persons unfamiliar with legal principles and settled rules of construction." *Brady v. Cassidy*, 104 N. Y. 147.

In the case of *Hutcheson v. Bawker*, 5 M. & W. 535, an offer to sell "good barley" was made by letter. The letter in answer, after stating the offer, went on to say: "of which offer we accept, expecting you to give us *fine* barley." The court, through PARKE, B., said: "The law I take to be this, that it is the duty of the court to construe all written instruments; if there are peculiar expressions used, which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the court to decide what the meaning of the contract was. It was right, therefore, to leave it to the jury to say whether there was a peculiar meaning attached to the word '*fine*' in the corn market; and the jury having found what it was, the question whether there was a complete acceptance by the written docu-

ment was a question for the judge."

"If a contract at all, they are a contract in writing. As such, the question of their interpretation—of their legal effect—was a question of law for the court. Nor is such interpretation the less a question of law because the construction may be aided by the use of extrinsic evidence, including what may be called the practical construction put upon the contract by the conduct and acts of the parties. The court, by the aid of extrinsic evidence, may put themselves in the situation of the parties, and look at the contract from their standpoint. But from whatever source light may be thrown upon the contract, what is its meaning, what promises it makes, what duties or obligations it imposes, is a question of law for the court. It is, after all, the legal reading and interpretation of what is written." *Smith v. Faulkner*, 12 Gray (Mass.) 255.

1. "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, weight. . . . But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one." Per JUSTICE MATTHEWS, *Toppliff v. Toppliff*, 122 U. S. 121.

"And although it is very true, as contended by the appellee, that where an agreement is plain and free from all ambiguity, it will not be construed by the acts and admissions of the parties in reference to it, yet, where the intention is obscure or doubtful, and extrinsic evidence can be invoked, no evidence is more reliable or entitled to greater consideration, as manifesting what their intention was, than the acts and conduct of the parties themselves." *Ins. Co. v. Doll*, 35 Md. 89; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50; *Williamson v. McHatton*, 16 La. Ann. 196; *Stopenhorst v. Wolff*, 35 N. Y. Super. Ct. 25; *Vinton v. Baldwin*, 95 Ind. 433; *Aetna Life Ins. Co. v. Nexsen*, 84 Ind. 347; *St. Louis Gas Light Co. v. St. Louis*, 46 Mo. 121; *Coleman v. Grubb*, 23 Pa. St. 393; *Butler v. Moses*, 43 Ohio St. 166; *Price v. Evans*, 26 Mo. 30;

roneous construction by them will control its effect, where its meaning is clear.¹

13. The Law of Domicil ; Place of Contract ; Place of Performance ; and Place of Trial in Questions of Construction.—The intention of the parties as to what law they desired to govern the construction of their contract, if ascertainable, must be followed.² Though, as a general rule, it is undoubted that the law of the country where an instrument is made is to be considered in construing

1 Add. on Contr. (8th ed., Abbott & Wood), p. 293; *District of Columbia v. Gallaher*, 124 U. S. 505; *Mathews v. Danahy*, 26 Mo. App. 660.

1. This rule does not mean that an error of the parties as to the effect of the instrument will bind them, if the meaning is clear. Thus it was said in *Ins. Co. v. Doll*, 35 Md. 89: "As was said by the supreme court, in the case of the Railroad Co. v. Trimble, 10 Wall. 367, where there is doubt as to the proper meaning of an instrument, the construction which the parties to it have themselves put upon it is entitled to great consideration; but where its meaning is clear, an erroneous construction of it by them will not control its effect. The same principle of construction was fully stated by CHIEF JUSTICE SHAW in the case of *Fogg v. The Middlesex Mut. Fire Ins. Co.*, 10 Cush. 337."

Where an agreement had been reduced to writing, purporting to be between certain individuals, in relation to the transfer of shares in a bank, but not signed by all the parties, their rights must depend, not upon what they considered them to be, nor upon the fact that the parties considered the agreement to be closed, and one party claimed the benefit thereof, but upon the application of the principles of law to the facts proved. *Agricultural Bank v. Burr*, 24 Me. 256; *Spencer v. Millsack*, 52 Iowa 31.

The fact that a party to a contract for three years paid interest which, on a proper and obvious construction of the contract, he did not owe, should have no weight on the question of the construction of the contract. *Garard v. Monongahela College*, 114 Pa. St. 337.

So where by mutual understanding certain meanings have been assigned to particular words or terms in an instrument by the parties, such meanings will be adopted in the construction of the instrument. *Conover v. Wardell*, 20

N. J. Eq. 266; *Haddock v. Woods*, 46 Iowa 433; 1 Add. Contr. (8th ed., Abbott & Wood), p. 293, note.

"But the parties can review their decision and arrive at a different construction, and if the different conclusion be acted on, it will in its turn become conclusive, unless the parties review it." Add. Contr. (8th ed., Abbott & Wood), p. 294, note; *Reading v. Gray*, 37 N. Y. Super. Ct. 79.

In construing a statute, the construction put upon it for a long time by the executive department charged with its execution, is entitled to great weight. *Chaffee's Appeal*, 56 Mich. 244 (1886); *United States v. Philbrick*, 120 U. S. 52; *United States v. Hill*, 120 U. S. 169.

2. Jones on the Construction of Commercial and Trade Contracts, p. 32. "In order to ascertain the intent of the parties as to the law they desired to govern their contract, the court must consider the terms of the agreement, the subject matter of the contract, the domicile of the parties, and every circumstance surrounding its execution, which may shed light upon the question. It seeks for evidence of positive intention, and if, in the particular case before the court, circumstances are developed indicating that the special contract under consideration should be construed in an exceptional manner, in order to carry out the intention of the parties, the court will so construe it."

In the case of *Pritchard v. Norton*, 106 U. S. 124, MR. JUSTICE MATTHEWS said: "The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have either expressly or presumptively incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by MR. CHIEF JUSTICE MARSHALL in *Wayman v. Southard*, 10 Wheaton 148, where he defined it as a principle of universal law: 'The prin-

the instrument.¹ But when a contract is made in one place, but to be performed in another, it is to be governed in its construction by the law of the place of performance.² When an instrument affecting personal property is executed by a party domiciled in a different country from that in which the property is situated, it is governed in its interpretation by the laws of that domicile.³ The construction put upon a statute by the courts of the country where the statute was enacted will generally be adopted.⁴ These rules owe their existence to comity. (See *CONFLICT OF LAWS.*)

14. Punctuation as a Means of Interpretation.—Punctuation in written instruments may sometimes, in cases of ambiguity, shed light upon the meaning of the parties, but it is never allowed to overturn what seems the plain meaning of the whole instrument. It may be resorted to when all other means fail.⁵

ciple that, in every form, a contract is governed by the law with a view to which it was made.”

1. When no place of performance is designated by a contract, it must be governed in its interpretation by the *lex loci contractus*. Thus, in an action for money paid for the use of an infant, but not for necessities, it appeared that the cause of action accrued in Scotland, and that the defendant was under age; but it did not appear from the evidence what was the law of Scotland in regard to the defendant's liability. And LORD ELDON said: “I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The law of the country where the contract arose must govern the contract; and what that law is should be given in evidence to me as a fact. No such evidence has been given, and I cannot take the fact of what that law is without evidence.” *Male v. Roberts*, 3 Esp. 163; *Brown v. Richardson*, 13 Martin (La.) 202; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439; *Peck v. Hibbard* 26 Vt. 703; *Walker v. Forbes*, 31 Ala. 9; *Barney v. Newcomb*, 9 Cush (Mass.) 46; *Partee v. Silliman*, 44 Miss. 272; *French v. Hall*, 9 N. H. 271; 2 Kent Comm 453.

2. Where contract made in one place, but to be performed in another, it is to be governed in its construction by law of place of performance. “Thus, a bill of exchange payable in France is a foreign bill, although it be actually made in England; and due notice of dishonor being parcel of the contract, it is sufficient, to entitle a party to re-

cover on such a bill in this country, to show that he gave sufficient notice of dishonor according to the law of France.” *Chitty on Contr.*, p. 96, quoting *Rothschild v. Currie*, 1 Q. B. 43; *Pittsburgh & St. Louis R. Co. v. Rothschild* (Pa.), 4 Cent. Rep. 109; *Lewis v. Headly*, 36 Ill. 433; *McDaniel v. Chicago & N. W. R. R. Co.*, 24 Iowa 417; *Dorsey v. Hardesty*, 9 Mo. 157; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285.

3. An instrument relating to or affecting personal property, when executed by a party domiciled in a different country from that in which the property is situated, the laws of that domicile govern as to the interpretation of that instrument. See *CONFLICT OF LAWS.*

Solemnities.—As to form, authentication etc., of contracts, see *CONFLICT OF LAWS*, 3 Am. & Eng. Ency. of Law, 558.

4. In construing statutes of the various States or of foreign countries, the supreme court of the United States adopts the construction put upon them by the courts of the state or country by whose legislature the statute was enacted. *Cathcart v. Robinson*, 5 Pet. (U. S.) 280; *Metropolitan R. Co. v. Moore*, 112 U. S. 558.

5. “Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail.” *Ewing v. Burnet*, 11 Pet. (U. S.) 54.

“Punctuation in written contracts may sometimes shed light upon the meaning of the parties, but it must never be allowed to overturn what

15. The Rules of Interpretation for Contracts, Wills and Statutes Almost Identical—Some Points of Difference.—In the preceding sections, the rules have been laid down for the interpretation of written instruments. It makes very little difference whether the instrument in question be a contract, will or statute, for obviously the cardinal rule to be observed in them all is to ascertain the intention of the writers.¹ But from the very nature of these instruments there has always been a difference in the degree of strictness employed by courts in their interpretation. Thus wills have never been subjected to as strict rules in their inter-

seems the plain meaning of the whole contract." *Osborn v. Farwell*, 87 Ill. 89.

"The want of proper punctuation is, if objectionable at all, no more allowable in vitiating the contract, or destroying its effect, than bad grammar, the rule against which is a maxim of the law. To allow the contractor to punctuate in *mitiori sensu* of his own words, would be something of a novelty. I think no case can be found upon which the sense of a contract has depended upon the absence of punctuation marks; words are the most usual evidence of intent, and formed into sentences, are to be taken to express the meaning of the party using them. Punctuation may aid in ascertaining the true reading of a production, but the production may be read and interpreted without such aids." *White v. Smith*, 33 Pa. St. 186.

"Punctuation may perhaps be resorted to when no other means can be found of solving an ambiguity, but not in cases where no real ambiguity exists, except what the punctuation itself creates. In such cases it will not be allowed to confuse a construction otherwise clear." *Weatherly v. Mister*, 39 Md. 620; *Sanford v. Raikes*, 1 Merivale 650; *Arcularius v. Geisenhainer*, 3 Brad. (N. Y.) 64; *Arcularius v. Sweet*, 25 Barb. (N. Y.) 406.

The court will sometimes supply punctuation marks in order to ascertain the meaning of the parties.

In the case of *In re Denny's Estate*, 8 Ir. R. Eq. 427, *CHRISTIAN, L. J.*, after inserting punctuation marks of his own in a deed which he was construing, said: "It would be no answer to this to say that the deed contains no such punctuation or supposed pauses as I have used; it is perfectly legitimate to assume them as a means of showing what construction the words are capable of; and in doing so I am only fol-

lowing what was done by the judges in one of the cases cited, *Galley v. Barrington*, 2 Bing. 387; and if by such aid we are enabled to see that the language can bear an interpretation which will make the whole instrument rational and self-consistent, we are bound to adopt that interpretation in preference to another which would attribute to the parties an intention utterly capricious, insensible and absurd. *English's Exr. v. McNair's Admrs.*, 34 Ala. 40; *Doe v. Martin*, 4 T. R. 65.

"The statutes in England are not punctuated in the original rolls; but more or less marks of punctuation appear in them as printed by authority. With us, the punctuation is the work of the draftsman, the engrosser, or the printer. In the legislative body, the bill is read; so that the ear, not the eye, takes cognizance of it. Therefore the punctuation is not, in either country, of controlling effect in the interpretation. Still a judge cannot avoid seeing the marks, and they seem to have been permitted to turn the scale in an evenly balanced case." *Bishop on the Written Laws*, § 78; *Shriedly v. State*, 23 Ohio St. 130, 149; *United States v. Isham*, 17 Wall. (U. S.) 496; *Randolph v. Bayne*, 44 Cal. 366; *Morrill v. State*, 38 Wis. 428.

1. "A statute is a writing, equally with a will or contract. And to a considerable extent the rules for the one class are those also for the other." *Bishop on the Written Law*, § 4. For example, the rule in contracts that the interpretation put upon them by the parties themselves is entitled to great weight, a principle which would appear to have little application to statutes, finds a close analogy in the interpretation of statutes in the rule that the construction adopted by the executive department charged with its execution, is entitled to great weight. *Chaffee's Appeal*, 56 Mich. 244 (1886).

pretation as contracts,¹ and neither of these to as strict rules as are employed in the interpretation of statutes.² (See CONTRACTS; STATUTES; WILLS.)

INTERPRETER.

1. Definition, 523.
2. Appointment, 523.
3. Translation Must be Under Oath, 524.
4. Competency, 525.
5. Accuracy May be Impeached, 525.
6. Interpreter Not an Agent of Witness, 525.
7. Privileged Communications, 526.
8. No Judicial Power, 526.

1. Definition.—An interpreter is one by whom a translation is made.³ A court interpreter is a person sworn at a trial to interpret the evidence of a foreigner, or of a deaf and dumb person, to the court.⁴

2. Appointment.—The appointment of interpreters for the courts is provided for in many States by statute.⁵ In the ab-

1. "There are certain rules of construction common to both deeds and wills; but as in the disposition of property by deed, an adherence to settled forms of expression is either rigidly exacted by the courts or maintained by the practice of the profession, the rules to which the construction of deeds has given rise are comparatively few and simple. But the peculiar indulgence extended to testators, who are regarded as *inops consilii*, has exempted the language of wills from all technical restraint, and withdrawn them in some degree from professional influence. By throwing down these barriers, a wide field is laid open to the caprices of language; though at certain points, as we have seen, its limits are ascertained by rules sufficiently definite, and we are guided through its least beaten tracks by general principles." 3 Jarman on Wills, p. 697.

When there are two repugnant clauses in a deed which cannot stand together, the first prevails. With a will the reverse is the case. Bouv. Law Dict., Interpretation; 1 Jorman on Wills, pp. 411-425.

2. In wills, as in contracts, evidence of all the surrounding circumstances is admissible to explain a latent ambiguity, but this rule is not applicable in the interpretation of statutes. Thus in the case of *State v. Rebecca Partlow*, 91 N. Car. 550 (1884), an act of assembly prohibited the sale of liquor "within three miles of Mt. Zion church in Gaston county," and it appeared, on trial of an indictment for its violation, that there were two churches of that name in the county. *Held*, that evi-

dence was not admissible to show which church was meant; and the court in its opinion, as a reason, says: "A member of the legislature might say one thing or person was meant; another might say another thing or person was meant; a third might say yet another thing or person was meant; and thus the legislative will might entirely fail."

"The more the text partakes of a solemn compact, the stricter should be its construction." Bouv. Law Dict., Interpretation.

There is a difference in the degree of strictness with which different kinds of statutes are construed. Thus penal statutes are strictly and remedial statutes liberally construed. Bishop on the Written Law, §§ 119, 120.

3. Bouv. L. Dict., tit. Interpreter.

4. Whart. L. Lex., tit. Interpreter.

5. In *Schall v. Eisner*, 58 Ga. 192, the court said that this power of appointment, founded in common sense, and absolutely necessary for the administration of justice, had always existed, and was merely re-enacted in Ga. Code, § 3858.

In *Pennsylvania*, where a court interpreter was appointed under the act of March 27th, 1865, Pamph. L. 795, which provides for the appointment by the governor, of a competent interpreter, whose duty it is to make "verbal or written translations of foreign invoices, manifests and other documents, which translation shall be duly certified;" and which in a subsequent clause authorizes the courts of common pleas to appoint "a competent interpreter of foreign languages for the court and from

sence of a regularly appointed officer, the courts may order an interpreter to be sworn to interpret.¹

3. Translation Must be Under Oath.—An unsworn translation will not be received in evidence. Interpreters are always sworn.²

time to time to fill vacancies as they occur;" and where a subsequent statute (act February 18th, 1869, Pamph. L. 198) establishes the office of interpreter (in the singular) for the city of Philadelphia; on a *quo warranto* proceeding against the court interpreter appointed under the first act, on the ground that the act of 1869 repealed that of 1865, AGNEW, J., said: "The argument for an implied repeal is drawn from the 3d section of the act of 1869, in these words: 'That no witness shall be produced, sworn or examined in any court of justice of said city of Philadelphia to interpret the testimony of any witness who testifies in a foreign language, or to translate any written paper, instrument of writing or document in a foreign language who shall not produce the certificate of said officer as to his fitness and competency for that purpose, bearing date of the day of his examination.' If we take this section literally it does not apply to an official interpreter who is examined and sworn upon his entering into the office to perform the duties faithfully, but only to an interpreting witness called to the stand *pro hac vice* and then sworn and examined. To give it a wider scope and apply it to the official interpreter of the court whenever he came to the stand to interpret, would produce consequences so monstrous and destructive of the due administration of justice, as would cause it to infringe directly on the bill of rights declaring that 'the courts shall be open' and 'right and justice administered without sale, denial or delay.' Its effect would be that no witness speaking a foreign language could possibly be examined until the parties have called on the city interpreter and paid him for a certificate; a sale of justice totally uncalled for and unnecessary. . . . We say, therefore, that the third section of the act of 1869 does not refer to the official interpreter appointed by the court when he comes to the stand to interpret in the ordinary course of his duty as interpreter." Commonwealth *ex rel. Girard v. Sanson*, 67 Pa. St. 322.

1. Norberg's Case, 4 Mass. 81; Amory v. Fellows, 5 Mass. 219; Schall

v. Eisner, 58 Ga. 190; Hout v. Hout, Wright (Ohio) 156.

Appointment Not Reviewable.—The appointment of an interpreter is not reviewable on appeal. People v. Ramirez, 56 Cal. 533; s. c., 38 Am. Rep. 73.

When Not Necessary.—There is no necessity of an interpreter to explain the contents of a mortgage on a homestead if it is established to the satisfaction of the court and jury that the wife understands English. Pfeiffer v. Kiehne, 13 Cal. 644.

When Appointment at Expense of County.—A Wisconsin circuit court, having a general jurisdiction in both civil and criminal cases, has power to appoint an interpreter whenever it may deem one necessary for the furtherance of its business, and to impose the expense thereof upon the county; but a county court has no such power except it be in criminal cases coming within its jurisdiction. In other cases the parties litigant must pay the expense incurred in the employment of an interpreter. Supervisors of Crawford Co. v. Le Clerc, 4 Chand. (Wis.) 56.

Foreign Commissions.—A commission was sent to Bremen and returned with the answers in German annexed to a German translation of the questions. A sworn interpreter who knew the German language was allowed to translate the answers *viva voce* to the jury. Kuhtman v. Brown, 4 Rich. (S. Car.) 479.

2. Vandervoort v. Ins. Co., 2 Cal. (N. Y.) 155; Norberg's Case, 4 Mass. 81; Amory v. Fellows, 5 Mass. 219. Where a deposition does not, upon its face, show that an interpreter was employed, but by oral proof it is shown that one was employed and properly sworn, it cannot be objected that there is nothing to show that the interpreter was sworn to interpret truly. People v. Dowdigan (Mich.), 38 N. W. Rep. 920.

The translation of a writing, to be admissible, must be accompanied by the document translated. In Bixby v. Bent, 51 Cal. 590, it was held that a translation of the expediente of a Mexican grant of land, unaccompanied by the original, or a certified copy of the

4. Competency.—A person who on oath declares that he is acquainted with the language in which records are written will be permitted to translate them.¹ A witness is competent to act as interpreter before the grand jury.² A next friend³ or the wife⁴ of a party is not incompetent. One not an adept in the sign language may nevertheless be sworn to interpret the evidence of a deaf and dumb person.⁵

5. Accuracy May be Impeached.—The accuracy of a translation may be impeached by one who understands the language. The question is for the jury.⁶

6. Interpreter Not an Agent of Witness.—An interpreter is deemed a witness and not an agent of the party whose testimony he interprets. His testimony given on a former trial cannot be admitted as evidence, unless satisfactory reasons are shown for his absence.⁷

same, is not admissible in evidence. 2 Whart. Ev., § 174.

1. *Davis v. Police Jury*, 19 La. 541. A judge is not bound to appoint a regular sworn interpreter. If there be none, any person competent to translate the evidence may be appointed as such. *Farar v. Warfield*, 8 Martin N. S. (La.) 697.

2. *People v. Ramirez*, 56 Cal. 533; s. c., 38 Am. Rep. 73.

3. Where the common law rules excluding parties from testifying have been done away with, the next friend of a party may, at the discretion of the court, act as interpreter. *Swift v. Applebore*, 23 Mich. 253; *Comm. v. Kepner*, 114 Mass. 278.

4. *Schutter v. Williams* (Ohio), 1 West. L. J. 319.

5. *Skaggs v. State*, 108 Ind. 533.

But in *People v. Gelabert*, 39 Cal. 663, it was held that a witness who has a very imperfect knowledge of the language employed in a conversation, and who did not understand the whole of the conversation, in which a supposed confession was made to him by an accused person, is incompetent to testify as to such confession. Referring to 1 Greenl. Ev., § 218, where it is stated as a rule that the whole of what a prisoner said on the subject, at the time of making a confession, should be taken together. See also 1 Gr. Ev., § 214, etc. But the same court held that this rule did not prevent proof of a conversation between a person indicted for murder, and his victim, while alive, the conversation having been partly in Chinese and partly in English, and being proved, that part of it in English

by persons present who understood English only, and that part of it in Chinese by persons present who understood Chinese, provided that both the accused and his victim understood both languages.

Deaf and Dumb Witness.—A deaf and dumb witness may be sworn and give evidence by means of tokens and signs through an interpreter. *Ruston's Case*, 1 Leach (Eng.) 408; *Steels' Case*, 1 Leach 451; *State v. DeWolf*, 8 Conn. 93; *Snyder v. Nations*, 5 Blackf. (Ind.) 295.

In *Morrison v. Lennard*, 3 C. & P. (Eng.) 127, it was observed by BEST, C. J., that where a deaf and dumb witness could write, it would be better to make him write his answers than to take his testimony in the sign language through an interpreter.

6. *U. S. v. Gilbert*, 2 Sumn. (U.S.) 19; *Schnier v. People*, 23 Ill. 17.

Where a conversation partly in a foreign language has been testified to and interpreted by a witness on cross-examination, it is not error to refuse to allow it to be again detailed, to test the correctness of the translation where that is not seriously questioned. *Ulrich v. People*, 39 Mich. 245.

7. *Shearer v. Harber*, 36 Ind. 536; *People v. Lee Fat*, 54 Cal. 527; *People v. Ah Yute*, 56 Cal. 119. The last two cases disapprove in part, at least, of 1 Whart. Ev., § 174. MR. WHARTON there says that the interpreter's rendition in court of the foreigner's testimony given at the same time is not hearsay.

Interpreters Between Parties.—That is the rule as to the interpreter of a witness in court, but it does not apply to

7. Privileged Communications.—An interpreter is not allowed to disclose the confidential communications made through him between attorney and client.¹

8. No Judicial Power.—The court in appointing an interpreter cannot confer judicial power upon him.²

INTERROGATORIES.—See also **BILLS OF DISCOVERY; DEPOSITIONS; EQUITY PLEADINGS.**

1. Definition, 526.

2. In Equity, 527.

a. *Origin and Purpose*, 527. [527.

b. *Averments Necessary as Bases*,

c. *Necessity of Interrogatories*, 530

d. *In Cases of Demurrer or Amendment to Bill*, 530.

e. *Filing and Serving of Inter-*

rogatories, 531.

f. *Who May be Interrogated; Principals; Rules of Privilege*, 532.

g. *Subject Matter*, 534. [534.

1. *Matter Material to Plaintiff*,

2. *Matter Relating to Defence*,

3. *At Law*, 534. [534.

1. Definition.—Interrogatories are defined as material and pertinent questions, in writing, to necessary points, not confessed, exhibited for the examination of witnesses or persons who are to give testimony in the cause. This article treats of interrogatories to parties.³

an interpreter between parties. An interpreter's statements of what a party said are treated as identical with those of the party himself; and therefore may be proved by any person who heard them, without calling the interpreter. *Fabrigas v. Mostyn*, 11 St. Tr. (Eng.) 171; *McCormick v. Fuller*, 56 Iowa 43; *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 541.

Declarations.—Declarations made in another language may be interpreted and given in evidence through one who heard them. *People v. Ah Wee*, 48 Cal. 236.

Admissions.—Where the plaintiff cannot speak English and the defendant cannot speak German, and the plaintiff's wife, understanding both languages, acts as interpreter between them, the wife's statements, while acting as such interpreter, may be given in evidence as admissions of the husband. *Schutter v. Williams* (Ohio), 1 West. L. J. 319.

When Agent.—If an interpreter is employed to communicate an offer, which is accepted, the offer as communicated by him is admissible in evidence against his principal, for the purpose of proving the contract, without proof that he truly interpreted the offer which he was authorized by his principal to communicate. *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 539.

In *Wisconsin*, it was held that the

mere fact that parties contract through an interpreter does not of itself make him their agent, so as to bind them by his false translation of their language. *Diener v. Sehley*, 5 Wis. 483.

1. *Parker v. Carter*, 4 Munf. (Va.) 273; *Jackson v. French*, 4 Wend. (N. Y.) 337; *Andrews v. Solomon*, 1 Pet. (C. C.) 356; *Du Barre v. Livette*, Peake's Cas. 77, explained in *Wilson v. Rastall*, 4 T. R. 756.

2. Where the court, during the trial of a criminal case, instructs the interpreter that whenever the witness undertakes to state something that somebody else has told him, he should inform the court, it would be error warranting a reversal of the judgment if it appear that such instructions were acted upon, and that the interpreter merely reported to the court that the witness had stated something that had been told him by somebody, and the court had acted on the bare statement without requiring the interpreter to repeat what the witness had said; but if it does not so appear the judgment should not be disturbed. *People v. Wong Ah Bang*, 65 Cal. 305.

3. *Bouvier's Law Dict.* A statute providing that an insolvent, applying for discharge, shall be examined on interrogatories, does not thereby require that the interrogatories shall be in writing, although it was said that the best and safest course is to interrogate

Not many years after the authorization of interrogatories in the actions at law, the legislation began which removed the disqualification of parties as witnesses. The reader is therefore referred to the article DEPOSITIONS. The article BILL OF DISCOVERY should also be given attention, particularly the part relating to statutory provisions. See also EQUITY PLEADINGS.

2. In Equity—*a. Origin and Purpose.*—The practice of putting special interrogatories seems to have been derived from the civil law;¹ and its object is the prevention of evasion by literal answers to the bill;² and, by detailed questioning, the refreshing of the respondent's recollection.³

in writing. And this decision was made, although at a somewhat earlier time there had been a statute in force requiring the insolvent to be examined upon interrogatories in writing. *State v. Ludlow*, 2 Southard (N. J.) 772, SOUTHARD, J., said: "What are interrogatories? The usual technical meaning of the word, in the court of chancery, is a question in writing; its ordinary meaning, in common discourse, is a question. I do not know of any fixed, certain and invariable meaning in common law courts."

"It is the seventh part of a bill in equity. It prays that the parties complained of may answer all the matters contained in the former parts of the bill, not only according to their positive knowledge of the facts stated, but also according to their remembrance, to the information they may have received, and to the belief they are enabled to form on the subject. One of the principal ends of an answer upon the part of the defendant is, to supply proof of the matters necessary to support the case of the plaintiff; and it is therefore required of the defendant, either to admit or to deny all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare himself unable to form any belief concerning it. And this he ought to do fully and explicitly, even though no special interrogatories should follow in the bill." *Story Eq. Pl.* (2nd ed.), § 35.

Costs of Interrogatories.—The costs of preparing interrogatories, which were not used owing to admissions being put in, will be allowed on taxation as between party and party.

1. *Story Eq. Pl.* (2nd ed.), § 39. Chief Baron Gilbert, in his *History and Practice of Chancery*, said: "By the civil

law, when the plaintiff had put in his positions before the judge, the defendant was to put in his contestations or negations of such positions, and the plaintiff had liberty to examine the defendant upon interrogatories, to supersede the necessity of proof; and these were called the *libellus articulatus*, and was generally put in after the first act, where the defendant had answered the positions.

"We also flung the positions and the *libellus articulatus* into one bill; and hence it is that the interrogatories must arise out of the facts alleged in the bill; that if the interrogatories do not arise from the facts alleged in the bill, but are totally foreign to it, the defendant may refer them for impertinence; but if he does not, but submits to answer them as pertinent, the court will, generally speaking, oblige him to answer the bill, unless the interrogatories are totally foreign and not at all pertinent to the bill." *Gilbert's Forum Romanum* 89.

2. *Tyler's Mitford's Eq. Pl.* (ed. of 1876), p. 142; *Story Eq. Pl.* (2nd ed.), § 35. The language in *Mitford* is as follows: "But as experience has proved that the substance of the matters stated and charged in a bill may frequently be evaded by answering according to the letter only, it has become a practice to add to the general requisition that the defendants should answer the contents of the bill, a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the enquiry after each fact an enquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion, and compel a full answer."

3. *Tyler's Mitford's Eq. Pl.* 142 (ed. of 1876).

Particular interrogatories must be

b. Averments Necessary as Bases.—The interrogating part should coincide with the stating and charging part of the bill. For a plea following negatively the charging part, will be sufficient, although the interrogatories question beyond what the bill charges.¹

The rule is that complainant is not only to question in the interrogatory part, but he must make charges in the charging part; otherwise he cannot except. But it seems to be a general rule that if defendant, though not bound to answer, do so, the plaintiff by replying puts the matter in issue properly; consequently that informality in the manner of charging (for it is no more) is supplied by the answering to it; for a matter may be put in issue by the answer, as well as by the bill; and if replied to, either party may examine with respect to it.² But there are exceptions. Some relaxation under the act of parliament of the strict rule is noted below.³ If a distinct fact is alleged in the bill, plaintiff

answered, although defendant make a general denial of plaintiff's case. 1 Dan. Ch. Pl. 726; *Hibbert v. Durant*, 1 Bro. C. C. 503, cited in *Prout v. Underwood*, 2 Cox Ch. 135; *Hepburn v. Durand*, 1 Bro. C. C. 503; *Ld. Red.* 310.

1. Thus in *Clayton v. Winchelsea*, 3 Y. & Coll. 688, a bill for tithings stated that defendant had cut and carried away timber, and the interrogatories were whether defendant had not cut and whether he had not carried away. Defendant merely pleaded that defendant had not cut any wood which he had carried away. *LORD ABINGER*, Ch. B., while feeling hesitation, *held* the plea sufficient. See also *Re Morgan*, 39 Ch. Div. 316.

For other rules, see *BILL OF DISCOVERY*, 2 Am. & Eng. Ency. of Law, 202, 203.

The bill should set forth in particular the matters upon which the discovery is desired. Vague and loose surmises do not demand answer. *Story Eq. Pl.*, § 325. See *Newkerk v. Willett*, 2 *Caine's Cas.* (N. Y.) 296.

Interrogatories need not be answered unless founded on averments in the bill. *Story Eq. Pl.*, § 36; *BILL IN EQUITY*, 2 Am. & Eng. Ency. of Law, 213, n. 5, 8.

2. *Attorney General v. Whorwood*, 1 *Ves. Sr.* 538.

Though under the allegation of a fact by bill the plaintiff may interrogate to incidental circumstances, he cannot as to a distinct subject. *Bullock v. Richardson*, 11 *Ves.* 373.

Where a bill in chancery was filed for

an account, and the defendant, in his answer, set up an agreement under seal between the parties, in defence, it was *held* that the complainant could not prove the agreement to be fraudulent, as there was no allegation of fraud in his bill. *James v. McKernon*, 6 *Johns.* (N. Y.) 543.

Every material matter should be put in issue by the pleadings; and no interrogatories can be filed which do not arise from or relate to some fact charged in the complainant's bill. *Woodcock v. Bennet*, 1 *Cow.* (N. Y.) 734; *James v. McKernon*, 6 *Johns.* (N. Y.) 543. See also *Story Eq. Pl.*, §§ 28, 853; *Jordon v. Jordon*, 3 *Swanst.* 472.

Interrogatories cannot compel discovery on distinct matters not included in allegation or charge. 1 *Dan. Ch. Pl.* 377; *Mechanics' Bank v. Levy*, 3 *Pai.* (N. Y.) 606; *Consequa v. Fanning*, 3 *Johns. Ch.* (N. Y.) 596; *Johnhan v. Child*, 1 *Bro. C. C.* 94. All beyond such are idle. *Kisor v. Stancifer*, *Wright* (Ohio) 323.

What, in an answer in chancery, is responsive to the bill, is to be determined by the allegations in the bill, and not by the interrogatories. The interrogatories can neither limit nor extend the defendant's obligation to answer. *McDonald v. McDonald*, 16 *Vt.* 630. A defect in the charging part cannot be supplied by a subsequent interrogatory. *Parker v. Carter*, 4 *Munf.* (Va.) 273; *Barton's Eq. Prac.* (Richmond, 1881) 264.

3. Parliament (15 and 16 *Vict.*, ch. 86) having required plaintiff to state in his bill the facts on which he *relied*, it

may enquire into everything incidental; what, how, when, etc.¹ And it is sufficient if an interrogatory is founded upon a statement in the bill which is inserted therein merely as evidence in support of the main charges.² If the complainant conceives, from any matter offered by the plea or answer, that his bill is not properly adapted to his case, he may obtain leave to mend his bill, and suit it to the defence, or he may file a supplemental bill.³

was *held* that as to matters not issuable, and on which plaintiff does not "rely," defendant could now be required to answer interrogatories, although no statement of those matters was made in the bill. A bill contained no charge of documents in defendant's possession; nevertheless he was required to answer fully interrogatories respecting them. Exception to his answer for insufficiency was sustained. *Terry v. Turpin, Kay*, app. 49; s. c., 18 Jur. 584.

So in *Parkinson v. Chambers*, 1 K. & J. 72, it was *held* that documents must be produced by defendant that plaintiff may prove that the statute of limitations has not run against the instrument in suit, although the bill contained no charge of documents.

"In the present case the bill does not contain the charge of books and papers, it being the settled practice of the court, since the act of parliament which requires the bill to contain only statements of fact, to regard charges of the evidence relied on as unnecessary, except when they are required to point to particular evidence, as in the case of admissions and the like. Upon the statement of facts contained in the bill, interrogatories are exhibited, and the court has not been very precise in limiting the extent of them; and I have myself *held* that the charge of books and papers is not necessary to give a right to interrogate as to the point, the act pointing out that it was desirable to omit from the bill all extrinsic matters not constituting facts in the cause." *Mansell v. Feeney*, 2 Johns. & Hem. 313.

Interrogatories as to particular documents must, however, be answered. *Catt v. Tourle*, 18 Weekly Rep. (Eng.) 966. The fact of a general affidavit, in the usual form, as to documents, having been filed, is not a sufficient reason for refusing to answer an interrogatory inquiring as to particular documents. See also, as to documents, ANSWER, 1 Am. & Eng. Ency. of Law, 602, par. 5 and note.

VICE-CHANCELLOR KINDERSLEY went further still. He said that the non-sense of the old forms was meant to be gotten rid of by the act. And he *held* that it is no longer necessary to introduce charges suggesting imagined facts to found an interrogatory; so that where a bill charged the existence of a mortgage known to the plaintiff, but did not charge that there were others, an interrogatory, "whether there were others, was *held* to be correct. *Marsh v. Keith*, 1 Drew & Sm. [1860] 342; s. c., Jur. N. S. 1182. See also *Hudson v. Grenfell*, 3 Giff. (Eng.) 388; s. c., 8 Jur. (N. S.) 878.

The practice in *England* now is to produce documents at chambers, as being cheaper and more summary than the old interrogatory way of getting at them. *Piffard v. Beeby*, L. R., 1 Eq. 623; s. c., 12 Jur. N. S. 117.

1. *Bulloch v. Richardson*, 11 Ves. 375; *Faulder v. Stuart*, 11 Ves. 296; note to *Clarke v. Turton*, 11 Ves. 240; note to *Muckleston v. Brown*, 4 Ves. 52. Under the general charge as to the fact of payment, the plaintiff may interrogate as to all the circumstances that go to prove or disprove the truth of the fact, as when, where, etc., without particular charges. *Faulder v. Stuart*, 11 Ves. 296; *Story Eq. Pl.*, § 37; *Cooper Eq. Pl.* 12.

2. *Mechanics' Bank v. Levy*, 3 Pal. Ch. (N. Y.) 606.

In action to recover land, plaintiff may interrogate upon what is relevant to his own case, notwithstanding the rule that forbids plaintiff in ejectment from recovering on the weakness of his adversary's title. Where plaintiff claimed as assignee of certain coheir-esses, he was permitted to interrogate defendant as to the pedigree of the heiresses, and as to certain declarations of defendant that the latter held as trustee for the late owner and her heirs, even though plaintiff had other means of proving the same things. *Lyell v. Kennedy*, 8 App. Cas. 217.

3. KENT, C. J., in *James v. McKer-*

c. Necessity of Interrogatories.—The interrogating part of the bill is not absolutely necessary. Full answers or full denials by defendant accomplish the object of interrogatories, though these be omitted. In the old forms of bills there were no special interrogatories.¹ Their use in sifting the conscience and refreshing the memory of respondent has already been mentioned, and in practice they are said to be almost universal, except in amicable suits.²

In *Vermont*, a bill containing no interrogatories was said to be defective.³ But in *Pennsylvania* interrogatories were said not to be indispensable to a bill in equity.⁴ In *Massachusetts*, the interrogatory as part of a bill has been regarded as necessary,⁵ but in the case in which this was said, the court said also that they would grant relief upon plaintiff's correcting the defect.⁶ And a prayer that defendant answer to the matters alleged has been held a good general interrogatory.⁷ It was held by CHANCELLOR KENT that the general interrogatory was enough to satisfy the rule, and that special interrogatories were not indispensable.⁸ And this would appear to be the law, especially in view of the fact that the bills in old times did not contain special interrogatories, which came into use because it was found that defendants artfully confined themselves to the letter of the general interrogatory, or else did honestly forget things whereof the special interrogatory served to remind them.⁹

d. In Cases of Demurrer or Amendment to Bill.—Demurrer to the bill does not relieve plaintiff from the necessity of seeing that his interrogatories are filed within the time limited.¹⁰ It seems that a defendant cannot protect himself from answering a

non, 6 Johns. (N. Y.) 564. And see *Thomas v. Graham*, Walk. (Mich.) 117.

1. LORD ELDON, in *Partridge v. Haycraft*, 11 Ves. Jr. 574; Story Eq. Pl., § 38; Cooper Eq. Pl., 11, 12.

2. See Story's Eq. Plead. (2nd ed.), § 38, note 3.

3. *Shed v. Garfield*, 5 Vt. 39.

4. *Eberly v. Groff*, 21 Pa. St. 256.

5. *Belknap v. Stone*, 1 Allen (Mass.) 572.

6. See *infra*, this title, FILING AND SERVING INTERROGATORIES.

7. *Ames v. King*, 9 Allen (Mass.) 258, where also the "conclusion" was held sufficient though the interrogatory was coupled with prayer for process, and was followed by a prayer for specific and general relief. Plaintiff may propose specific interrogatories in a proper case. Mass. Chanc. Pr., rule 4.

8. *Methodist Church v. Jaques*, 1 Johns. Ch. (N. Y.) 75.

9. Under Chancery rules in *Maine*, "A general interrogatory only shall be introduced, and it shall be sufficient to

require a full answer to all the matters alleged." Rule 1, app. 581, 37 Me. Rep.

When the practice in *England* was to put the interrogatories in the bill, the particular ones each defendant was to answer were specified in a note at the foot of the bill. And such is the rule adopted by the United States supreme court. 1 Dan. Ch. Pl., *376, n.

See generally Story Eq. Pl. (2nd ed.), § 38; Methodist etc. Church v. Jaques, 1 Johns. Ch. (N. Y.) 65; Hagthorp v. Hook, 1 Gill & J. (Md.) 270; Salmon v. Claggett, 3 Bland (Md.) 125; Bank of Utica v. Messereau, 7 Paige (N. Y.) 517; Cugler v. Bogert, 3 Paige (N. Y.) 186; Parkinson v. Trousdale, 3 Scam. (Ill.) 380; Mass. Chanc. Rules, rule 5. See also Kisor v. Stancifer, Wright (Ohio) 324; Ames v. King, 9 Allen (Mass.) 258; Perry v. Turpin, 18 Jur. 594; Attorney General v. Rees, 12 Beav. 54; Jordan v. Jordan, 16 Ga. 446; Pitts v. Hooper, 16 Ga. 442.

10. *Harding v. Pingey*, 10 Jur. N. S. 873.

particular interrogatory on the ground that had he chosen he could have demurred to the whole bill.¹ Where he amends his bill, interrogatories may be filed in due time as to the amendments; but this does not enable plaintiff to go back to the original—if the time for interrogating as to it has gone by—and question as to it.² Plaintiff cannot oppress defendant by requiring him, after amendment to bill, to reanswer interrogatories already answered in the interrogatories to the original bill.³ Special application for leave to interrogate original defendants as to the original bill is necessary where that examination is desired.⁴ In the case of new defendants, added by amendments, the interrogatories may extend to the whole bill, the bill being, as to them, original; but a new set of interrogatories must be filed, as the old ones, if any, cannot be amended as to the new defendants.⁵

c. Filing and Serving of Interrogatories.—Where a written bill was filed, it was held that the interrogatories could be filed without waiting for the printed bill.⁶ A second set of interrogatories to the same bill may be filed if the time for filing interrogatories has not expired, without order, as against defendants who were not previously interrogated.⁷ If the time has expired, an order is necessary.⁸ If the interrogatories first filed have not been answered, plaintiff may obtain an order amending them so as to reach such other defendants.⁹

1. *Marsh v. Keith*, 6 Jur. N. S. 1182.

2. *Harding v. Pingey*, 10 Jur. N. S. 873; *Southampton Boat & Pier Co. v. Rawlins*, 12 Week. Rep. (Eng.) 285. Plaintiff filed no interrogatories to the amended bill within the time in that behalf limited. The defendant put in a voluntary answer. Then the plaintiff amended the bill, and filed interrogatories extending to the whole bill as amended, and not to the amendments alone. The defendant put in an answer to the interrogatories on the amendments only, and put in no answer to the interrogatories which went to the matter in the original bill, insisting that his voluntary answer must be taken to be a complete and sufficient answer to everything in the original bill. The plaintiff excepted. *Held*, that the answer to the amendments only was sufficient. But the court has power, in such case, on special application, to give the plaintiff leave to file interrogatories, and compel a full answer to the original bill. *Denis v. Rochussen*, 4 Jur. N. S. 298.

3. *Drake v. Symes*, 2 De G. F. & J. 81. See also *Attorney General v. Rees*, 12 Beav. 50.

Where the statement of a bill employs a word or phrase according to a certain meaning, and the interrogatory accompanying the statement is responded to according to such sense, and afterwards amendment is made of the bill wherein the language is used for a different meaning, the defendant can only be made to answer as to the new meaning, by a special requirement by plaintiff so to do. *Attorney General v. Rees*, 12 Beav. 50.

4. *Denis v. Rochussen*, 4 Jur. N. S. 298; *Southampton Steamboat Co. v. Rawlins*, 12 Week. Rep. (Eng.) 285; *Attorney General v. Rees*, 12 Beav. 50, 54.

5. *Quoting* 1 Dan. Ch. Pl. *485, which cites *Braithwaite's Pr.* 310.

6. *Lambert v. Lomas*, 9 Hare app. 291.

7. *Quoting* 1 Dan. Ch. Pl. *485; *Braithwaite's Pr.* 35.

8. 1 Dan. Ch. Pl. *486.

9. 1 Dan. *486; *Braithwaite's Manual* 183. Daniell also states that the order to amend must express the object, and that the defendant as against whom the interrogatories were first filed must be served with a copy of the interrogatories as amended.

The English general orders provide for service of interrogatories on defendants without the jurisdiction, the decree of the court to limit a time within which defendant must plead, answer, or demur, or obtain from the court further time to make defence to the bill.¹ The application for leave to serve abroad is *ex parte*, and the English practice requires affidavit.²

f. Who May be Interrogated—Principals—Rules of Privilege.—A guardian *ad litem* of an idiot or lunatic cannot be compelled to answer interrogatories.³

A party is not excused from answering interrogatories on the ground that they are as to matters which are not within such party's own knowledge, but are only within the knowledge of his servants or agents, if derived in the course of their employment; and he is bound to obtain the information from such agents or servants, unless he show that it would be unreasonable to require him to do so, as that either such agents or servants have left his employment, or it would occasion unreasonable expense or an unreasonable amount of detail or the like.⁴ But it is advisable

"And, generally, interrogatories may be amended under an order as of course, to be obtained on motion, or on petition at the rolls, at any time before an answer is put in." 1 Dan. *486; *citing* Braithwaite's Pr. 309.

Cross Suits.—Where plaintiff in the original suit fails to file interrogatories in the time limited, and the cross plaintiff files interrogatories in due time, the original plaintiff loses his right to answer before he answers the cross bill. For when the interrogatory time has expired, defendant is in the position of a person not called on to answer; and this is not altered by the court's indulgence giving plaintiff further time to file his interrogatories. *Garwood v. Curteis* 10 Jur., N. S. 199, Sir W. P. Wood, V. C.

So under the old rule, plaintiff amending bill after cross bill filed, thereby lost priority regarding the new matter. *Garwood v. Curteis*, 10 Jur. N. S. 199.

The original bill is to be first answered; but if the plaintiff after the cross bill filed, amend his bill, he loses his priority. *Steward v. Roe*, 2 P. Wms. 435; *Child v. Frederick*, 1 P. Wms. 266; *Long v. Burton*, 2 Atk. 218; *Noel v. King*, 2 Madd. 392.

And this is so, although the amendment is made after an order extending original plaintiff's time to answer cross bill until after original defendant has answered original bill; but as such order, when made, was regular, and is only discharged because of the amendment,

it is to be discharged without costs. *Johnson v. Freer*, 2 Cox Ch. 371.

In *New Jersey*, a statute provides that a cross bill need not be answered by the original plaintiff till his own bill has been answered by the cross plaintiff. *Williams v. Carle*, 2 Stockt. Ch. (N. J.) 544.

But where the amendment is before notice of the cross bill, the priority is not lost. *Gray v. Haig*, 13 Beav. (Eng.) 65.

1. Ord. 10, 7 (1), (2); 1 Dan. Ch. Pl. *481.

2. 1 Dan. Ch. Pl. *481. This is no doubt the universal rule.

3. Vol. 2, p. 203, etc.; vol. 1, p. 604, note; 608 notes; *Ingram v. Little*, 11 Q. B. Div. 251; *Leving v. Calverly*, Prec. Ch. 229, is not followed in this respect.

4. 2 Am. & Eng. Ency. of Law, 204. In an action by cargo owners against the owners of a ship, for a loss alleged to have arisen from negligence in the navigation of such ship by which she was run ashore and was stranded, an answer by the defendants to interrogatories as to what was done by those on board with regard to such navigation at the time of the accident, which stated in substance that the defendants were not on board at the time and had no knowledge or information respecting the matters enquired into, except as appeared by the protest of which the plaintiffs had had inspection, was held insufficient, as it did not appear that there was any difficulty in the defend-

to interrogate expressly as to the servants' knowledge, if this is wanted.¹

Of course, the universal rule that a party cannot be compelled to criminate himself or expose himself to penalties, holds good here. Nor can he be deprived of the other rules as to privilege.²

The English practice is, however, to allow these interrogatories, leaving to defendant the option of answering, except that if they do not appear to be put *bona fide* for information in the action, but with the ulterior object of showing that the party interrogated has committed a criminal offence, the court will, in the exercise of its discretion, disallow them.³

ants' obtaining the required information from those who were in charge of the ship at the time of the accident. *Bolkow v. Fisher*, 10 Q. B. D. 161, decided, it is true, under the new English supreme court rules of 1883, but the old chancery practice was discussed, and stated to be in accordance with this decision.

In *Attorney General v. Rees*, 12 Beav. 50, the question regarded the working of a mine. It was held that defendant, the mine owner, was bound to answer not only with respect to his own knowledge, but to obtain information from the persons by whom, as his agent, the act inquired of was done.

1. *Rasbotham v. Shropshire Union Ry.*, 48 L. T. N. S. 902.

2. Vol. 1, p. 601; *Marsh v. Keith*, 6 Jur. N. S. 1182; *Wich v. Parker*, 22 Beav. 59; s. c., 2 Jur. N. S. 582; *Webb v. East*, 5 Ex. Div. 108; *Martin v. Treacher*, 16 Q. B. Div. 507; *Orme v. Crockford*, 13 Price 376; *United States v. McRae*, L. R., 3 Ch. 79; *Sloman v. Kelly*, 4 G. & C. 169; *Boteles v. Allington*, 3 Atk. 457; *Adams v. Porter*, 1 Cush. (Mass.) 170; *Mahanke v. Cleland*, 76 Ia. 401; *Northrop v. Hatch*, 6 Conn. 363; *Skinner v. Judson*, 8 Conn. 533; *Marshall v. Riley*, 7 Ga. 367.

It was held in one case that a plaintiff is entitled to an answer as to whether or not certain documents (claimed by the defendant in his affidavit to be privileged) relate to a certain deed, and as to what are the grounds on which such privilege is claimed. *Catt v. Touble*, 18 Week. Rep. (Eng.) 966.

Where one defendant claims privilege, averring that the information came to him, "by virtue of my employment as the solicitor of [another] defendant," this was held not enough, for it was not

equivalent to an assertion that the information came to him from the client, or in some other way conferring privilege. *Marsh v. Keith*, 6 Jur. N. S. 1182.

Usury.—The *New York* statute of 1837 allowing discovery of usury, so as to deprive lender of the money actually loaned, as well as the legal and the usurious interest, was in one case held constitutional. *Perrine v. Striker*, 7 Pal. Ch. (N. Y.) 598. Before the statute, the discovery would have been refused. *Perrine v. Striker*, 7 Pal. Ch. (N. Y.) 598; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174; opinion by SIR P. YORK, afterwards LORD HARDWICKE, in *Sel. Cas. by a Solicitor*, 19; *Hogshead v. Baylor*, 16 Gratt. (Va.) 99.

3. *Kerr on Discovery*, 270. That they will be allowed. *Bartlett v. Lewis*, 104 E. C. L. 249; *Fisher v. Owen*, 8 Ch. Div. 645.

In *Tupling v. Ward*, 6 H. & N. 749, the exchequer refused to allow such an interrogatory. The discretion of the court, thus exercised, was in regard to questions in libel suit, whether defendant was the author, etc.

That they will not be allowed where the offensive design alluded to in the text exists: *Baker v. Lane*, 3 H. & C. 544, explained in *Bickford v. Darcy*, L. R. 1 Exch. 357.

Nor will they be allowed, where the very end of the suit is to inflict penalty. *Chadwick v. Chadwick*, 22 L. J. (Ch.) 329. A common informer cannot have interrogatory allowed. *Hunnings v. Williamson*, 102 B. D. 459; *Martin v. Treacher*, 16 Q. B. Div. 507. So that *Society of Apothecaries v. Nottingham*, W. N. for 1875, 259, must be regarded as overruled.

Perhaps in actions for exemplary damages, defendant might make the same objection.

g. Subject Matter.—1. *Matter Material to Plaintiff*.—Plaintiff may exact discovery as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case, and which defendant does not, by his pleading, admit.¹ In foreclosure bills, the practice prevails of interrogating as to encumbrances other than that of plaintiff, in order that if there are any others, the owners may be made parties.²

Where certain stenographic notes, which defendant moved should be produced by plaintiff, were taken in proceedings forming part of the very dispute between the parties, although in another stage or action, it was held that the notes must be produced, although they had been taken at plaintiff's own expense and in anticipation of other proceedings by him.³

2. *Matter Relating to Defence*.—But the right is limited to discovery of such material facts as relate to "plaintiff's case;" it does not extend to discovery of the manner in which defendant's case is to be exclusively established.⁴

But while the adversary cannot be made to expose his case, it would seem that he must give some idea as to its nature, to prevent surprise.⁵

3. At Law—(See BILL OF DISCOVERY ; DEPOSITIONS ;

The question whether the defendant or the court is the judge whether the answer will criminate him is not discussed here. The authorities at hand at the instant are *Osborn v. London Dock Co.*, 10 Exch. 698; *Fisher v. Ronalds*, 12 C. B. 762; 74 E. C. L. R.; *Short v. Mercier*, 3 Mac. & G. 205; *Best on Ev.* (2nd ed.) 162; 2 Phill. Ev. 488; *Taylor Ev.*, § 1071; *Parkhurst v. Lowden*, 2 Swanst. 203; *Chambers v. Thompson*, 4 Bro. C. C. 433; *People v. Mather*, 4 Wend. (N. Y.) 253; *Garbetts' Case*, 1 Den. C. C. 236. In *Lamb v. Munster*, 10 Q. B. Div. 110, it was held that the defendant would not be held to any form of words in his affidavit that the tendency of his answer, if given, would tend to criminate him, if from the question and the circumstances such tendency seemed likely. And held, in an action of libel, where defendant was asked, in effect, whether he published the libel, that the answer here quoted was sufficient, viz: "I decline to answer all the interrogatories upon the ground that my answer to them 'might' tend to criminate me." See also *Adams v. Bartley*, 18 Q. B. Div. 625; *Malone v. Fitzgerald*, 18 L. R. (Ir.) 187.

1. *Bidder v. Bridges*, 29 Ch. Div. 29; *Lyell v. Kennedy*, 8 App. Cas. 223; *Commissioners of Sewers v. Glassey*, L. R., 15 Eq. 302. Compare *Ivy v. Keke-*

wich, 2 Ves. 679; *Lowndes v. Davies*, 6 Sim. 468; *Eades v. Jacobs*, 3 Exch. Div. 335; *Hoffman v. Postill*, L. R., 4 Ch. 673; *Wigram on Discovery*, 286.

2. 1 Dan. Ch. Pl. *277, n. 6; *Story's Eq. Pl.*, § 193, n.

Interrogatories filed in a foreclosure suit instituted by mortgage bondholders of a railroad company, respecting the acts, plans, intentions or papers of companies or organizations formed for the purpose of buying the road, should it be offered for sale, are irrelevant, and need not be answered. *Robinson v. Phila. R. Co.*, 28 Fed. Rep. 340.

3. *Stenographic Notes of Evidence*.—*Rawstone v. Preston Corporation*, 30 Ch. Div. 116.

But this is not to be extended so as to allow discovery of documents, shorthand notes, of proceedings against other parties in a distinct action. *Nordon v. Defries*, 8 Q. B. Div. 508.

4. *Wigram on Discovery*, 286; *Sto. Eq. Pl.*, § 572; 2 Am. & Eng. Ency. of Law, 203.

But in *Adams v. Porter*, 1 Cush. (Mass.) 170, it was said that the rule prohibiting prying into the adversary's title was inapplicable in *Massachusetts*. See also *Haskell v. Haskell*, 3 Cush. (Mass.) 543.

5. See *Cayley v. Sandycroft Brick etc. Co.*, 33 W. R. (Eng.) 577; *PEARSON, J.*

EQUITY PLEADINGS)—*Compelling of Answers—Default.*—The courts have exerted several powers to compel answers to the statutory interrogatories. The practice probably is *first* to enter a rule or order on the adversary to answer,¹ unless this has already been done at the filing of the interrogatories. This order having been made, on noncompliance, attachment of the adversary's person upon order of court therefor seems to be one authorized mode, or default.² In *Alabama*, the legislature has authorized attachment, or continuance, or the entry of judgment as by default.³ An order directing dismissal of plaintiff's suit

1. See Rapalje on Contempt, 3 Am. & Eng. Ency. of Law, tit. CONTEMPT. Compare DEPOSITIONS, 5 Am. & Eng. Ency. of Law, 600, n. Under Georgia act 1847, order made in *open court* was requisite to require adversary's answer. By act 1850, the order could be obtained either in term time, or in vacation from a judge of the superior or justice of the inferior court, neither to have jurisdiction, however, to act in a case pending in a court of the other. *Tillinghast v. Nourse*, 14 Ga. 641.

Interrogatories cannot be taken as confessed on default in answer without order of court directing them to be answered within a given time, and notice of such order given to the party interrogated. *Lapene v. Riche*, 15 La. An. 612.

In *Louisiana*, no order to answer is requisite unless the answers are to be made in open court; and the interrogatories, if unanswered without cause shown, will be taken for confessed at the trial without further notice. *Seaman v. Babington*, 11 La. An. 173.

In *Louisiana*, order on garnishee to answer is not essential; service of petition, containing the interrogatories and citation, is sufficient warning. *Parmerly v. Bradbury*, 13 La. 353; *Sturgis v. Kendall*, 2 La. An. 565; *Henry v. Brice*, 11 La. An. 691. See 8 Am. & Eng. Ency. of Law, 1211.

A party, required to answer or produce a book in open court, must be notified of the day which must be fixed for that purpose, unless present at the trial or when the order is made; he is not otherwise in default. The designation of the day of trial as that for answering or producing the book is insufficient, unless named in the order notified to the party. Nor is the usual weekly notice, posted in the court room, of the days for which cases are fixed, sufficient. *Weathersby v. Huddleston*,

2 La. An. 845; *Spears v. Nugent*, 2 La. An. 11.

In *Georgia*, the statute provides that the court, or judge, in vacation, before ordering answer to interrogatories, must be satisfied, by the party's oath or otherwise, 1, 2, that the interrogatories are pertinent and that the answers will be material evidence; and thirdly, such as plaintiff or defendant would be compelled to disclose in answer to a bill for discovery. *Thornton v. Adkins*, 19 Ga. 464.

2. *Cleveland v. Hughes*, 12 Ind. 512. See *Robbins v. Holman*, 11 Cush. (Mass.) 26; Iowa R. S., § 2992, (McClain, § 2700), authorizes process of contempt, or dismissal of petition or quashing of answer; R. S., § 2991 provides for taking subject of interrogatories supported by affidavit, as true. But judgment is not to be entered without trial, and in the meantime the party failing to answer may, if he wish, have his case nonsuited, although the other party object. *Perry v. Heighton*, 26 Ia. 451. Nor can the demand for judgment for want of answer be made for the first time in the appellate court. *Sully v. Wilson*, 44 I. 394.

Florida: Party or officer of corporation which is party, not answering, may be proceeded against as for contempt. *McClellan's Florida Digest of Statutes*, p. 516, § 18.

It is discretionary with the presiding judge whether nonsuit shall be ordered for refusal of plaintiff to answer. *Stern v. Filene*, 14 Allen (Mass.) 9; *Townsend v. Gibbs*, 11 Cush. (Mass.) 158; *Harding v. Noyes*, 125 Mass. 572; *Harding v. Morrill*, 136 Mass. 291.

Whether he order the nonsuit, or allow further time, no appeal lies to the supreme court. *Harding v. Noyes*, 125 Mass. 572; *Harding v. Morrill*, 136 Mass. 291.

3. A statute providing that in case

on failure to answer within a time named is not a final order, but may be modified or vacated at a subsequent time.¹

Vague or Irrelevant Interrogatories.—The object of testimony, whether obtained from witnesses or extorted from the party, is to establish facts. If, then, an interrogatory is vague, and fails to call for special matter of fact, it is hard to see how omission to answer can be regarded as confession. "What matter of fact," it was asked, "would be established by taking this interrogatory as confessed?"²

Interrogatories Bad in Part.—Where a single interrogatory embraces both matters which should be answered, were they alone inquired of, and other matters which are not proper subjects of inquiry, the adversary is not bound to take the risk of separating the two; and is not to be defaulted without a specific order of court as to particulars in which his answers are insufficient, and opportunity to amend them.³ But his neglect to answer interrogatories which themselves are entirely proper, although other distinct interrogatories are bad, exposes him to default.⁴

of evasive answer or failure to answer at all, the court may attach the party so in default, or continue the case, and require more explicit answers; or give judgment as by default, places it within the option of the party interrogating, subject to control of court, which of the courses shall be pursued. *Goodwin v. Harrison*, 6 Ala. 438.

It is entirely competent for the court, on a sufficient showing, to extend the time for the answer, or even to set aside the default. *Goodwin v. Harrison*, 6 Ala. 438.

Nor is this discretion reviewable. *Goodwin v. Harrison*, 6 Ala. 441; *Pool v. Harrison*, 18 Ala. 515.

But this discretion ought never to be exercised, unless a satisfactory reason is shown for the omission to answer in proper time; and this, in all cases where it is practicable, should be accompanied with full and explicit answers. *Goodwin v. Harrison*, 6 Ala. 438.

The court is not required to dismiss plaintiff's suit on his failure to answer; but it may resort to the other steps indicated in the code,—attachment, continuance, etc. *Ex parte McLendon*, 33 Ala. 276.

Mandamus will certainly not lie to compel discovery under statutory interrogatories when the same are irrelevant; whether it would lie in any case, *quære*. *Ex parte Grantland*, 29 Ala. 69.

1. *Ex parte McLendon*, 33 Ala. 276. See also *Reese v. Billing*, 9 Ala.

263. See FINAL JUDGMENTS AND DECREES, 7 Am. & Eng. Ency. of Law, 966.

Such order does not become effectual, until the default has been judicially ascertained at the next ensuing term; it is not effectual on the occurrence of the contingency in vacation. *Ex parte McLendon*, 33 Ala. 276; *ex parte Remson*, 23 Ala. 25; *Edwards v. Lewis*, 18 Ala. 494; *Reese v. Billing*, 9 Ala. 263.

2. *Harrison v. Knight*, 7 Tex. 52. Compare DEPOSITIONS, 5 Am. & Eng. Ency. of Law, 615.

To prove admission of indebtedness, an interrogatory whether defendant gave a legacy to claimant conditioned that the latter would not claim against his estate, need not be answered; it is irrelevant, and only to be regarded as an offer to purchase peace. *Ex parte Grantland*, 29 Ala. 69; *Phill. Ev.*, pt. 1, p. 218; *Cowen & Hill's Notes*.

3. *Wetherbee v. Winchester*, 128 Mass. 293; *Hare on Discovery* (2nd ed.), 105.

4. The proper course is to answer such as are pertinent, and take the judgment of the court on such as are claimed to be impertinent. Neglect to answer any subjects a plaintiff in such default to be nonsuited, in the discretion of the court. *Harding v. Morrill*, 136 Mass. 291.

Interrogatories are not to be treated with unnecessary strictness. And where one is too broad, and includes

Substantial answer is enough, unless the court direct further answer.¹

Evasive Answers.—Where answers are insufficient or evasive, nonsuit or default is not to be entered without further proceedings upon exceptions to such answers.² In *Louisiana*, where answers were manifestly evasive, the court allowed the interrogatories to be taken as confessed without application to that effect.³

In *Massachusetts*, a supplemental statute provides that the party answering may reply beyond the scope of the interrogatory, provided his answer relate to the issue.⁴

matter irrelevant to the pleading, the party interrogated is not bound to answer the irrelevant part, and may confine his answer to what is relevant. *Hancock v. Franklin Ins. Co.*, 107 Mass.

113.

1. *Amherst & B. R. Co. v. Watson*, 8 Gray (Mass.) 529.

Answers which do not answer fully are not to be disregarded, so far as they are responsive. *Meyer v. Claus*, 15 Tex. 516.

2. (See DEPOSITIONS, 5 Am. & Eng. Ency. of Law, 598). "Questions of great difficulty often arise as to how far a party is bound to answer interrogatories proposed by the adverse party, and it was not the intention of the statute to compel a party to decide such questions at the risk, if he decides erroneously, of a nonsuit or default.

Fels v. Raymond, 139 Mass. 98. The interrogating party should file a motion setting forth his objections to the answers, and praying that they be made more full and clear; and it is for the court to determine upon such motion how far the answers are imperfect, and which of the interrogatories require fuller answers. If the answers are adjudged to be imperfect, the interrogated party ought to have the opportunity to amend them, after the particulars in which they are insufficient are pointed out. If he refuses to amend or to answer more fully, according to the order of the court, a nonsuit or default may be entered. *Amherst etc. R. Co. v. Watson*, 8 Gray (Mass.) 529; *Wetherbee v. Winchester*, 128 Mass. 293; *Fels v. Raymond*, 139 Mass. 101.

Where there is a total neglect to answer interrogatories, then the court, in its discretion, may enter nonsuit or default. *Fels v. Raymond*, 139 Mass. 100; *Harding v. Noyes*, 125 Mass. 572; *Harding v. Morrill*, 136 Mass. 291.

The court must act on a motion to take answers for confessed on ground of their being evasive; the motion cannot be referred to the jury to determine on the merits of the cause. *Knox v. Thompson*, 12 La. An. 114.

3. An answer manifestly evasive creates a violent presumption that, if direct and true, it would destroy the party's claim or defence, and is such a neglect as authorizes the interrogatory to be taken for confessed without an application to that effect. *Whiting v. Ivey*, 3 La. An. 649; *Graham v. Benjamin*, 5 La. An. 186; *Hoover v. Miller*, 6 La. An. 204; *Commercial Bank v. Routh*, 7 La. An. 128; *Walker v. Wingfield*, 16 La. An. 300.

Where a creditor, interrogated to ascertain how much has been paid him by his debtor, whom he is fraudulently endeavoring to shield, answers evasively to different sums suggested, he will be considered as admitting the largest sum named. *Prater v. Pritchard*, 6 La. An. 730.

A factor whose answers touching various items of his account sued on are evasive and unsatisfactory, will, on such items, be nonsuited. *Brander v. Lum*, 11 La. An. 217.

4. Under the *Massachusetts* act of 1851, the party answering was confined to an answer to the interrogatory propounded, and matters explanatory thereof, but could not go further and introduce statements which, though relevant to the issue, were not relevant to the interrogatory. No decision to that effect was ever rendered by the supreme court; but such was the holding of the common pleas. *Hand v. Hughes*, 14 L. Rep. 393; *Higbee v. Bacon*, 8 Pick. (Mass.) 484; s. c., 14 L. Rep. 518. See also L. Rep. 575. But, says HOAR, J., the unfairness of the rule was the subject of much complaint,

INTERRUPT—INTERRUPTION—INTERSECT.

INTERRUPT.¹

INTERRUPTION—(See. EASEMENTS; PRESCRIPTION).—The effect of some act or circumstance which stops the course of a prescription or act of limitations.²

INTERSECT.—To cross.³

and it was altered by the legislature of the next year, in Gen. St. ch. 129, § 51, which provides: "The party interrogated may introduce into his answer any matter relevant to the issue to which the interrogatory relates." That is to say, "issue to which the interrogatory" relates, not issue *raised* by the interrogatory. The court therefore interpret the statute as meaning, "the issue in the cause, between the parties, upon which the interrogatory calls for a fact which may be used by the party interrogating as evidence." *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.) 320. And see *Williams v. Cheyney*, 3 Gray (Mass.) 220, where the act of 1852 was alluded to, with the remark that it was meant to prevent partial and garbled disclosures by artful interrogatories.

And under *Iowa Rev.*, §§ 2985, 2986, it is *held* that the answer may embrace not merely that responsive to interrogatories, but new matter concerning the same cause of action. *Gwyer v. Figgins*, 37 I. 517.

1. In a prosecution, under statute, for disturbing religious worship, the court charged that "the word 'interrupt,' as used in the statute . . . means anything done by the defendants or any other persons which takes the attention of the hearers from the services or the discourse of the minister. This was *held* to be erroneous, as withdrawing the attention of the jury from the essence of the offence, the intention, it being necessary that, the interruption should be wilful. *Brown v. State*, 46 Ala. 175.

2. *Bouv. L. Dict.*, Co. Litt. 114 b. It is the breaking of the continuity of the enjoyment of an easement. "Interruption of the possession is where the right is not enjoyed or exercised continuously; interruption in the right is where the person having or claiming the right ceases the exercise of it in such a manner as to show that he does not claim to be entitled to exercise it." It may arise from the act of the person having or claiming the right, from the act of the servient owner or of another person. *Repalje & L. Law Dict.*

"Interruptions are of two kinds, natural and civil. The first consisted in entering into and upon immovable things, in taking away such as were movable; civil interruption was the interruption of a legal claim, in a court of justice. 1 *Brown's Civ. Law*, 248; *Muerarity v. Heirs of Mims*, 1 Ala. 674. "Civil interruption is that which takes place by some judicial act. Natural interruption is an interruption in fact." *Bouv. Law Dict.*

"'Interruption' means obstruction, not a cesser or intermission, or anything denoting a mere breach in time." There must be an overt act, indicating that the right is disputed." *Carr v. Foster*, 3 Q. B. 581.

3. A Connecticut statute provided that whenever it should be necessary for the construction of a railroad to intersect or cross any water course or highway, it should be lawful for the company to construct the railroad across or upon the same; but that it should restore the stream or road thus intersected to its former state, or in a sufficient manner not to impair its usefulness. In applying this act, the court said: "The railroad does not cross this highway. The word 'intersect' ordinarily means the same as to cross; literally to cut into or between. The two words seem to be used in the same sense, as is apparent from the fact that the word *intersected* only is used in the latter part of the quotation, whereas, if they were used in different senses, we should find the words 'or crossed' also used. But if it be conceded that the word 'intersect' is to be understood in the sense of touching, or coming in contact with, we think it cannot be extended so as to embrace a case like this, where the layout of the railroad covers a portion of the layout of the highway, without disturbing or interfering with the traveled part of the highway." *State v. N. H. & N. Co.*, 45 Conn. 331.

Where a petition was filed for a road "to begin in the G turnpike at a point where the road from the F road intersects the said turnpike," and the viewers reported a road "beginning at a point

INTERSTATE COMMERCE¹—(See BRIDGES; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CARRIERS OF STOCK; CONSTITUTIONAL LAW; FOREIGN CORPORATIONS; FREIGHT; NAVIGATION; RAILROADS; TELEGRAPH COMPANIES; TICKETS OF PASSENGERS).

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1. Definition.—Interstate commerce, or commerce “among the

in the middle of the G turnpike where the same is intersected by the middle line of the road leading from the F road,” there was *held* to be no variance. “The viewers, in laying out a road, do not fix its width; nor run and mark the outside lines of the road on the ground. They run and mark but one line—the center line of the road. The point of intersection of two roads as laid out and marked on the ground by the viewers is then the point where the middle or center lines of the two roads intersect—the very point at which the viewers in this case commenced. But if this be not so, it is wholly immaterial whether they commenced at the intersection of the outside or the middle line of the turnpike and public road.” Springfield Road, 73 Pa. St. 127.

1. Peculiarity of the Decisions.—The decisions of the one ultimate judicial authority on questions of interstate commerce, the supreme court of the United States, have not been altogether uniform. There is probably no subject in which we find dissenting opinions in such a proportion of the cases, and even the views of the majority that have from time to time decided them have been influenced in one direction and another, not only by changes in the means by which, and the conditions under which, commerce is carried on, but by diversities of view as to “State rights,” “strict construction,” and the like. This lack of uniformity and stability (inevitable, perhaps, with so new a subject, where precedents had to be made, not followed) has been admitted by the court itself (see *Fargo v. Michigan*, 121 U. S. 230, 240; *Leloup v. Mobile*, 127 U. S. 640, 648), and will probably be much less marked in the future, as of late there has

been an evident determination to decide all questions in accordance with the comprehensive doctrine first announced by MARSHALL, C. J., in *Gibbons v. Ogden*, 9 Wh. (U. S.) 1. As was recently said by BRADLEY, J.: “A great number and variety of cases involving the commercial power of congress have been brought to the attention of this court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by CHIEF JUSTICE MARSHALL and other members of the court in former times, and to modify to some degree certain *dicta* and decisions that have occasionally been made in the intervening period.” *Leloup v. Mobile*, 127 U. S. 640, 648.

It will be seen that an extraordinary number of State court decisions have been reversed at Washington, a circumstance due both to the lack of uniformity above mentioned and to the fact that, when the limits of State authority were in question, it was inevitable that, in case of any doubt in the mind of a State court, the scale should turn in favor of the State. *Ex parte Asher*, 23 Tex. App. 662, is a special instance of this. The treatment of cases similar to those reversed has involved some difficulty, and where, from the peculiarity of the facts involved, the overruling was not absolutely certain, they have been cited, but only to indicate the views of the State courts, not as authorities.

several States" of the American Union, is commerce which concerns more States than one.¹

2. Power of Congress Over Interstate Commerce—*a. In General.*—To protect the commercial interests of the various States from interference from any one of them, the constitution has given congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."² The only form of commerce within the limits of the United States which is not subject to this vast power is the purely internal commerce of each State, which is reserved to each by direct im-

1. "Among the Several States."—The word 'among' means 'intermingled with.' A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. . . . Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." *Gibbons v. Ogden*, 1 Wh. (U. S.) 1, 194.

Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity has commenced." *The Daniel Ball*, 10 Wall. (U. S.) 557, 565.

"Any carriage of goods which crosses a State line is interstate commerce." *Ex parte Koehler*, 30 Fed. R. 869.

The question has recently been raised whether a continuous carriage between points in the same State, but by a route lying partly in another State, is interstate commerce or not. By analogy with *Lord v. S. S. Co.*, 102 U. S. 541 (deciding that carriage between ports in the same State, but over the high seas, was foreign commerce), it would seem that the question must be answered affirmatively, and it is so answered in *N. O. Cot. Exch. v. N. O. & T. P. R. Co.*, 2 Int. Com. R. 375; *State v. C. St. P. M. & O. R. Co. (Minn.)*, 41 N. W. R. 1047. Shortly before the decisions in these cases, it was answered the other way, in *Com. v. L. V. R. Co. (Pa.)*, 17 Atl. R. 179.

It may happen that commerce which is unquestionably internal, and confined to one State, is so closely connected with interstate commerce as to require

its being to some extent subject to the same control. Thus it was recently held that the interests of interstate commerce on the navigable waters of the United States require that all steamboats plying thereon, even those engaged in *intrastate* commerce only, should be a like subject to certain regulations of congress, in regard to number of passengers carried, etc. *The City of Salem*, 37 Fed. Rep. 846.

The "Act to Regulate Commerce," commonly called the "Interstate Commerce act" (U. S. Sts. 1886-7, ch. 103), is not limited in its operation to interstate carriage only, but regulates certain classes of international carriage, and even where only one State or Territory in the United States is concerned.

2. U. S. Const., art. 1, § 8, cl. 3.

"The design and object of that power, as evinced in the history of the constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies, or local and partial interests, might be disposed to introduce and maintain." *Veazie v. Moor*, 14 How. (U. S.) 568, 574.

"It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress." *Brown v. Maryland*, 12 Wh. (U. S.) 419, 446. See also *Gloucester Fer. Co. v. Penna.*, 114 U. S. 196.

"So vast is the subject of this power, and so much does it comprise, that its limits cannot well be defined without the risk of excluding something which may in some form, or at some time, deserve to be included. It is given in the largest and most liberal terms, and has been interpreted and applied with ade-

plication.¹ With reference to the scope of this power, the term "interstate commerce" must be understood in the widest sense to denote not traffic only, but every species of commercial intercourse, including all the means by which it is carried on, both such as were in use when the constitution was adopted, and those which have since been developed.² Navigation³ (and as incident

quate, if not with equal liberality." 2 Hare's Am. Const. Law., p. 1257.

1. *Gibbons v. Ogden*, 9 Wh. (U. S.) 1, 194; *The Daniel Ball*, 10 Wall. (U. S.) 557.

In this respect the position of congress differs from that of the Canadian parliament under section 91 of the British North America act, which gives it the power to "regulate trade and commerce." This applies to domestic and internal as well as foreign and external commerce. It includes "political arrangements in regard to trade requiring the sanction of parliament, regulations of trade in matters of interprovincial concern, and it may be . . . general regulations of trade affecting the whole dominion." It does not include the regulation of the contracts of a particular business or trade. *Citizens' Ins. Co. v. Parsons*, 7 App. Cas. 96 (see s. c., 4 Can. S. C. 215); *Russell v. Queen*, 7 App. Cas. 829 (affg. *Mayor of Fredericton v. Queen*, 3 Can. S. C. 505); *Severn v. Queen*, 2 Can. S. C. 70.

2. Congress has "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 9 Wh. (U. S.) 1-196.

"The same case established once and for all the broad doctrine that commerce is intercourse, and that the power to regulate it includes the power to regulate the means by which it is carried on. (See next note.) Navigation was the only means of intercourse under consideration in *Gibbons v. Ogden*, but the doctrine applies to every form of traffic, transportation and communication. These powers of congress, as was said in a later case, are not confined to the instrumentalities of commerce, or the postal service, known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circum-

stances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances. As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation." *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1. See also *Welton v. Missouri*, 91 U. S. 275, 280.

Penal Authority.—The power to regulate commerce includes that of punishing all offences against commerce, e. g., larceny of merchandise from a ship, though committed on shore. *U. S. v. Coombs*, 12 Pet. (U. S.) 72. And see the penal clauses of the various acts relating to commerce.

3. Navigation.—The leading case on interstate commerce is *Gibbons v. Ogden*, 9 Wh. (U. S.) 1, decided in 1824, and contemporaneous with the beginning of that immense development of commercial intercourse which has marked this century. In the infancy of steam navigation, certain States sought to encourage its inventors and promoters by granting the exclusive right to navigate their waters by boats moved by fire or steam. One Ogden, the assignee of this right for navigation between New York city and certain places in New Jersey, found his monopoly infringed by the owner of steamboats duly licenced by the national government for the coasting trade. Ogden obtained an injunction in the New York court of chancery, but this was dissolved by the U. S. supreme court on the ground that the monopoly granted by New York was an interference with interstate commerce. The

thereto, all the navigable waters of the United States,¹ the vessels employed upon them,² and the bridges which cross

comprehensive meaning of the term "commerce," as used in the constitution, was established by MARSHALL, C. J., on incontrovertible grounds. Almost at the outset of his long and masterly opinion, he said: "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects to one of its significations. Commerce undoubtedly is traffic, but it is something more, it is *intercourse*. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter. . . . All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late."

Embarking and Landing.—The business of receiving and landing freight and passengers at a wharf is incident to, and in fact a part of, their transportation by water. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax upon such receiving and landing of passengers and

freight is a tax upon their transportation, *i. e.*, if the transportation be from one State to another, a tax upon interstate commerce. *Gloucester Fer. Co. v. Penna.*, 114 U. S. 196.

Ferries across a river or channel separating two States are a means of interstate commerce, and cannot be interfered with by State taxation. *St. Louis v. Fer. Co.*, 11 Wall. U. S. 432; *Gloucester Ferry Co. v. Penna.*, 114 U. S. 196, 216. But congress has never exercised the right to establish them, but has hitherto left this to the States. *Fanning v. Gregoire*, 16 How. U. S. 524; *Conway v. Taylor's Ex.*, 1 Bl. (U. S.) 603; *Wiggins Fer. Co. v. E. St. Louis*, 107 U. S. 365, affirming *s. c.*, 102 Ill. 560; *Chilvers v. Peop.*, 11 Mich. 43.

1. Control of Navigable Waters.—"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation and subject to all the requisite legislation of congress." *Gilman v. Phila.*, 3 Wall. (U. S.) 724.

This power "authorizes appropriate legislation for the protection of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient or safe navigation of all navigable waters of the United States, whether that legislation consists in regulating the removal of obstructions to their use, in prescribing the form and size of vessels employed upon them, or in subjecting the vessels to inspection and licence in order to insure their proper construction and equipment." *The Daniel Ball*, 10 Wall. (U. S.) 556, 564.

Rivers and harbors may be regulated by congress, and the navigation therein improved, even if it be necessary to close one or more channels to accomplish the result. No agreement between States that such channels shall remain open for the use of the citizens of both, can affect the matter. *South Carolina v. Georgia*, 93 U. S. 4.

2. Control of Vessels.—*Gibbons v. Ogden*, 9 Wh. (U. S.); *The Daniel Ball*, 10 Wall. (U. S.) 557, 564; *Phila. & S. M. S. S. Co. v. Penna.*, 122 U. S. 326.

them¹), railroads,² and all other modes of interstate transportation and communication,³ are, therefore, subject to the control of congress; but this does not extend to the manner in which goods are put up for transportation, nor, apparently, to the genuineness or quality of the goods themselves.⁴ Such control may also be ex-

It has recently been *held* in the Oregon circuit court that the federal law forbidding a steamboat to carry more passengers than her certificate of inspection allows, being intended to insure the convenient and safe navigation of all navigable waters of the United States, applies to all steamboats navigating the same, even to those plying between ports of the same State only. Were this otherwise, the safety and interests of other vessels, engaged in interstate commerce on the same waters, might be endangered thereby. *The City of Salem*, 37 Fed. Rep. 846.

The sale and mortgage of vessels, being incidental to commerce, is within the power of congress to regulate. *White's Bank v. Smith*, 7 Wall. (U. S.) 646; *Shaw v. McCandless*, 36 Miss. 206; *Richardson v. Montgomery*, 49 Pa. St. 203.

1. Bridges Over Navigable Waters.—These may, if stretching from one State to another, be themselves means of interstate commerce. They may also, wherever situated, be obstructions to interstate commerce. In either case, they come within the control of congress by its constitutional power. *Penna. v. Wheeling Br. Co.*, 18 How. (U. S.) 421. And see *n.* 2, p. 545; title **BRIDGES**, 2 Am. & Eng. Ency. of Law.

2. Railroads, Construction of.—In regard to railroads, it was said in a recent case, "the power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exercised to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the

expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration has prevailed and led to the conclusion that congress has plenary power over the whole subject." *California v. C. P. R. Co.*, 127 U. S. 1.

Regulation of.—The act of July 15th, 1866 (Rev. Sts., § 5258), authorizes railroads transporting property from one State to another to "connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." This has been declared constitutional in *R. R. Co. v. Richmond*, 19 Wall. (U. S.) 584; *Council Bluffs v. K. C. etc. R. Co.*, 45 Iowa 338, 351; *Hardy v. A. T. & S. F. R. Co.*, 32 Kan. 608, 717.

The act of March 3rd, 1873 (Rev. St., §§ 4386-4390), regulates the carriage of cattle, etc., on cars or vessels, from one State to another. The constitutionality of this act has been sustained in *U. S. v. B. & A. R. Co.*, 15 Fed. R. 209; *U. S. v. L. & N. R. Co.*, 18 Fed. R. 480; but does not apply to transportation between points in the same State. *U. S. v. E. T. V. & G. R. Co.*, 13 Fed. R. 642.

For the Interstate Commerce act of 1887, the greatest exercise of the power of congress over the subject, see § 4, p. 559.

3. Telegraph Lines.—See *Pen. Tel. Co. v. W. U. T. Co.*, 96 U. S. 1; *W. U. T. Co. v. Pendleton*, 122 U. S. 347; *Leloup v. Mobile*, 127 U. S. 640.

A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods. *Tel. Co. v. Texas*, 105 U. S. 480.

By the act of August 7th, 1888 (Sts. 1887-88, ch. 772), companies operating telegraph lines constructed to any extent by government aid are required to give equal facilities to all connecting lines, and to this end are put under the control of the interstate commerce commission.

4. Every species of property which is the subject of commerce, or which is

exercised over all forms of interstate traffic, *i. e.*, the purchase, sale and exchange of commodities,¹ including, perhaps, such accessories as bills of exchange and bills of lading,² but not policies of insurance.³ This control attaches whether the commerce be transacted by individuals or corporations,⁴ by one agency or by many.⁵ It is, moreover, all pervading, operating in every part of

used or even essential in commerce, is not within the control of congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety, and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property. *U. S. v. Steffens*, 100 U. S. 82. Hence, as seems to be indicated in that case, though the point was not decided, congress could not undertake to regulate brands or trade marks.

1. *Traffic*.—*E. g.*, the sale by itinerant venders, in one State, of the goods, wares and merchandise of other States (*Welton v. Missouri*, 91 U. S. 275), and the negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made. *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489; *Corson v. Maryland*, 120 U. S. 502; *Asher v. Texas*, 128 U. S. 129.

2. *Bills of Exchange and Bills of Lading*.—"It may be inferred from the *dicta* in *Paul v. Virginia*, 8 Wall. (U. S.) 168, and in *Nathan v. Louisiana*, 8 How. (U. S.) 73, that bills of exchange drawn on another State or a foreign country may be the subject of State legislation, prescribing the place and time at which demand must be made and notice given to charge the drawer with damages for nonpayment. The point actually decided in *Nathan v. Louisiana*, however, was that a tax on the business of an exchange broker is not a tax on commerce, though he is principally or exclusively engaged in the purchase and sale of foreign bills of exchange; and it does not follow from these decisions that such bills may not be regulated by congress, or that a State may subject them to restrictions which will injuriously affect trade with foreign nations or among the States. It is by means of such instruments that the merchant anticipates the sale of the goods which he has purchased for exportation, and is enabled to make an immediate payment, and they are consequently an indispensable aid to com-

merce, which should be free from local taxation.

"Whatever be the rule as to bills of exchange, it results from the case of *Almy v. California*, 24 How. (U. S.) 169, as interpreted in *Woodruff v. Parham*, 8 Wall. (U. S.) 123, 137, that bills of lading are so far instruments of commerce that the States cannot subject them to a tax that will impede exportation or operate hostilely on interstate or foreign commerce." 1 *Hare's Am. Const. Law*, 479.

3. Policies of insurance are contracts of indemnity. They "are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. . . . Such contracts are not interstate transactions, though the parties may be domiciled in different States." *Paul v. Virginia*, 8 Wall. (U. S.) 168-183; *Phila. Fire Ass'n v. N. Y.*, 119 U. S. 110. The same view of policies of insurance has been taken in Canada, where they have been held not within the authority of the Dominion parliament to regulate trade and commerce. The privy council left the point undecided, however. *Citizens' Ins. Co. v. Parsons*, 4 Ont. App. 103; 4 Can. S. C. 215; 7 App. Cas. 96. See FOREIGN CORPORATIONS.

4. *Paul v. Virginia*, 8 Wall. (U. S.) 168, 182; *Welton v. Missouri*, 91 U. S. 275; *Mobile v. Kimball*, 102 U. S. 691; *Gloucester Fer. Co. v. Penna.*, 114 U. S. 196; *Phila. & S. M. S. v. Penna.*, 122 U. S. 326, 342; *Stockton v. B. & N. Y. R. Co.*, 32 Fed. R. 9.

5. "The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does not in any respect affect the character of the transaction. To the extent to which each agency acts in that transportation, it is subject to the regulation of commerce." *The Daniel Ball*, 10 Wall. (U. S.) 557, 565.

"Any carriage of goods which crosses.

the Union;¹ but its exercise cannot affect existing private contracts based on previous legislation and circumstances.²

b. When Exclusive and When Not.—This power of congress does not, however, affect all matters of interstate commerce to the same extent. It is exclusive as to all subjects which are in their nature national or admit only of one uniform system of regulation,³

a State line is interstate commerce; and the fact that transportation from one State to another is transacted in whole or in part through the agency of independent and unrelated carriers up to and from the State line, does not affect the character of the transaction in this respect. For, whenever an article destined to a place without the State is shipped or started therefor, it becomes the subject of interstate commerce, and the carriers employed in the transportation thereof, although neither of them may pass from one State to the other, are subject, as instruments of such commerce, to national legislation and control." *Ex parte Kochler*, 30 Fed. R. 869.

In *Iowa*, it has been held that if a railroad company takes goods destined for a point outside the State, but contracts that its liability shall cease when it has delivered them to another carrier at a point within the State, such carriage by the first company is not interstate commerce. *Heiserman v. C. B. & Q. R. Co.*, 63 Iowa 732.

1. As was said in *Gibbons v. Ogden*, 9 Wh. (U. S.) 1, 195, "In regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. . . . This principle is, if possible, still more clear when applied to commerce 'among the several States.' They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce 'among' them; and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. . . . The power of congress, then, whatever it may be, must be

exercised within the territorial jurisdiction of the several States."

See also *Brown v. Maryland*, 12 Wheat. (U. S.) 446; *Penna. v. Wheeling Bridge Co.*, 13 How. (U. S.) 518; s. c., 18 How. (U. S.) 421, 431; *Guy v. Baltimore*, 100 U. S. 434.

2. Hence a contract for the handling, at a stipulated price, of all grains brought by a railroad to a certain place, was not affected by the building, under authority of congress, of an interstate bridge which made such handling a useless expense to one of the parties. The enforcement of this contract was not an interference with the power of congress over interstate commerce. *R. R. Co. v. Richmond*, 19 Wall. (U. S.) 584; followed in *K. & I. Br. Co. v. L. & N. R. Co.*, 37 Fed. R. 567, 633; and see *C. & A. R. Co. v. V. & W. Coal Co.*, 79 Ill. 121, 127.

3. *Gibbons v. Ogden*, 9 Wh. (U. S.) 1; *Brown v. Maryland*, 12 Wh. (U. S.) 419; *Cooley v. Port Wardens*, 12 How. (U. S.) 299; *Almy v. California*, 24 How. (U. S.) 169; *Gilman v. Phila.*, 3 Wall. (U. S.) 731; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Welton v. Missouri*, 91 U. S. 275; *R. R. Co. v. Husen*, 95 U. S. 465; *Mobile v. Kimball*, 102 U. S. 691; *Cardwell v. Bridge Co.*, 113 U. S. 205; *Gloucester Fer. Co. v. Penna.*, 114 U. S. 196; *Brown v. Houston*, 114 U. S. 622; *Walling v. Michigan*, 116 U. S. 446; *Pickard v. Pull. South. C. Co.*, 117 U. S. 34; *W. St. L. & P. R. Co. v. Illinois*, 118 U. S. 557; *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489; *Council Bluffs v. K. C. etc. R. Co.*, 45 Iowa 336; *Hardy v. A. T. & S. F. R. Co.*, 32 Kan. 698.

The distinction between the exclusive and nonexclusive powers of congress, and the fact that it turns on the nature of the subjects in regard to which the power is exercised, is made very clear by *CURTIS, J.*, in *Cooley v. Port Wardens*, 12 How. (U. S.) 299, 318.

"The grant of commercial power to

and the nonexercise of this power as to any such subject indicates an intention that no restrictions should be imposed, and does not warrant any action in the matter by the State.¹ As to subjects of minor or local importance, the power of congress is not exclusive till exercised.² To the first class belong transportation, communication and traffic,³ strictly considered, and as distinguished from matters incidental thereto, which come within the second class.⁴

congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded it must be because the nature of the power thus granted to congress requires that a similar authority should not exist in the States. . . . When the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive regulation by congress. Now the power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some as imperatively demanding that diversity which alone can meet the local necessities of navigation.

"Either absolutely to affirm or to deny that the nature of this power requires exclusive legislation by congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. Whatever subjects of the power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first congress that the nature of this subject is such that until congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local

peculiarities of the ports within their limits."

To the same effect is the more recent case of *Cardwell v. Bridge Co.*, 113 U. S. 205. After citing the earlier cases the court said that they "illustrate the general doctrine, now fully recognized, that the commercial power of congress is exclusive of State authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting all the States; and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management until congress interferes and supersedes their action."

1. "The fact that congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled." *Welton v. Missouri*, 91 U. S. 275; and see the cases cited in the last note.

2. See the cases cited in *§. 2*, p. 545.

3. It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating State legislation." *Welton v. Missouri*, 91 U. S. 275. To the same effect, *Gloucester Fer. Co. v. Penna.*, 114 U. S. 196. As to traffic, *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489. As to communication, *W. U. T. Co. v. Pendleton*, 122 U. S. 347.

4. *Cooley v. Port Wardens*, 12 How. (U. S.) 299.

Bridges Over Navigable Waters.—These form a good illustration of the

nonexclusive power of congress, whether they obstruct or facilitate commerce. In the first instance the general power of congress to regulate commerce includes the power to determine what shall or shall not be deemed such an obstruction in judgment of law. Hence congress can legalize a bridge across a navigable stream, and compel vessels to be regulated so as not to interfere with it. *Penna. v. Wheeling Br. Co.*, 18 How. (U. S.) 421; *Miller v. Mayor of N. Y.*, 109 U. S. 388.

It has been indicated, though not decided, that if a bridge, erected by State authority only, prove an obstruction to navigation, congress may order it abated without compensation. *Bridge Co. v. U. S.*, 105 U. S. 470.

Again, bridges may be means of interstate commerce, and it has recently been decided in the United States circuit courts in New Jersey and New York that congress can grant to a private corporation the right to occupy navigable waters within a State, and the soil underneath the same, in order to erect and maintain a bridge from one State to another, to be used for the purposes of interstate commerce, though such grant be without the consent and notwithstanding the protest of the State; and in such a case cession of the soil by the State in which it lies is not necessary to the exercise of the privilege. *Decker v. B. & N. Y. R. Co.*, 30 Fed. R. 723; *Stockton v. Same*, 32 Fed. R. 9; *Penna. R. Co. v. Same*, 37 Fed. R. 129. In the second of these cases, *BRADLEY, J.*, said:

"The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters or the land under them; it has what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of congress, and congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power

stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of congress, may be necessary or expedient."

Congress may prescribe the rates of toll upon bridges over its navigable waters. *C. S. R. Co. v. Int. Br. Co.*, 8 Fed. Rep., 190.

Where congress has exercised no authority, a State can authorize and regulate the erection of bridges over navigable streams which are entirely within its limits. *Gilman v. Phila.*, 3 Wall. (U. S.) 713; *Escanaba v. Chicago*, 107 U. S. 687; *Cardwell v. Am. Br. Co.*, 113 U. S. 205. If, however, the stream flows through more than one State, or from the boundary between States, the right of States in regard to bridges is not so certain. According to a recent writer this right "should seemingly depend, not on whether the river flows through one or many States, but on how far it is navigable, the size and number of the vessels which pass up and down the channels, and the kind and value of their cargoes. If the regulation of the Schuylkill can safely be left to the local authorities, and the Hudson is exclusively under the control of congress, it is not because the entire course of the former river is in the State of Pennsylvania, while the latter divides New York from New Jersey, but because the traffic on the Hudson much exceeds that on the Schuylkill. A river flowing through two or more States may be so far common property that no one of them can sanction any structure that will obstruct the channel; but if, as we may infer from *Gilman v. Phila.*, a State may bridge rivers which, like the Penobscot, are important avenues of commerce, there would seem to be no sufficient reason why New York and New Jersey should not unite in throwing a bridge over the Hudson. The test seemingly should be: Is the river of such importance to interstate and foreign commerce that it should be exclusively regulated by the general government, and cannot safely be trusted to local legislation, subject to

3. Restrictions Upon the Power of the States—*a. As to Discrimination.*—No State can, by taxation or otherwise, discriminate against nonresidents—citizens of the United States—as to the business carried on by them in the State,¹ nor against the products of other States.²

b. As to Taxation.—No State, even without discrimination, can

the intervention of congress? and the question whether the entire course of the stream is in the State is a circumstance that may deserve consideration, but is not of itself conclusive. A river which has its source in one State and its mouth in another, is, so far as its course through the former is concerned, as entirely local as if it did not enter the latter; and the Hudson above Newburgh should therefore be as much under the control of New York as is the Schuylkill at Philadelphia, especially if the latter be viewed in its true aspect as a branch of the Delaware." 1 Hare's Am. Const. Law, 500.

1. Ward v. Maryland, 12 Wall. (U. S.) 418; See vol. 6, title DRUMMERS; vol. 3, titles COMMERCIAL TRAVELERS; CONSTITUTIONAL LAW; also note 2, p. 549. But here, under a general law, a specific tax is assessed upon "every sewing machine company selling or dealing in sewing machines, by itself or its agents, in this State." This embraces domestic as well as foreign companies and is not a regulation of interstate commerce, although, as a matter of fact, no domestic companies may exist. Singer Mfg. Co. v. Wright, 33 Fed. Rep. 121.

Foreign Corporations.—While a State may exclude foreign corporations, or prescribe terms or impose a licence fee for their transacting business within her limits (Bk. of Augusta v. Earle, 13 Pet. (U. S.) 519; Paul v. Virginia, 8 (Wall.) U. S. 168; Penna. v. Standard Oil Co., 101 Pa. 119), yet this power must not be so exercised as to hinder, burden, or regulate interstate commerce. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727; Pembina Min. Co. v. Penna., 125 U. S. 181.

Hence the circuit court for Louisiana has held that an article of the constitution of that State, providing that no foreign corporation shall do any business therein without having one or more known places of business and authorized agents on whom process can be served in the State, is void as an attempt to restrict navigation. N. O. & M. P. Co. v. James, 32 Fed. Rep. 21.

In *Alabama*, a similar constitutional provision has been sustained by the State Court as against a telegraph company. A. U. T. Co. v. W. U. T. Co., 56 Ala. 26. Similar legislative provision has been upheld by the United States Supreme Court. Fire Assoc. of Phila. v. New York, 119 N. Y. See FOREIGN CORPORATIONS, 8 Am. & Eng. Ency. of Law.

In *Iowa*, the State court sustained (though rather as a matter of form, and with much doubt) a statute requiring foreign corporations, other than mercantile or manufacturing, to take out permits before exercising any corporate functions whatever, which permits should be forfeited if the corporation, when sued in a State court, should remove the cause to a federal court on account of local prejudice or its own nonresidence. Goodrel v. Kreichbaum, 70 Iowa 362.

2. A State law requiring persons dealing in merchandise grown or manufactured without the State to pay for and take out a license, while the sale of wares made within the State is left free, is void. Welton v. Missouri, 91 U. S. 275; Webber v. Virginia, 103 U. S. 344; Walling v. Michigan, 116 U. S. 440; State v. Pratt, 59 Vr. 590; Van Buren v. Downing, 41 Wis. 122.

So is a city ordinance taxing peddlers unless they reside in, and the goods are manufactured in, a certain county. Marshalltown v. Blum, 58 Iowa 184. Or an ordinance requiring vessels laden with the products of other States to pay a larger sum for the use of the public wharves of a city than where the cargo consists of articles grown or made in the State. Guy v. Baltimore, 100 U. S. 434.

But a law taxing "all peddlers of sewing machines and selling by sample" affects such persons "without regard to the place of growth or produce of material, or of manufacture," and is valid. Machine Co. v. Gage, 100 U. S. 676, affirming s. c., 7 Bax. (Tenn.) 518. But see note 2, p. 549, as to sale by sample. As to regulation of the liquor traffic see *infra*, n. 1, p. 556.

impose any tax upon interstate commerce,¹ whether upon sales, by sample or otherwise, of goods to be brought from another State,² or upon passengers³

1. It is well settled that no State can impose a tax under such circumstances and with such effect as to constitute it a regulation of foreign or interstate commerce, and also that the test to be applied in such cases is that where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it. *Brown v. Maryland*, 12 Wh. (U. S.) 419.

"The fairest and most just . . . construction of the constitution leads to the conclusion that no State has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress." *Leloup v. Mobile*, 127 U. S. 640.

It does not help the matter that domestic commerce is subject to the same tax. *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489; *Leloup v. Mobile*, 127 U. S. 640.

2. "Drummers'" *License Taxes*.—*Welton v. Missouri*, 91 U. S. 275 (note 2, p. 548), decided simply that there must be no discrimination against interstate commerce. *Machine Co. v. Gage*, 100 U. S. 676 (*supra*, same note), sustained the constitutionality of a nondiscriminating State tax on "all peddlers of sewing machines [whether domestic or foreign] and selling by sample;" a decision which seems warranted by the facts of the case, for the agent taxed appears to have sold only machines which had been brought into the State and had become part of the general property. (See *Woodruff v. Parham*, 8 Wall. (U. S.) 123; note 1, p. 550). The business of selling *by sample* was not referred to in that case; but it is now settled that a State law providing that "all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein, by sample, shall be required to pay to the county trustee

the sum of \$10 per week, or \$25 per month for such privilege, and no license shall be issued for a longer period than three months," is void in so far as it applies to persons soliciting the sale of goods on behalf of individuals or firms doing business in another State. *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489.

The same is true of a law providing that "no person or corporation other than the grower, maker, or manufacturer, shall barter or sell or otherwise dispose of, or shall offer for sale any goods, chattels, wares or merchandise within the State without first obtaining a license" to be paid for at a certain rate. *Corson v. Maryland*, 120 U. S. 502, reversing s. c., 57 Md. 257. But license to enter, required of foreign corporations, depends on other principles. See note 1, p. 548. To the same effect, *Asher v. Texas*, 128 U. S. 129 (reversing s. c., 23 Tex. App. 662); *ex parte Stockton*, 33 Feb. R. 95; *State v. Agee*, 83 Ala. 110; *Fort Scott v. Pelton*, 39 Kan. 764; *Simmons Hdwre. Co. v. McGuire*, 39 La. Ann. 848; *ex parte Rosenblatt*, 19 Nev. 439; *State v. Bracco* (N. Car.), 9 S. E. Rep. 404.

In *West Virginia*, a license tax on agents travelling with one or more horses and selling "any lightning rod, sewing machine, or organ, or other musical instrument" has recently been sustained as against agents selling sewing machines manufactured outside the State, on the ground that it applied only to agents carrying their goods with them. *State v. Richards* (W. Va.), 9 S. E. Rep. 245. Unless, however, these goods could be held to have reached their destination and thereby become part of the general property of the State, they were still a matter of interstate commerce (note 2, p. 548), and not subject to taxation, directly or in this indirect way.

3. *Passengers*.—In *Crandall v. Nevada*, 6 Wall. (U. S.) 35, the supreme court doubted whether the transportation of passengers were commerce, but *Hall v. De Cuir*, 95 U. S. 485 (note 2, p. 554), settled that it is. This has been followed in the various Pullman car cases, and interstate transportation of passengers is now regulated by the Interstate Commerce act.

or goods¹ carried or messages sent to or from other States,² or

1. **Goods.**—Neither the business of carrying goods from one State to another (State Freight Tax Case and other cases in next note), nor the goods themselves while in transit (*Coe v. Errol*, 116 U. S. 517), can be taxed; nor can a licence tax be imposed upon the business or occupation of selling the goods, for that is in effect a tax upon the goods themselves. *Welton v. Missouri*, 91 U. S. 275. As to the goods themselves, as was observed in the last two cases, it is not an easy matter to designate or define the point of time when state jurisdiction over them begins and federal jurisdiction ends, or *vice versa*; yet it is highly important, both to the business community and to the State, that this should be done as far as possible.

The control of a State over goods brought from another State begins sooner than in the case of imports from a foreign country. In the latter case, the right to sell without any restriction imposed by a State is a necessary incident of the right to import without such restriction, and hence so long as the goods remain the property of the importer, and continue in the original form and packages in which they were imported, the State can impose no tax or duty upon them. *Brown v. Maryland*, 12 Wh. (U. S.) 419. See *Coe v. Errol*, 116 U. S. 517, 527. Nor can their sale by an auctioneer be taxed like other auction sales. *Cook v. Penna.*, 97 U. S. 566.

In the case of goods from another State, no universal rule was stated in *Welton v. Missouri*, 91 U. S. 275, the court deeming it sufficient for the purpose of that case to hold that the "commercial power [of congress] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it even after it has entered the State from any burdens imposed" on that account. It would seem to be the received doctrine that this protection of the goods from all State control while in transit, and from discrimination at all times, is all that congress can or need undertake to secure in the matter. After the goods have been sent from one State to another for sale, or in consequence of a sale, and have reached their destination, they become part of the general property of

the State, and are subject to its regulations and taxes just as all other property is, provided only that there be no discrimination against them by reason of their extra-state origin. *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Machine Co. v. Gage*, 100 U. S. 676; *P. & S. Coal Co. v. Bates*, 40 La. Ann. 226.

The destination once reached, the mere fact that the sale takes place on the vessel which brought them, cannot divest the State control, which has already attached. *Brown v. Houston*, 114 U. S. 622.

When State control over goods exported to another State ends is perhaps not so clearly settled, but the best rule would seem to be "that such goods do not cease to be part of the general mass of property of the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." Hence, logs cut and hauled to the place whence they were to be floated to another State, but kept in that place till it was convenient to float them away, were not yet commodities of interstate commerce, but were taxable. *Coe v. Errol*, 116 U. S. 517.

2. **State Freight Tax Case.** 15 Wall. (U. S.) 232; *Tel. Co. v. Texas*, 105 U. S. 460; reversing s. c., 55 Tex. 314.

Occupation and Office License Taxes.—Interstate commerce cannot be taxed even indirectly, as by requiring the payment of a license fee for carrying it on. *Moran v. New Orleans*, 112 U. S. 69; *Leloup v. Mobile*, 127 U. S. 640. This case practically overrules *Osborne v. Mobile*, 16 Wall. (U. S.) 479, in which a license tax on express and railroad companies "having a business extending beyond the limits of the State," was held not to impose a tax upon interstate commerce, and hence to be valid.

In *Pickard v. Pull. South. Car. Co.*, 117 U. S. 34, *Osborne v. Mobile* is distinguished from State Freight Tax Case, 15 Wall. (U. S.) 232, and approved because involving a tax upon a business carried on within the city of Mobile only. But in *Leloup v. Mobile*, *BRADLEY, J.*, said, in delivering the opinion of the court: "In view of the course of decisions which have been made since

that time (*i. e.*, the date of *Osborne v. Mobile*), it is very certain that such an ordinance (as the one in that case) would now be regarded as repugnant to the power conferred upon congress to regulate commerce among the several States."

The downfall of *Osborne v. Mobile* would seem to carry with it that of *Lightburne v. Taxing Dist.*, 4 Lea (Tenn.) 219, which upheld in reliance on *Osborne v. Mobile*, a privilege tax upon steamboat and railroad agents, other than officers of railroads terminating in the taxing district, as valid even as against agents whose business was to contract for interstate commerce. Perhaps, also, the same may be said of *N. & W. R. Co. v. Commonwealth*, 114 Pa. St. 256, which held that where a railroad company is confined, by the terms of its charter, to the carriage of freight and passengers within one State, its participation in through transportation carried on by force of traffic contracts with other companies owning roads in other States, is not interstate commerce, and that hence such company can be required to pay an office license tax in another State.

Taxation of Receipts.—State taxation of the receipts derived from interstate commerce is likewise forbidden. *Fargo v. Michigan*, 121 U. S. 230; *Phila. & South. S. S. Co. v. Penna.*, 122 U. S. 326 (reversing *s. c.*, 104 Pa. 109); *Ratterman v. W. U. T. Co.*, 127 U. S. 411; *W. U. T. Co. v. Penna.*, 128 U. S. 39; *Indiana v. A. E. Co.*, 7 Biss. (C. C.) 227.

Even in proportion to the distance travelled in the State by passengers or goods carried into, through or out of it. *Indiana v. Pull. P. C. Co.*, 16 Fed. R. 193; *State v. Wood, S. & P. C. Co.*, 114 Ind. 155.

It is immaterial that goods destined for points without the State were temporarily detained in the State. This did not alter their character. *D. & H. C. Co. v. Com. (Pa.)*, 17 Atl. R. 175.

The reversal of *Phila. & South. S. S. Co. v. Com.*, 104 Pa. 309, in 122 U. S. 326, would seem to indicate that *Pull. P. C. Co. v. Com.*, 107 Pa. 148, was also wrongly decided. It held that a carrying company was taxable on all its receipts from business carried on in the State, even including receipts derived from the carriage of passengers into, through, or out of the State. See *FOREIGN CORPORATIONS*, vol. 8.

In *Pennsylvania*, it has also been very recently held that a State can tax

the receipts from continuous transportation between points within the same, but by a route lying partly in another State, so that the passengers and goods were actually carried out of the State, and then into it again. *Com. v. L. V. R. Co.*, 17 Atl. R. 179. This decision may be questioned. See *supra*.

The rule above given is analogous to that established in *W. St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, that a State cannot regulate interstate transportation charges even for the distance travelled in the State. See title *FREIGHT*, 8 Am. & Eng. Ency. of Law.

The fact that a company is engaged in interstate commerce does not, however exempt it from taxation on its receipts derived from internal commerce, *e. g.* from the transportation of passengers whose whole journey is within the State. *State v. Pull. P. C. Co.*, 64 Wis. 89; or from telegrams sent by private citizens from one place to another within the State. *Tel. Co. v. Texas*, 105 U. S. 460. See title *FOREIGN CORPORATIONS*, 8 Am. & Eng. Ency. of Law.

Authority of State Tax on Railway Gross Receipts Questioned.—In that case, 15 Wall. (U. S.) 284, it was held that a State could tax the gross receipts of a domestic corporation, even though a part of such receipts be derived from interstate commerce. This was on the ground that the tax was in effect a tax on the franchise which the State had a right to tax on any basis it might see fit, and also that the tax was not levied until after the money had actually come into the company's hands, thereby losing its distinctive character as freight earned, and becoming incorporated into the general mass of the company's property. In *Phila. & South. S. Co. v. Penna.*, 122 U. S. 326, however, the decision in the *Railway Gross Receipts* case was questioned, and the second ground above given held to be untenable. *BRADLEY, J.*, said: "No doubt a ship owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce or banking or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter

upon the means by which interstate commerce is transacted, except in so far as they may be subject to direct taxation as property.¹

c. As to Regulation.—Such matters as are subject to the exclusive control of congress cannot be regulated by the States in any way, whether by fixing rates of charges,² granting monop-

when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it."

1. It is familiar that the property of individuals and corporations engaged in foreign or interstate commerce is subject to State taxation equally with other property, provided always it be within the jurisdiction of the State. See *McCulloch v. Maryland*, 4 Wh. (U. S.) 316, 429; *Passenger Cases*, 7 How. (U. S.) 283, 402; *Tel. Co. v. Texas*, 105 U. S. 460; *Gloucester Ferry Co. v. Penna.*, 114 U. S. 196, 206.

Hence vessels engaged in interstate commerce may be taxed as property, but only at their home port, which must be within the jurisdiction of the State where their owner resides, without regard to their port of registry. *St. Louis v. Ferry Co.*, 11 Wall. (U. S.) 423; *People v. Commrs. of Texas*, 23 N. Y. 224; *Same v. Same*, 58 N. Y. 242.

This is so even if the vessel be employed exclusively in commerce between other ports, and do not touch at her home port. *Hays v. P. M. S. Co.*, 17 How. (U. S.) 596; *Morgan v. Parham*, 16 Wall. (U. S.) 471.

A license fee imposed by a State or a municipality upon ferry boats plying across a navigable river between two States, is, however, not a regulation of interstate commerce. *Wiggins Ferry Co. v. E. St. Louis*, 107 U. S. 365.

Sleeping and parlor cars belonging to a foreign company, and merely passing through or into a State, cannot be taxed there. *Pickard v. Pull. South. C. Co.*, 117 U. S. 34; *Tenn. v. Same*, 117 U. S. 51.

But it has been held in *Pennsylvania* that a foreign corporation doing business in the State is liable to taxation on the proportion of its capital stock invested therein, as represented by the cars used by it in the State, whether such cars be owned or leased by the company; and that the fact that such cars are continuously run into, through, or out of the State, and are also oper-

ated in other States, does not exempt them from taxation in the State, but only reduces the valuation upon which the company is taxable. *Pull. P. C. Co. v. Com.*, 107 Pa. St. 156.

Hence a telegraph company can be taxed on its corporate franchise, at a valuation equal to the aggregate value of the shares of its capital stock after deducting from such valuation an amount proportionate to the length of the line lying without the State. *Atty. Gen. v. W. U. T. Co.*, 33 Fed. R. 129; *affd.* 125 U. S. 530.

2. A State cannot, directly or indirectly, regulate the charges for freight or passengers to points outside its limits. *P. C. S. S. Co. v. Bd. of Commrs.*, 18 Fed. R. 10; *Carson v. I. C. R. Co.*, 59 Iowa, 148; *Hardy v. A. T. & S. F. R. Co.*, 32 Kan. 698; *infra*, vol. 8, title FREIGHT.

Hence in a case arising from a carriage forming part of an interstate conveyance, a State law forbidding any railroad company to "charge or receive the same or a greater sum for the transportation of passengers and freight of the same class for any distance within the State than it does for a longer distance," was held unconstitutional, because applicable even though the longer distance be without the State, and hence affecting contracts for interstate transportation. *Wabash etc. R. Co. v. Illinois*, 118 U. S. 579, reversing *s. c.*, 105 Ill. 236.

Even if the regulation is confined in terms to so much of the distance traversed as is within the State, and congress has taken no action in the matter, this does not alter the case. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557; *Kaeiser v. I. C. R. Co.*, 5 *McCr.* (U. S. C.) 496; *s. c.*, 18 Fed. R. 151; *L. & N. R. Co. v. Commn.*, 19 Fed. R. 679; *I. C. R. Co. v. Stone*, 20 Fed. R. 468; *M. & O. R. Co. v. Sessions*, 28 Fed. R. 592; *State v. C. & N. W. R. Co.*, 70 Iowa 162; *Com. v. Hous. R. Co.*, 143 Mass. 264; *R. R. Commrs. v. R. R. Co.*, 22 S. Car. 220; *infra*, vol. 8, title FREIGHT.

The same rule applies to carriage be-

tween points in the same State, but by a route lying partly in another State. This is interstate commerce, and the rates are subject to the control of congress. *N. O. Cot. Exch. Co. v. N. O. etc. R. Co.*, 2 I. C. C. R. 375; *State v. C. St. P. M. & O. R. Co. (Minn.)*, 41 N. W. Rep. 1047.

Before the "Interstate Commerce act" was passed, a State could require railroads traversing its territory to fix their rates of charges annually, and to keep printed tables of such rates posted in their stations, and forbid the charging of a higher rate than is so fixed and posted. *R. R. Co. v. Fuller*, 17 Wall. (U. S.) 560. In that case the court said: "No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public, and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company." The federal act has now superseded such legislation.

The "Granger Cases."—In *Munn v. Illinois*, 94 U. S. 113; *C. B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. C. & N. W. R. Co.*, 94 U. S. 164; *C. M. & St. P. R. Co. v. Ackley*, 94 U. S. 199; *W. & St. P. R. Co. v. Blake*, 94 U. S. 180; and *Stone v. Wisconsin*, 94 U. S. 181, it was held (FIELD and STRONG, J. J., dissenting) that where a railroad or warehouse was situated within the limits of a single State, its business was carried on there and its regulation was a matter of domestic concern, although such road or warehouse might be used as an instrument of interstate as well as of domestic commerce; and that until congress acted in regard to the interstate relations of such a road or warehouse, the State could enforce her own regulations upon it, and limit the rates to be charged for carriage or other services, even though such regulations should "indirectly operate upon commerce outside her immediate jurisdiction." (94 U. S. 135.)

These cases were cited with approval by WAITE, C. J., in the later "Railroad Commission cases," 116 U. S. 307, 325, 329, but have been the subject of much criticism. Very many of the State courts of last resort have relied on them in support of State authority against the defence of interstate commerce, only to find that they had leant upon a "bruised reed." It is to be ob-

served that in *Munn v. Illinois* the court say: "We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive dominion of commerce in respect of interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done," while in *C. B. & Q. R. Co. v. Iowa*, the answer denied that any attempt was to be made to enforce the law so far as concerns interstate commerce. In all the Granger cases the interference with interstate commerce was only one of several constitutional matters assigned for error, and was treated as one of the least important. The reports clearly show that the main questions were: first, the fundamental one of the right of a State to restrict in any way the power of a railroad or elevator company to fix the rates at which it would do business, without regard to whether that business might be interstate or not; and secondly, that of the right to make any such restrictions in view of the express or implied rights of the railroads under their charters. The extent to which such restrictions might affect interstate commerce, and the right of a State to make any restrictions which might affect it, received very little attention either from court or counsel. In a general way the court treated the cases as belonging to that class of commercial regulations (like those affecting pilotage, bridges, etc.) which were within the power of a State until congress acted; or, perhaps, rather as resembling those internal regulations which are necessarily within the power of a State even though they may possibly have an incidental effect on interstate commerce. All this is pointed out in *W. St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, by MILLER, J., who was of the majority who decided the Granger cases. He admits that the general language of the court in those cases "may be susceptible of the meaning which the Illinois court placed upon it" in the case before him, and which, speaking for the majority, he then and there declared not to be law, viz.: that a State could limit the rates of transportation for such proportion of a contract of interstate carriage as was actually performed within the State. Such an admission is perhaps as near an overruling as it was possible to go, inasmuch as the

lies,¹ or other modes of interference.² As to other matters, the individual States are entitled to some control, which is usually manifested in the exercise of the police power.³ They may, in the ab-

cases were, in his view, properly decided as to all the principal points presented in the arguments.

On the whole, therefore, the granger cases may safely be relied upon as establishing the right of a State to limit the rates for transportation, etc., to be charged by corporations engaged in strictly internal commerce within its borders; *i. e.*, that such limitation is not a taking of private property for public use without due process of law, and also that the laws under consideration in those cases do not infringe the constitutions of the States that had enacted them. As to interstate commerce, however, in view of the recent cases of *W. St. L. & P. R. Co. v. Illinois*, 118 U. S. 557; *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489, and *Leloup v. Mobile*, 127 U. S. 640, they can hardly be considered as of any authority. Apart from this, too, congress has since acted in regard to the interstate matters involved in all the cases except *Munn v. Illinois* (the elevator case), and the Interstate Commerce act, declaring that interstate transportation rates shall be reasonable and uniform, removes all possibility of State interference in the matter.

1. *Gibbons v. Ogden*, 9 Wh. (U. S.) 1; *Pen. Tel. Co. v. W. U. T. Co.*, 96 U. S. 1.

2. A State cannot require telegraph companies doing business within the State to deliver despatches by messenger to the persons to whom the same are addressed or their agents, provided they reside within one mile of the telegraph station or within the city or town where such station is, so far as such requirement affects the delivery of messages outside the State. *W. U. T. Co. v. Pendleton*, 122 U. S. 347; reversing *s. c.*, 95 Ind 15.

A State law requiring the owners of all steamboats navigating its waters to file certain statement in regard to each boat before it should leave a certain port, is void as regards vessels engaged in interstate commerce. *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Foster v. Davenport*, 22 How. (U. S.) 244.

In *Hall v. De Cuir*, 95 U. S. 485, it was held that a State law securing equal rights to all passengers in any public

conveyance passing through two or more States or from one State to another, was a regulation of interstate commerce and therefore void. The reasoning was that if one State might require that persons of different colors should occupy the same cabin, another might insist that they should be kept apart, a diversity of rules embarrassing to commercial intercourse. If legislation were necessary in the matter, it was for congress to undertake it.

In *New York*, the "Sunday laws" have been held void in so far as they attempt to interfere with the right of an express company to transact interstate business on that day. *Dinsmore v. N. Y. Pol. Bd.*, 12 Abb. N. C. (N. Y.) 439; *Ad. Ex. Co. v. Same*, 65 How. (N. Y.) 72.

But in *West Virginia*, the right to forbid the running of freight trains on Sunday has been upheld without regard to the interstate character of the business. *State v. & B. O. R. Co.*, 24 W. Va. 783.

In *Texas*, it has been held that as the State constitution prohibits railroads from controlling parallel or competing lines, this applies to traffic associations engaged partly in interstate commerce, and even though some of the members are foreign corporations. The court thought that "the defendant corporations who derive their charters from this State are acting in violation of law in entering into this contract of association; some of the members of the association being competing lines of road. The association, being illegal as to some of the defendants, is illegal as to all. *G. C. & S. F. R. Co. v. State (Tex.)*, 10 S. W. Rep. 81.

Where a railroad has been organized under the statutes of several States to operate a continuous line, statutes authorizing the consolidation of the whole are not an interference with interstate commerce. *Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 157.

3. It has not always been found easy to keep State authority within its proper limits.

"The line of distinction," says JUDGE COOLEY, "between that which constitutes an interference with commerce, and that which is a mere police regula-

sence of congressional legislation on the subject, pass laws regulating interstate commerce as to matters which are so local in their nature and operation that a uniform system throughout the whole country would be impracticable, and also matters constituting mere aids to commerce.¹ Furthermore, in pursuance of their general authority over internal concerns, the States may pass laws incidentally affecting interstate commerce, provided such laws do not discriminate against such commerce, and are not in-

tion, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations as well as the States, confining their operation to the subjects over which it is given control by the constitution. But as the general police power can better be exercised under the supervision of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations which are made by congress do not often exclude the establishment of others by the State covering very many particulars." Cooley's Const. Lim. (5th ed.) 724.

1. "It is an established principle that the only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce; such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing in the State or belonging to its population, and upon avocations and employments pursued therein, not directly

connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingling with and forming part of the great mass of property therein." Robbins v. Shelby Taxing Dist., 120 U. S. 489.

A State may prescribe a system of pilotage. Cooley v. Port Wardens, 12 How. (U. S.) 299; State v. Penny, 19 S. Car. 218.

But not one discriminating in favor of vessels of any State or plying between any particular ports. Sprague v. Thompson, 118 U. S. 90, reversing s. c., 69 Ga. 409; Freeman v. The Undaunted, 37 Fed. R. 662.

A State may establish port regulations. Owners of Brig v. Owners of Ship, 21 How. (U. S.) 184.

And even apart from measures to protect health, the State may prescribe rules for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient for the expenses attendant upon the execution of these regulations. Vanderbilt v. Adams, 7 Cow. (N. Y.) 349.

Or quarantine regulations, and may require fees to be paid for inspections. Morgan v. Louisiana, 118 U. S. 455.

Or provide for the improvement of harbors, bays and rivers. Mobile v. Kimball, 102 U. S. 691; *In re Watson*, 15 Fed. R. 511.

And protect them from the deposit of

consistent with acts of congress. This power of the States is absolutely essential to the existence of a proper measure of local self government.¹

offal and dirt therein. *N. Y. v. Furgueson*, 23 Hun (N. Y.) 594.

If a State improves its rivers and harbors, it may impose a tax upon all vessels navigating them. This would not be a tax upon commerce, but merely a compensation for the additional facilities provided. *Kellogg v. Union Co.*, 12 Conn. 7; *Thames Bk. v. Lovell*, 18 Conn. 500; *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447.

A State may provide for the erection of wharves and collection of wharfage. *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Onachita P. Co. v. Aiken*, 121 U. S. 444.

Or grant ferry licenses, directly or through a municipality. *Fanning v. Gregoire*, 16 How. (U. S.) 524; *Conway v. Taylor's Exr.*, 1 Bl. (U. S.) 603; *Wiggins Fer. Co. v. E. St. Louis*, 107 U. S. 365, affirming s. c., 102 Ill. 560.

Or provide for the erection of bridges over navigable streams. See p. 546, note 4.

1. The leading case on this point is *Wilson v. Black Bird etc. Co.*, 2 Pet. (U. S.) 245, in which a State law authorizing the erection of a dam across a small navigable creek in order to exclude the tide and reclaim an unhealthy marsh, was held not be a regulation of commerce, but an exercise of the right, common to every State, to adopt such measures as will, in the opinion of the legislature, promote the health of the inhabitants or give additional value to the land. So long as congress passed no law regulating State legislation upon the particular creek, or upon such creeks in general, the State law did not interfere with the authority of congress. The only criticism to be made upon this is that the decision seems to have been reached with rather unnecessary difficulty. If the fact that interstate commerce may be incidentally affected to an infinitesimal degree were held to prevent a State from exercising the most ordinary and necessary functions of government in a matter in which congress has shown no intention of acting, or from allowing its citizens to protect their own health or promote their own convenience, local self government would be at an end.

As was said in *Sherlock v. Alling*, 93 U. S. 99: "Whatever congress de-

termines, either as to a regulation [of commerce] or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of congress are silent, and the laws of the State govern . . . and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." Hence it was held in that case that in the absence of congressional legislation as to liabilities for marine torts, committed within the territorial limits of a State, and resulting in death, a State law giving a right of action to the personal representatives of the deceased was valid.

So a State may regulate maritime liens. *The Lottawanna*, 21 Wall. (U. S.) 558.

The powers reserved to the several States extend to all the objects which in the ordinary course of affairs concern property and the rights of property within each State. Hence the liability of the owners of a vessel or railroad engaged in interstate commerce for injury caused by such vessel or railroad, by fire, or otherwise, to property on land or outside the premises occupied by the railroad, is not a matter within the control of congress. *King v. Am. Transp. Co.*, 1 Flip. (U. S.) 1; *Smith v. B. & M. R. Co.*, 63 N. H. 25.

And a State may authorize such liability to be enforced by lien. *Johnson v. C. & P. Elev. Co.*, 119 U. S. 388.

State Regulations.—A State can impose reasonable restrictions upon the mode in which any business is carried on, whether interstate commerce be involved or not, provided only that it be not hampered thereby. Thus a State may require timber floating down a river from or to other States to be bound into rafts and placed under the

care of a sufficient number of persons. *Harrigan v. Conn. Riv. L. Co.*, 129 Mass. 580; s. c., 37 Am. R. 387.

Or require oyster boats to be licenced and regulate the mode of catching, in order to preserve clams and oysters. *Smith v. Marpland*, 18 How. (U. S.) 71; *Johnson v. Loper*, 46 N. J. L. 321.

As to Railroads.—As was said in *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 333 (one of the "Railroad Commission cases"), "There can be no doubt that each of the States through which the Mobile and Ohio railroad passes incorporated the company for the purpose of securing the construction of . . . a continuous line of interstate communication between the Gulf of Mexico in the south and the great lakes in the north. It is equally certain that congress aided in the construction of parts of this line of road so as to establish such a route of travel and transportation. But it is none the less true that the corporation created by each State is for all the purposes of local government a domestic corporation, and that its railroad within the State is a matter of domestic concern. . . . Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the State which is the lawful subject of State government. It may, beyond all question, by the settled rule of decision of this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the State; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time tables at proper places; etc. . . . This company is not entirely relieved from State control in Mississippi simply because it has been incorporated by, and is carrying on business in, the other States through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the constitution of the United States within the exclusive jurisdiction of congress. . . . It is not enough to prevent the State from

acting that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within."

Hence, a State may require locomotive engineers to pass a color examination, and punish companies employing them without certificate of their fitness. *Smith v. Alabama*, 124 U. S. 465; *N. C. & St. L. R. Co. v. Alabama*, 128 U. S. 96.

In *Illinois*, it is *held* that passenger trains, though coming from or going to another State, may be required to stop at county seats a sufficient time to enable passengers to get on and off. *C. & A. R. Co. v. Peop.*, 105 Ill. 657.

In *Arkansas*, it is *held* that a State may prohibit the collection of more freight than the bill of lading specifies, and punish the withholding of goods until extra charges are paid. This is a mere police regulation, to prevent extortion and delay. *L. R. & F. S. R. Co. v. Hanniford*, 49 Ark. 291.

A State may require railroad companies to draw the cars of other corporations at reasonable times and rates, to be agreed upon by the parties or fixed by the commissioner. *Rae v. G. T. R.*, 14 Fed. R. 401; *Iowa v. C. M. & St. P. R. Co.*, 33 Fed. R. 391.

And it has been *held* that the charge for taking such cars onto the company's line ("switching," as it is called) is not part of the through rate, and has no reference to interstate commerce, and hence may be regulated by a State commission appointed under the police power. *C. M. & St. P. R. Co. v. Becher*, 32 Fed. R. 849.

Or even if such "switching" be an act of interstate commerce, such regulation is valid, as it does not refer to the carriage of freight outside the State. *Iowa v. C. M. & St. P. R. Co.*, 33 Fed. R. 391.

The time, place and manner of making transfers of the subjects of commerce from one company's road to another cannot be regulated by a State so far as interstate commerce is concerned. *Council Bluffs v. K. C. etc. R. Co.*, 45 Iowa 338.

In *Iowa*, it has been *held*, in reliance upon the "Granger cases," that a State law avoiding a contract of carriage limiting the carrier's liability is valid even as against contracts for interstate carriage. The court said: "The pro-

vision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier . . . is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the property. But no burden is placed upon the property which is the subject of the contract; nor is any rule prescribed for his government respecting it. . . . The statute was enacted by the State in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within the jurisdiction." *Hart v. C. & N. W. R. Co.*, 69 Iowa 485.

As to Health.—The power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce. *Gloucester Ferry Co. v. Penna.*, 114 U. S. 196.

Hence, the importation of diseased cattle from another State may be prohibited. *M. P. R. Co. v. Finley*, 38 Kan. 550.

And the importer may be held liable for the consequences of letting cattle which come from a dangerous district run at large. *Kimmish v. Ball*, 129 U. S. 217.

But all importation of cattle, whether diseased or not, from other States, or certain of them, cannot be forbidden. *R. R. Co. v. Husen*, 95 U. S. 455; *Salzenstein v. Mavis*, 91 Ill. 391; *Arton v. Sherlock*, 75 Mo. 247.

A State law punishing the sale of oleomargarine colored with annatto is valid as applied to a sale by the agent of a manufacturer in another State and although the package sold had been sent from such other State for sale. *Waterbury v. Newton*, 50 N. J. L. 534. The court said: "It seems proper to conclude that the package of oleomargarine with which we are now dealing became, on its delivery to the consignee in Jersey City, subject to our laws relating generally to all articles of that nature in the State, unless those laws are opposed to the legislation of congress. The only federal law [on the subject] im-

plies that the prohibition of such traffic [in oleomargarine] by State legislation is permissible."

Kentucky statute regulating inspection and gauging of oils and fluids, is a mere police regulation within the power of the State, and does not contravene the federal constitution. *Patterson v. Kentucky*, 7 Otto (U. S.) 501; Book 24, L. ed. 1115. The right conferred upon a patentee and his assigns to use and vend an oil for illuminating purposes, created by the application of a patented discovery, must be exercised in subordination to the police regulations which the State established by such statute. *Patterson v. Kentucky*, 7 Otto (U. S.) 501.

As to Liquor Traffic.—The importation of intoxicating liquor from another State may be subjected to a license tax (*Hinson v. Lott*, 8 Wall. (U. S.) 148; *License Cases*, 5 How. (U. S.) 504), or even prohibited, providing domestic liquor be subject to the same restriction. *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129; *Beer Co. v. Mass.*, 97 U. S. 25; *Weil v. Calhoun*, 25 Fed. R. 165; *Kansas v. Bradley*, 26 Fed. R. 289; *State v. O'Neil*, 58 Vt. 140.

In *Iowa*, a statute prohibiting the manufacture or sale of intoxicating liquors, even for exportation, unless manufactured within the State for mechanical, medical, culinary or sacramental purposes, and prohibiting also the sale of imported foreign intoxicating liquor, unless in its original packages and quantities, is not in conflict with the exclusive power of congress over interstate commerce. *Pearson v. Int. Dist.*, 72 Iowa 348.

As to Inspection.—Inspection laws are likewise permissible, if reasonable. *Turner v. Maryland*, 107 U. S. 38; *Higgins v. Casks of Lime*, 130 Mass. 1.

As to Game.—Inasmuch as no State can pass a law (whether congress has already acted upon the subject or not) which will directly interfere with the free transportation from one State to another, or through a State, of anything which is or may be a subject of interstate commerce, it follows that a law allowing prairie chickens to be killed, and thereby to become a subject of commerce, but prohibiting their transportation to any other State, is unconstitutional and void. Had the law forbidden the catching and killing of prairie chickens, and thereby indirectly prevented their exportation, it might have been valid. *State v. Saun-*

4. The Interstate Commerce Act.—By the “act to regulate commerce,” of February 4, 1889, amended by that of March 2, 1889,¹ congress subjected to its regulation all common carriers² engaged

ders, 19 Kan. 127. See *infra*, vol. 8, title GAME AND GAME LAWS.

1. U. S. Stat. 1886-87, ch. 103; U. S. Stats. 1888-89, ch. 382.

Constitutionality of the Act.—MR. DOS PASSOS says (Int. Com. Act, p. xii) that when “its constitutionality is challenged, it will be found that outside of some disjected *dicta* of judges there is no precedent for it in the decisions of the United States courts;” and he further (p. 8) says that the language of MILLER, J. (in *W. St. L. & P. R. Co. v. Ill.*, 118 U. S. 557, 577, that the prevention of discrimination is “a regulation of commerce” which must be of a “national character,” and can only be affected “by general rules and principles,” which facts “demand that it should be done by the congress of the United States under the commerce clause of the constitution”), “should be regarded as *obiter dictum*, and used only in a most general sense. MR. HARPER (Law of Int. Com., pp. 19-29) has answered this objection at some length and to some purpose. No case under the act has yet been decided in the supreme court, though its enactment was referred to with approval by MILLER, J., in *Fargo v. Michigan*, 121 U. S. 230, 239. At present it may be sufficient to call attention to the fact that the constitutionality does not seem to have been attacked in any of the circuit court cases in regard to the act, while in one of them the court, apparently of its own motion, expressly affirmed this constitutionality, saying: “Prior to the passage of the Interstate Commerce act, this power and exclusive authority over the subject was only exercised—with the exception of regulations for the protection of passengers upon navigable waters, and the transportation of live stock by railways—through the judicial department of the general government in the way of restraining or annulling State legislation or action which undertook to interfere with, obstruct or impose burdens or restrictions upon interstate commerce. But the power is manifestly not confined or limited to this negative form of action upon the State. It clearly admits of affirmative exercise on the part of congress, as much as any other power granted by the constitution to

the federal government.” *K. & I. Br. Co. v. L. & N. R. Co.*, 37 Fed. R. 567, 534.

2. Carriers Subject to Its Jurisdiction.—The act “embraces the carriers ‘engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment,’ in interstate or international commerce.

“**Carriers by Water.**—It does not embrace the carriers wholly by water, though they also may be engaged in the like commerce, and as such be rivals of the carriers which it undertakes to control. . . .

“**Express Carriers.**—The question whether [they are] within the contemplation of the act is not so clear. . . .

“The commission . . . is of opinion that the express business, so far as it is done by the railroad companies themselves, whether directly, and by their managing officers, or indirectly, and through nominal corporations created for the purpose, is within the act; and that such companies are under obligations to see to it that such tariffs are filed, and that the rules of fairness and equality which the act prescribes are observed. Whether the express companies which are independent of the railroads are within the contemplation of the act is more doubtful. . . . Congress ought to [decide it] by either expressly and by designation including the express companies or by excluding them. [See *In re Exp. Co.’s*, 1 I. C. C. R. 349.]

“**Other Carriers.**—What is said of the express business is applicable also to the business of furnishing extra accommodations to passengers in sleeping and parlor cars. These accommodations are furnished in some cases by the railroad companies, and in others by outside corporations, which are not supposed to be embraced by the terms of the law. Outside companies are also to some extent engaged in the transportation of live stock in cars owned by themselves, but transported over the railroads under special arrangements with the railroad companies which supply the motive power.

in continuous¹ interstate or international² transportation³ of passengers or property by rail,⁴ or rail and water combined, under a common control, management or arrangement,⁵ except as re-

"It is well known also that the transportation of mineral oil is already to a very large extent in tank cars owned by parties who are not carriers subject to regulation under the act. If it is the will of congress that all transportation of persons and property by rail should come under the same rules of general right and equity, some further designation of the agencies in transportation which shall be controlled by such rules would seem to be indispensable." Rept. of Com. 1 I. C. C. Rep. 271-278.

Carriers whose participation in interstate traffic is limited to a few species of traffic only, must, however, conduct such traffic subject to the act. Rept., 2 I. C. C. Rep. 399-402.

Foreign Carriers.—These are subject to the act in regard to all interstate or international transportation carried on by them, to the same extent as domestic carriers are. *In re* G. T. R. Co., 3 I. C. C. Rep. 89.

Bridge Company Not a Carrier.—A bridge company, empowered to make its bridge and the approaches thereto "a public thoroughfare or highway, for the use of which by railroads or street cars, wagons, vehicles, animals, and foot passengers, it was authorized to charge 'reasonable tolls,' for the collection of which suitable toll gates could be established," is not a common carrier engaged in interstate commerce, within the act of 1887, although the bridge connect two States. Nor does the fact that the company transfers cars over its own tracks from one railroad to another, within the limits of a single town, and charges for such switching, alter the matter. *K. & I. Br. Co. v. L. & N. R. R. Co.*, 37 Fed. Rep. 567, 615-620.

1. Continuous Carriage.—The act does not include the carriage or handling of passengers or property, by rail or otherwise, where such carriage or handling is performed wholly within a State, unless such passengers or property are shipped directly to or from such State from or to another State or a foreign country. Hence it does not apply to two companies carrying between San Francisco, Cal., and Portland, Ore., but giving no through bill of lading, and each liable only for the carriage on its own line. There is no "common

control" in such a case. *Ex parte* Koehler, 30 Fed. Rep. 867.

2. The commerce affected is international as well as interstate. It is "transportation of passengers or property . . . from one State or territory of the United States, or the District of Columbia, to any other State or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also . . . of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country." Act of 1887, § 1.

3. "Transportation" embraces "all instrumentalities of shipment or carriage" (§ 1, par. 2), and includes such cars as are provided by the carrier, but the act does not regulate the car equipment except to prevent discrimination. *Schofield v. L. S. & M. S. R. R. Co.*, 2 Int. Com. 90, 117.

4. "Railroad" is defined in § 1, pt. 2, as including "all bridges and ferries used or operated in connection with any railroad," and all the road in use, whether owned by the company operating it or not. Hence, it includes a railroad situated wholly in one State, and not operated by its owners, but used as a means of interstate commerce by companies owning interstate roads. *Heck v. E. T. V. & G. R. Co.*, 1 I. C. C. R. 495.

5. "Control"—In the case of a contract by a railroad company concerning all roads which it then did or might thereafter control, by ownership, lease, or otherwise, this was *held* to mean an immediate or executive control exercised by officers and agents chosen by and acting under the direction of the company's board of directors acting as such; and where the company afterwards acquired a majority of the stock of another road, and elected its own president and vice president and some of its directors to the same positions in

gards carriage under certain specified circumstances.¹ All such carriers are forbidden to make any unreasonable rates for such carriage;² or any unjust discrimination as between shippers by means of special rates or rebates, or undue preferences or prejudices;³ or as between connecting lines by refusing reasonable

the other company, this was *held* not to be a control within the meaning of the contract. *Pull. P. C. Co. v. Mo. Pac. R. Co.*, 11 Fed. R. 634.

"Arrangement."—This word is probably used in the same sense as in the English Regulation of Railways act, 1873 (36 & 37 Vict., ch. 48). It has been *held* under that act that "an arrangement" by a railway company "for using, maintaining or working steam vessels for the purpose of carrying on a communication between any towns or ports" covered any arrangement with the proprietors of steam vessels for carriage to or from any place with which there was railway communication, provided the railway company party to the arrangement owned or worked, or was otherwise immediately interested in, some portion or other of the line of railway communication. *Cal. R. Co. v. Greenock etc. R. Co.*, 4 R. & C. Traf. Cas. 135.

An agreement between a railway company and a steamboat company for a service of vessels between certain ports, "the hours of departure to be determined by the steamboat company, regard being had, however, to the convenience of the railway company and the arrival and departure of their trains," is an arrangement within the act. *Belfast etc. R. Co. v. G. N. R. Co.*, 4 R. & C. Traf. Cas. 379.

The practice by a railway company of issuing through tickets between two points, including the carriage by certain steam vessels for the sea part of the journey, has been *held* not such an "arrangement" for the use of these vessels as to enable the owners to require through rates to other points, under the act. *Ayr Har. Trustees v. Glasgow Ry. Co.*, 4 R. & C. Traf. Cas. 81.

1. The matters excepted from the operation of the act are "the carriage, storage or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat;" "the free carriage of destitute and homeless persons transported by charitable societies, and the agents em-

ployed in such transportation;" "the issuance of mileage, excursion or commutation passenger tickets," the "giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of "homes for soldiers or sailors or their orphans, under arrangements with the managers of such homes; free carriage to the officers and employes of the company carrying them; exchange of passes or tickets between different roads for the carriage of their respective officers and employes. Sec. 22 as amended.

See *In re Indian Supplies*, 1 I. C. C. R. 15; *In re Disabled Soldiers*, 1 I. C. C. R. 28; *In re Fish Comm.*, 1 I. C. C. R. 21; *Larrison v. C. & G. T. R. Co.*, 1 I. C. C. R. 147; *Ass'd Grocers v. St. L. & M. P. R. Co.*, 1 I. C. C. R. 156.

The exception as to passes to officers and employes does not apply to their families. *Ex parte Koehler*, 31 Fed. R. 315.

2. Under § 1 of the act, all charges made for any service in the transportation of passengers or property or for receiving, delivering, handling or storing property must be reasonable and just. *Cutting v. Fla. R. & N. Co.*, 30 Fed. R. 663; *Bds. of Trade v. C. M. & St. P. R. Co.*, 1 Int. Com. R. 215; *Raymond v. C. M. & St. P. R. Co.*, 1 Int. Com. R. 230; *Evans v. Oregon R. & N. Co.*, 1 Int. Com. R. 325; *Farrar v. E. T. V. & G. R. Co.*, 1 Int. Com. R. 480.

When, pending proceedings to test the reasonableness of rates, they are reduced to a satisfactory basis, the commission will not consider the question of whether they were excessive before the reduction, it being no longer a practical question. *Bishop v. Duval*, 3 Int. Com. R. 128.

Unreasonably low rates are not illegal, nor has the commission authority to require them to be increased on the ground that persistence in them would be ruinous. *In re C. St. P. & K. C. R. Co.*, 2 Int. Com. 231.

3. **Discrimination.**—Act of 1887, §§ 2, 3. See, as to special rates, rebates, etc., *P. C. Co. v. P. & W. R. Co.*, 1 Int. Com. R. 107; *Larrison v. C. & G. T. R.*

facilities for the interchange of traffic;¹ or to fix a smaller compensation in the aggregate for a long than a short haul in the transportation of passengers, or of like kind of property, under substantially similar conditions and circumstances, over the same line in the

Co., 1 Int. Com. 147; *Smith v. N. P. R. Co.*, 1 Int. Com. 208; *Riddle v. P. & L. E. R. Co.*, 1 Int. Com. 374; *Rice v. L. & N. R. Co.*, 1 Int. Com. 503.

Free passes, except to officers, etc. (see § 22), are forbidden, but the act is not violated unless the forbidden pass is used. *Griffie v. B. & M. R. R. Co.*, 2 Int. Com. 301.

See, as to preferences and prejudices, *P. C. Co. v. P. & W. R. Co.*, 1 I. C. C. R. 107; *Keith v. K. C. R. Co.*, 1 Int. Com. 189; *Bds. of Trade v. C. M. & St. P. R. Co.*, 1 I. C. C. R. 215; *Raymond v. Same*, 1 I. C. C. R. 230; *Council v. W. & A. R. Co.*, 1 I. C. C. R. 339; *Reynolds v. W. N. Y. & P. R. Co.*, 1 I. C. C. R. 393; *Crews v. R. & D. R. Co.*, 1 I. C. C. R. 401; *Heard v. Ga. R. Co.*, 1 I. C. C. R. 428; *Bost. Ch. of Com. v. L. S. & M. S. R. Co.*, 1 I. C. C. R. 436; *Heck v. E. T. V. & G. R. Co.*, 1 I. C. C. R. 495; *Rice v. L. & N. R. Co.*, 1 I. C. C. R. 503.

Undue preferences include preferences of one class of passengers over another where both pay the same rate of fare. If a company furnishes separate cars to white and colored passengers on its line engaged in interstate travel, it must make all the cars equal in comforts, accommodation and equipment. *Heard v. Ga. R. Co.*, 3 I. C. C. R. 111.

But "all discriminations and preferences are not forbidden or made unlawful; but only such as are unjust, or undue, or unreasonable, are prohibited. In each and every case, therefore, the question whether a discrimination is unjust, or a preference is undue or unreasonable, either as to the common carrier or the commerce it may transport, involves a consideration of the circumstances and conditions under which such discrimination or preference is made or given." *K. & I. Br. Co. v. L. & N. R. Co.*, 37 Fed. R. 567, 624.

As to discrimination in general, see FREIGHT.

Fleeing.—The offence is "unjust discrimination" in whatever manner effected, and whether directly or indirectly. The particular device resorted to need not be averred in an indictment.

A count stating that the defendant charged and received of one party a higher rate than that charged and received of another party for transporting the same class of goods between the same points (naming them), and over the same route, is sufficient, without averring that the service was rendered "under substantially similar circumstances and conditions." *U. S. v. Sozer*, 37 Fed. R. 635.

1. Facilities to Other Companies.—By the act of 1887, § 3, every common carrier within the act must "afford all reasonable, proper and equal facilities" for the interchange of traffic, etc., to all connecting lines. *Cutting v. Fla. R. & N. Co. Co.*, 30 Fed. R. 663. See *A. T. & S. F. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667.

"Facilities" for the interchange of traffic and passengers are what the act contemplates, not the furnishing of cars. *Schofield v. L. S. & M. S. R. Co.*, 2 I. C. C. R. 90, 116.

This provision does not cover any mode of procedure for establishing through routes and through rates, and the equitable apportionment of the rates established, as is done by the English acts. *K. & I. Br. Co. v. L. & N. R. Co.*, 37 Fed. R. 567, 630; *L. R. & M. R. Co. v. E. T. V. & G. R. Co.*, 3 I. C. C. R. 1, 16.

Nor does it require a road to sell through tickets over another line whose managers persist in offering commissions to the agents who sell such tickets. *C. & A. R. Co. v. P. R. R. Co.*, 1 I. C. C. R. 86.

It does not necessitate the forming of new connections or the establishing of new stations for the reception and delivery of freight, etc., but only that whatever facilities in the way of yards, stations, etc., it affords to some of its connecting lines at any point, the same proper, reasonable and equal facilities cannot be denied to other lines connecting at the same point. *K. & I. Br. Co. v. L. & N. R. Co.*, 37 Fed. R. 567, 623.

Proviso.—The section concludes with a proviso that it "shall not be construed as requiring any such common carrier to give the use of its track or

same direction,¹ unless authorized by the commission;² or to combine for the pooling of freights and dividing of earnings.³ They are also required, and may be compelled by mandamus, to file with the commission, and keep posted in all their stations,⁴ schedules, made according to a form prescribed by the commission,⁵ of all

terminal facilities to another carrier engaged in like business. This leaves it open to any common carrier to arrange with other lines for the use of its track or terminal facilities without incurring the charge of preferring such lines or discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines." *K. & I. Br. Co. v. L. & N. R. Co.*, 37 Fed. R. 567, 628.

Where a railway company had contracted with a city to allow other roads the use of its terminal facilities, and a State law has provided that different companies might have a joint use of such facilities, the contract and rights of the other roads must be determined by the State laws, and the Interstate Commerce act can have no application. *Iowa v. C. M. & St. P. R. Co.*, 33 F. 591.

1. "Substantially Similar Circumstances and Conditions."—Cost of service constitutes a difference in "circumstances." *D. M. Col. Co. v. M. S. & L. R. Co.*, 11 App. Cas. 97; *C. & A. R. Co. v. Peop.*, 67 Ill. 11.

Competition with other lines does not. *L. & N. W. R. Co. v. Evershed*, 3 App. Cas. 1029; *Budd v. L. & N. W. R. Co.*, 36 L. T. (U. S.) 802; *Thompson v. L. & N. W. R. Co.*, 2 N. & M. 115; *Greenop v. S. E. R. Co.*, 2 N. & M. 319; *C. & A. R. Co. v. Peop.*, 67 Ill. 11.

But competition with water transportation does constitute a difference. *Ex parte Koehler*, 23 Fed. R. 529; s. c., 25 Fed. R. 73.

In the application of the act, where the circumstance or condition producing dissimilarity is not clearly proved, the subject of the law should have the benefit of the doubt, and substantial similarity should be presumed. In case of substantial similarity, even though there may be other circumstances which would make the act operate un-

justly, the commission alone can relieve a carrier from compliance with it. *Mo. Pac. R. Co. v. T. & P. R. Co.*, 31 Fed. R. 862.

Grouping of Stations.—The grouping and grading of stations to avoid a violation of the fourth section is not illegal unless the consequences are illegal. *La Crosse Union v. C. M. & St. P. R. Co.*, 1 C. C. R. 631; *Assn. v. C. St. P. M. & O. R. Co.*, 2 I. C. C. R. 52, 66. See vol. 8, title FREIGHT, at p. 965.

As to the long and short haul clause in general, see FREIGHT.

2. **Discretion of the Commission.**—The right of congress to confer discretionary power upon the commission as to the application of the long and short haul clause is the same as that of the State legislatures in regard to State railroad commissions, as to which see *P. & O. R. Co. v. G. T. R. Co.*, 46 Me. 69; *Commrs. v. P. & O. R. Co.*, 63 Me. 269; *Com. v. E. R. Co.*, 103 Mass. 254; *State v. C. St. P. M. & O. R. Co.*, 19 Neb. 476.

An appeal to this discretionary power is the carrier's only resource in case the conditions are substantially similar. *Mo. Pac. R. Co. v. T. & P. R. Co.*, 31 Fed. R. 862.

As to the exercise of this power, see Report, 1 I. C. C. R. 279-291.

3. **Section 5.**—It has been held in *New York* that the prohibition of pooling does not invalidate a contract between two railroad companies, whose lines are parallel, by which naturally tributary territory is preserved to each, within which it may extend its branch lines without interference with or from the other. *Ives v. Smith* (s. c., Spl. T., N. Y. Co.), 3 N. Y. Suppl. 645.

4. **Section 6 as amended.**—In case of a special traffic, *e. g.*, the transportation of petroleum oil, where the carrier furnishes rolling stock for one method, but not for another, the published rates should show the terms on which the rolling stock is furnished, which terms must be uniform and must be adhered to. *Rice v. L. & N. R. Co.*, 1 I. C. C. R. 503.

5. **Section 6 as amended; *In re Tariffs***, 3 I. C. C. R. 19.

rates and fares for interstate and international carriage, whether over their own lines or lines operated by two or more common carriers jointly,¹ together with a statement of terminal charges, etc.² These rates and fares must be maintained as regards all parties, and can only be changed after public notice.³ Carriers must, if required by the commission, make annual reports of all their property and business, and furnish it with specific information at any time.⁴ Failure to comply with any requirements of the act,⁵ combinations to evade it by making the carriage not continuous,⁶ and false billing, classification or weighing by carriers or shippers,⁷ are punishable criminally, and expose the offender to civil liability to all parties injured.⁸ Besides the corporate liability of the carriers, their officers and agents are also individually liable for wilful violations of the act.⁹

The commission established by the act¹⁰ is charged with the duty of investigating, both on complaint and of its own motion,¹¹ all alleged violations of the act;¹² and of making in each case a report which thereafter shall be deemed *prima facie* evidence as to all facts found therein.¹³ In case any complaint be sustained,

1. § 6 as amended.

Such published rates should not exceed the combined rates. *Martin v. S. P. R. Co.*, 2 I. C. C. R. 1.

The provision in regard to joint tariffs, etc., does not authorize carriers to issue through tickets to passengers, or through bills of lading for property, at through rates, over connecting lines, in the absence of such arrangements between the companies. *K. & I. Br. Co. v. L. & N. R. Co.*, 37 Fed. R. 567, 630.

2. § 6 as amended.

3. By § 6 ten days' public notice must be given of all advances in rates, and three days' notice of all reductions.

Pleading.—Where variance from the rate is charged, it is enough to allege that the rate in question had been "established and published" prior to the alleged date, and that it "was in force on that day," without averring that it had not been altered. *U. S. v. Tozer*, 37 Fed. R. 635.

4. § 20.

5. § 6, par. 6.

6. § 7.

7. § 10 as amended.

8. § 8.

By this section, the costs recoverable include counsel fees, but these are awarded by the court alone, not by the commission. *Council v. W. & A. R. Co.*, 1 I. C. C. R. 339.

A claim for pecuniary damages must be asserted in a court of law, not before

the commission. *Council v. W. & A. R. Co.*, 1 I. C. C. R. 339; *Heck v. E. T. V. & G. R. Co.*, 1 I. C. C. R. 495.

9. § 10 as amended.

An indictment against an agent need not aver that he had any authority to do the acts charged. *U. S. v. Tozer*, 37 Fed. R. 635.

10. For the composition of the commission, see §§ 11, 18 as amended.

By § 19, the principal office of the commission is in Washington, where its general sessions are held. Special sessions may be held in any part of the country.

11. § 13; *In re G. T. R. Co.*, 3 I. C. Rep. 89, 110.

12. § 12 as amended, 13, 17 as amended.

By § 13, "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

13. **The Commission Not a Court.**—The functions of the commission are administrative, not judicial. Its duty is to hear, investigate, and report upon the complaints laid before it, or to investigate and report of its own motion, but the "recommendation," "order" or "requirement" of its report is not final, and can only be enforced by proceedings in a federal court, begun either by itself or a party interested. A suit based upon the report is an independent proceeding, where the cause is heard and determined by the court *de novo*, upon proper pleadings and proofs, the report

INTERVAL—INTERVENE—INTIMIDATION.

the commission must order the parties charged to desist and also to make reparation for injury done,¹ which order may be enforced by injunction and attachment, subject to appeal to the Supreme Court of the United States, where \$2,000 or more are involved.² The commission must report annually to congress all useful information collected, with recommendations for any further legislation.³

By the act of August 7, 1888, congress placed all companies operating telegraph lines which had been constructed to any extent with government aid, under the control of the commission as to certain matters.⁴

INTERVAL.—See note 5.

INTERVENE.—To voluntarily interpose in an action or other proceeding with leave of court.⁶

INTERVENING DAMAGES.—Such as are occasioned to an appellee by the delay incident to the appeal.⁷

INTERVENTION.—See INTERPLEADER; PARTIES TO ACTIONS.

INTESTATE.—A person dies intestate who either has made no will at all, or has made one not legally valid, or if the testament he has made be revoked or made useless, or if no one has become heir under it.⁸

INTESTATE LAWS.—See STATUTES OF DISTRIBUTION.

INTIMATE.—See note 9.

INTIMIDATION.—See DURESS; ELECTIONS; THREATS.¹⁰

being only *prima facie* evidence of the facts thereby found. *K. & I. Br. Co. v. L. & N. R. Co.*, 37 Fed. R. 567, 612.

1. § 15.

2. § 16 as amended.

3. § 21 as amended.

4. U. S. St. 1887-88, ch. 772. Such companies must maintain and operate their telegraph lines for railroad, governmental, commercial and other purposes, and must give equal facilities to connecting lines. In case they fail to do so, the commission proceed as in case of breach of the Interstate Commerce act.

Authorities.—Hare's American Constitutional Law, 1889; Harper's Law of Interstate Commerce, 1887; Dos Passos' Interstate Commerce Act, 1889; Rorer's American Interstate Law, 1879; Patterson's Federal Restraints on State Action, 1888.

5. "At an interval of not less than fourteen days" requires that fourteen days shall intervene or elapse between the two dates. The phrase is exclusive of the two dates. *In re The Ry. Sleepers Supply Co.*, 54 L. J., ch. 720.

6. Repalje and L. Law. Dict.

7. *Peasey v. Buckminster*, 1 Tyler (Vt.) 267.

This phrase is used in certain statutes providing for security to be given on taking appeals. It means such damages "resulting from delay as are occasioned by a material alteration in the circumstances or situation of the party appealing or reviewing subsequent to the entering of the recognizance, such as the bankruptcy or removal of the party beyond process." Expenses in procuring witnesses, engaging counsel, and other charges incurred in defending the original suit are not such, being provided for in the fee bill. *Peasey v. Buckminster*, 1 Tyler (Vt.) 264. Nor does it include interest accruing after taking of appeal. *Stearns v. Brown*, 1 Pick. (Mass.) 532; and see *Swan v. Picquet*, 4 Pick. (Mass.) 465.

8. Repalje and L. Law Dict.; Bouv. Law Dict.

9. A charge that a man has been intimate with his brother's wife is not equivalent to a charge of adultery. *Adams v. Stone*, 131 Mass. 433.

10. As used in an indictment for conspiracy to obtain changes in the govern-

INTOXICATED—INTOXICATING DRINKS.

INTIMIDATION OF VOTERS.—See vol. 6, pp. 358-364.

INTO.—See note 1.

INTOXICATED.—Inebriated or drunk “by the drinking of intoxicating spirituous liquors,” being understood, unless the word is otherwise qualified.²

INTOXICATING DRINKS.—See **INTOXICATING LIQUORS.**

ment, laws and constitution by intimidation, “the word is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom the fear was intended to operate.” *TINDAL, C. J.*, in *O’Connell v. Reg.*, 11 Cl. & F. 255.

1. **Into Court.**—A delivery of a defendant into court by his sureties signifies “a delivery to the officers of the court who are under the control of the court and can take custody of the principal under the direction of the court.” The delivery must be made during the session of the court. *Converse v. Washburn*, 43 Vt. 132.

Into Port.—A vessel being towed from one dock to another is not passing “into or out of” port within a pilot act. *The Maria, L. R.*, 1 Adm. & Ecc. 358.

A ship chartered to load a cargo at a port in the East Indies and to proceed to Belle Isle, Scilly, Queenstown or Falmouth for orders to discharge at a port in the United Kingdom or on the continent, which proceeded to Falmouth and there received orders to go to Bremen, where she discharged, carried her cargo into port in England within the meaning of an act regulating the jurisdiction of admiralty courts. The act does not mean carried into for delivery. *The Piere Superiore, L. R.*, 4 Add. & Ecc. 170.

Into the State.—An exception in a statute of limitations, that where the debtor is absent from the State, at the time the cause of action accrues, suit may be brought “after his return into the State” means after his return within the jurisdictional limits of the State where the process of the courts of the State will run. A removal to an

Indian nation, where such process will not run, is not such a return, though the nation be within the territorial limits of the State. *Smith Admr. v. Heirs of Bond*, 3 Ala. 386.

Into, Through or Under.—An act authorizing a local board to carry any sewer “into, through or under” any lands within its district, does not confine it to carrying a sewer underground. *Roderick v. Aston Local Board*, 5 Ch. D. 328.

2. It is error to charge that “a person who is in the habit of drinking intoxicating liquors intemperately is a person who is in the habit of getting intoxicated.” “Intemperance does not necessarily imply drunkenness.” *Mullinix v. People*, 76 Ill. 211.

“It needs no discussion or illustration to show that when it is said that a man is intoxicated, the meaning is that his condition has been produced by the drinking of intoxicating spirituous liquors. No additional word or expression is used or needed to convey the full and unambiguous idea. Whenever any other idea is intended to be conveyed by the term *intoxicated* or its equivalent, *drunk*, other words are always used, and are necessary to be used. It is sometimes said that a person is intoxicated or drunk with opium, or with ether, or with laughing gas. But it is always felt and understood that such is an unusual and forced use of the words *intoxicated*, *drunk*, and the addition to them is needful in order to prevent misapprehension of the sense in which those words are thus used. . . . There is, then, no need of any addition to the word when used in the complaint, in order, fully, exclusively and explicitly to indicate the crime defined and meant by the statute, as the one made the subject of the prosecution instituted by the complaint.” *State v. Kelly*, 47 Vt. 294.

INTOXICATING LIQUORS—(See CIVIL DAMAGE ACTS, vol. 3, p. 257; CONSTITUTIONAL LAW, vol. 3, p. 670; CRIMINAL LAW, vol. 4, p. 707, 713; CRIMINAL PROCEDURE, vol. 4, p. 802; DISORDERLY HOUSE, vol. 5, p. 702; DRUNKENNESS, vol. 6, p. 35; HABITS OF INTEMPERANCE AND HABITUAL DRUNKENNESS, vol. 9, p. 258; HOMICIDE, vol. 9, page 613; INSANITY; LOCAL OPTION; MUNICIPAL CORPORATIONS).

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I. DEFINITION.—Intoxicating liquors are such liquors as will intoxicate or make drunk, and which are commonly used as a beverage for such purposes, whether they be spirituous, vinous or malt, distilled or fermented. Any mixture of such liquors as retains the intoxicating qualities and which may be used as a beverage and become a substitute for the ordinary intoxicating drinks, it is thought, may be properly classed under the head of intoxicating liquors.¹

II. WHAT LIQUORS ARE INTOXICATING AND PROHIBITED.—Any liquid substance constituting any part of a mixture of intoxicating liquor or liquors which retain their intoxicating qualities, and which may be used as a beverage, and thereby become the substitute for the ordinary intoxicating drinks, is thought to be within all statutes denouncing or prohibiting the sale of intoxicating liquors.² It has been decided that any liquor is within the meaning of the terms "strong and spirituous liquors" in an act to suppress intemperance, whether such liquors be fomented or distilled, of which the human stomach can contain enough to produce intoxication.³

1. See Intoxicating Liquor Cases, 25 Kan. 767; s. c., 37 Am. Rep. 284; State v. McGinnis, 30 Minn. 52; Commrs. v. Taylor, 21 N. Y. 173; State v. Reynolds, 47 Vt. 299.

"Liquors" is commonly understood to mean all liquors, whether spirituous, vinous, inferior fermented, or malt. People v. Crilley, 20 Barb. (N. Y.) 248; State v. Brittain, 89 N. Car. 576.

The court say, in People v. Crilley, 20 Barb. (N. Y.) 248, that "the strength of liquors and their intoxicating powers depend upon the quantity of alcohol which they contain. Spirituous liquors contain from 53 to 56 per cent.; wines (champagne), from 13 to 26 per cent.; currant wine or sherry wines over 10 per cent.; methlegen, about 7½ per cent.; cider (the average), about 7½ per cent.; ale (the average), about 6¼ per cent.; citing Brand's Manual of Chemistry, 1645-46.

Spirituous liquors are distilled liquors. All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous, such as fomented liquors. Com. v. Gray, 68 Mass. (2 Gray) 502; s. c., 61 Am. Dec. 476; see State v. Oliver, 26 W. Va. 422, 425, 426; s. c., 53 Am. Rep. 79.

"Intoxicating liquors" and "spirituous liquors" are not synonymous. An indictment for unlawfully selling "spirituous and intoxicating liquors" is not supported by proof of sales of liquors which are intoxicating, but not spirituous. Com. v. Livermore, 70 Mass. (4

Gray) 20. See Com. v. Gray, 68 Mass. (2 Gray) 502; s. c., 61 Am. Dec. 476; Com. v. Giles, 67 Mass. (1 Gray) 466.

Vinous liquors are such liquors as are made from the juice of the grape. Adler v. People, 55 Ala. 24; Worley v. Spurgeon, 38 Iowa 467.

In Iowa wine manufactured from grapes, currants, or other grown fruit within the state, is not included in the term intoxicating liquors within the meaning of the prohibitory law. Worley v. Spurgeon, 38 Iowa 465. See Intoxicating Liquor Cases, 25 Kan. 751; s. c., 37 Am. Rep. 284.

The term "liquors," when used in a statute forbidding the sale of liquors, refers only to spirituous or intoxicating liquors. See People v. Crilley, 20 Barb. (N. Y.) 246; Townley v. State, 18 N. J. L. (3 Harr.) 311.

Intoxicating liquors, in some of the acts regulating the sale of liquors, such as the Illinois "Dram Shop Act," means spirituous, malt or vinous liquors, and for that reason proof of a sale of beer made to a minor without showing the kind of beer, and whether malt, spirituous or vinous, is not sufficient to sustain the indictment, because there are kinds of beer which are neither a malt liquor nor intoxicating. Hansberg v. People, 120 Ill. 21-25; s. c., 60 Am. Rep. 549.

2. See Intoxicating Liquor Cases, 25 Kan. 751; s. c., 37 Am. Rep. 284.

3. Tompkins Co. Com. of Excise v. Taylor, 21 N. Y. 173; s. c., 19 How. (N.

It is thought that the trial of a person indicted for unlawfully selling intoxicating liquors under a statute regulating the sale of liquors, the court is not called upon to construe the terms "intoxicating liquor," that being done by the statute.¹

1. **Decoctions.**—Any beverage or decoction which contains spirituous liquor, if any essence adulterated with water or other fluids imparts its intoxicating quality, it is embraced within the term "spirituous liquor," and it is immaterial that such beverage or decoction is qualified by other ingredients under the guise of a drink or medicine;² however, it has been held that the courts may not say, as a matter of law, that the presence of a certain per cent.

Y.) Pr. 259. See *State v. Hutchinson*, 72 Iowa 561; *State v. Giersch*, 98 N. C. 720.

"**Liquor.**"—It is said in the case of *State v. Giersch*, 98 N. C. 720, that the term "liquor," in its most comprehensive significance, implies fluid substance such as water, milk, blood, sap, juice, but in a more limited sense, and its more common application, it means spirituous fluids, whether fermented or distilled, such as brandy, whiskey, rum, gin, beer and wine, and also decoctions, solutions, tinctures, and the like fluids in great variety.

"**Spirit**" or "**Spirituous.**"—It has been said that the term "spirituous," as used in statutes regulating the sale of intoxicating liquors, signifies an inflammable liquid produced by distillation, either pure or mixed with ingredients, which do not convert it into some article of intoxication not known in common parlance under the appellation of "spirituous." *Attorney General v. Bailey*, 1 Ex. 281; s. c., 17 L. J. Ex. 9.

The supreme court of North Carolina say in the case of *State v. Giersch*, 98 N. C. 720, that the term "spirit" or "spirituous," as the general meaning, is applied to fluids mostly of a lighter character than ordinary water, obtained but not produced by distillation, but is also applied to liquors that signify the essence, the extract, the purest solution, the highly rectified substance, the pure alcohol contained in them. The spirit of liquors is really the alcohol in them. It is this characteristic, this essential element, that makes them spirituous, that gives all liquors of whatever kind their intoxicating quality and effect.

"**Spirituous.**"—The word spirituous when used in the statute means spirituous liquors. *Com. v. Burke*, 81 Mass. (15 Gray) 408.

The word "**spirits**" used in prohib-

itory statutes means prohibiting of spirits having refined strength, ardent quality of alcohol in greater or less degree. Hence spirituous liquors implies such liquors as contain alcohol and thus have spirit, no matter by what particular name denominated or in what liquid form or combination they may appear. Hence distilled liquors, fermented liquors and vinous liquors are alike, all spirituous liquors. These liquors respectively may have different degrees of spirit in point of fineness and strength. Distilled liquors may be stronger or weaker according to the quantity of alcohol in them, and so are the other kinds mentioned.

Under Iowa Code, which defines the words "intoxicating liquors," wherever they occurred in the statute for the suppression of intemperance, to mean alcohol, and all spirituous and vinous liquors, with a proviso expressly excepting cider made from apples, was repealed by the twentieth general assembly and the following section substituted: "§ 1555. Wherever the words 'intoxicating liquors' occur in this chapter, the same shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatever." *State v. Hutchinson*, 72 Iowa 561.

Cider and Wines Made from Home Grown Fruit.—In Maine one may be indicted and convicted for a nuisance in selling cider and wine, made from fruit grown in that state for tipping purposes, provided the jury find they are intoxicating liquors. *State v. Page*, 66 Me. 418.

1. *State v. Wittmar*, 12 Mo. 407.

2. *Ramagnano v. Crook*, 85 Ala. 226; *Wall v. State*, 78 Ala. 417. See *Prussia v. Guenther*, 16 Abb. (N. Y.) N. C. 231; *Galloway v. State*, 23 Tex. App. 398.

of alcohol brings the compound within the prohibition of the statute, or that any particular ingredient does or does not destroy the intoxicating influence of the alcohol or prevent the decoction from ever becoming an intoxicating beverage, in which case the question is one of fact and to be settled by the jury as other questions of fact.¹

2. Cordials, Essences and Tinctures.—A cordial made of whiskey sweetened and scented with peppermint and other things, such as is usually sold in stores, has been said to be within the description of spirituous liquors, or mixed liquors intended to be prohibited by a statute which prohibits the sale of any "wine, rum, brandy, gin, whiskey, or other spirituous liquors."²

It has been said that whatever is generally and properly known and used as medicine and articles of the toilet or for culinary pur-

1. Intoxicating Liquor Cases, 25 Kan. 751; s. c., 37 Am. Rep. 284-294. See *State v. Laffer*, 38 Iowa 426; *Com. v. Ramsdell*, 130 Mass. 68; *Russell v. Sloan*, 33 Vt. 659.

Medicines and Articles of Food — Statutory Construction.—The court say in the case of *Com. v. Ramsdell*, 130 Mass. 68, that it is not a reasonable construction to hold that the statute prohibits the sale of either medicines or articles of food, in the preparation of which liquor is used in order to determine whether the statute applies to a sale; the true test is to enquire whether the article sold is in reality an intoxicating liquor; if it is, the sale is illegal, although it is sold to be used as a medicine, or it is attempted to disguise it under the name of a medicine, or it is a mixture of liquor with other ingredients. See *Com. v. Hallett*, 103 Mass. 452; *Com. v. Bathrick*, 60 Mass. (6 Cush.) 247; *Com. v. Sloan*, 58 Mass. (4 Cush.) 52. But if the liquor sold cannot be used as an intoxicating drink, it is not within the prohibition of the statute, although it contains, as one of its ingredients, some spirituous liquor. The sale of such liquor is not within the mischief intended to be remedied by the statute, nor within the fair meaning of its language.

"Sun-Smile."—An allegation for the sale of intoxicating liquors is sustained by proof of sales of "sun-smile," an article containing fifteen per cent. of alcohol, and capable of producing intoxication. *Prussia v. Guenther*, 16 Abb. (N. Y.) N. C. 230.

Same—Proof of numerous sales by defendant at his hotel bar of a beverage called "sun-smile," which was shown

to be intoxicating. *Held*, sufficient to sustain a conviction under the statute. *Prussia v. Guenther*, 16 Abb. (N. Y.) N. C. 230; citing *Andrews v. Harrington*, 19 Barb. (N. Y.) 343; *Commrs. of Excise of Orange Co. v. Taylor*, 21 N. Y. 173.

"Whiskey Cock-tail."—In a prosecution for selling whiskey on Sunday, it was in proof that the beverage sold was "whiskey cock-tail," a compound in which whiskey was the predominating element. The court held that the sale was of "whiskey" within the purview of the statute, and that there was no variance between the allegation and the proof. *Galloway v. State*, 23 Tex. App. 398.

2. State v. Bennet, 3 Harr. (Del.) 565. See *State v. Muncey*, 28 W. Va. 494; *State v. Haymond*, 20 W. Va. 18; s. c., 43 Am. Rep. 787.

"Mixed Liquors."—In the case of *State v. Bennet*, 3 Harr. (Del.) 565, the court say: "We think the mixed liquors intended by that act, following as it does the specification of punch as a mixture of spirituous or other liquor prohibited to be sold separately; and where the basis or substance of the liquor sold is spirituous and not mixed by the vendor, it comes within the precise prohibition of selling spirituous liquors, otherwise it would be no means to convict in any case, for no liquor is entirely unmixed. We think the cordial here proved is spirituous liquor, and of a kind intended to be prohibited by the act."

Same—Gum Camphor and Alcohol mixed by the seller before delivery and sold as a medicine is not embraced by § 1 of ch. 107 of the acts of the legislature

poses, recognized, and the formula prescribed for its preparation described in some standard dispensatory, and not among liquors ordinarily used as beverages, such as tinctures, gentian, paregoric, bay-rum, cologne, essence of lemon, and the like, is without the statute and may be so declared as matter of law by the courts, notwithstanding the fact that such articles contain alcohol and may in fact produce intoxication.¹

3. Bitters and Other Medicines.—It has been said that an act prohibiting trafficking in intoxicating liquors does not apply to medical preparations in which alcohol is used in quantities capable of producing intoxication, such as bitters, tinctures and the like, which are in good faith made and sold for medical purposes;² but

of 1877, which provides that "no person without a State license therefor shall sell, offer or expose for sale spirituous liquors, wine, porter, ale, or beer or any drink of a like nature," etc. *State v. Haymond*, 20 W. Va. 18; s. c., 43 Am. Rep. 787.

Same—"Essence of Cinnamon."—A defendant was held properly found guilty of selling intoxicating liquor on proof of a sale of a bottle of "essence of cinnamon," defendant having refused to sell it to drink, and the buyer having said that he did not want it for that purpose, and then having drunk it and been so affected by it that he could not see after night. *State v. Muncey*, 28 W. Va. 494.

Same—"McLean's Strengthening Cordial" and "Sherman's Prickly Ash Bitters."—"A statute defining intoxicating liquors as "all liquors and mixtures, by whatever name called, that will produce intoxication." Held, not to embrace medicine and toilet articles not ordinarily used as beverages, such as tincture of gentian, bay rum and essence of lemon, although containing alcohol. Whether it embraces "McLean's Strengthening Cordial and Blood Purifier," a mixture of whiskey, syrup of tolu, and syrup of wild cherry, and "Sherman's Prickly Ash Bitters," is a question of fact. *Intoxicating Liquors Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284. See *State v. Laffer*, 38 Iowa 426; *Com. v. Ramsdell*, 130 Mass. 68; *Russell v. Sloan*, 33 Vt. 659.

1. *Intoxicating Liquor Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284.

2. *Russell v. Sloan*, 33 Vt. 656. See *King v. State*, 58 Miss. 737; s. c., 38 Am. Rep. 344.

Compounds of Alcohol and Water, etc.—"Home Bitters."—In the case of *King v. State*, 58 Miss. 737; s. c., 38 Am. Rep.

344, the defendants were indicted for selling intoxicating liquor without a license, the liquor in question was a compound composed of thirty per cent. alcohol and the rest of water, bark, peeling, seeds, etc., known as "Home Bitters." The defendants alleged that they sold it as a medicine. The court charged that if the compound was intoxicating, and was sold as a beverage, the jury should convict, but if it was sold in good faith only as a medicine, they should acquit, although the compound might be intoxicating. Which instruction was held to be a fair statement of the law."

In Iowa, a trial court refused to charge that if the liquor was only sold after being compounded with medicine and other drugs, and was sold as a medicine in good faith, and with no intent to violate the law, the defendant should be acquitted; and charged that unless the liquor had been so changed that it had lost its distinctive character it was a violation of the law to sell it, but if it had been so changed that it could not be used as a beverage, and had become a medicine and of such a character that it could not be reasonably styled or used as an intoxicating drink, its sale was not illegal. On appeal these instructions were approved, the court saying: "So long as the liquors retain their character as intoxicating liquors, capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall under the ban of the law; but where they are so compounded with other substances as to lose the distinctive character of intoxicating liquors, and are no longer desirable for use as a stimulating beverage and are in fact medicine, then their sale is not prohibited." *State v. Laffer*, 38 Iowa 422.

A pharmacist sold a pint of whiskey to a stranger upon his simple statement that he was accustomed to take it as medicine, and wanted it as a medicine. On appeal the court sustained a conviction, observing: "We incline to think it is true, liquors might be prescribed by a physician and yet the circumstances surrounding the transaction might be such as to warrant the jury in concluding the liquor was sold as a beverage. Conceding a person may prescribe for himself and lawfully determine he should take intoxicating liquors as a medicine, and that a druggist, in such case, may lawfully sell such liquor, it does not follow that it is always so prescribed or sold. It is undoubtedly true, the claim that it is taken and sold as medicine may be a subterfuge, and that while in form sold as a medicine, it was in fact a beverage and so understood by both buyer and seller. The druggist must act in good faith and the mere fact that a person says he wants intoxicating liquors as medicine will not exonerate the druggist if the circumstances are such as to warrant the court or jury in concluding that in truth and in fact it was sold as a beverage." *State v. Knowles*, 57 Iowa 669.

A druggist, who in good faith and with due caution sells as a medicine, by the direction of a practicing physician, spirituous liquors in a quantity less than a quart is indictable therefor under the North Carolina statute and other statutes regulating trafficking in intoxicating liquors. *State v. Wray*, 72 N. Car. 253.

In the above case the court say: "The letter of the law has been broken, but has the spirit of the law been violated? The question here presented has been much discussed, but it has not received the same judicial determination in all states in which it has arisen. In this conflict of authority we shall remember that the reason of the law is the life of the law, and when one stops, the other should also stop. What was the evil sought to be remedied by our statute? Evidently the abusive use of spirituous liquors, keeping in view at the same time, the revenues of the State. The special verdict is very minute in its details, and makes as strong a case for the defendants as perhaps will ever find its way into court again. A physician prescribes the brandy for a sick lady, and directs her husband to get it from the defendants, who are druggists. It may be that a pure article of brandy,

such as the physician was willing to administer as a medicine was not to be obtained elsewhere than at the defendant's drug store. The doctor himself goes to the defendants, and directs them to let the witness have the brandy as a medicine for his wife, and the further fact is found, which perhaps might have been assumed without the finding, that French brandy is an essential medicine, frequently prescribed by physicians and often used; and the farther and very important fact is established that in this case it was bought in good faith as a medicine and was used as such. After this verdict we cannot doubt that the defendants acted in good faith, with due caution in the sale which is alleged to be in violation law. . . . Now unless this sale comes within the mischief which the statute was intended to suppress, the defendants are not guilty; for it is a principle of the common law, that no one shall suffer criminally for an act in which his mind does not concur. The familiar instance given by Blackstone illustrates our case better than I can do by argument. The Bolognian law enacted 'that whosoever drew blood in the street should be punished with the utmost severity.' A person fell down in the street with a fit, and the surgeon opened a vein and drew blood in the street. Here was a clear violation of the letter of the law, and yet from that day to this it has never been considered a violation of the spirit of the law. Perhaps it will give us a clear view of the case if we put the druggist out of the question, and suppose the physician himself, in the exercise of his professional skill and judgment, had furnished the liquor in good faith as a medicine. Can it be pretended that he would be any more guilty of a violation of our statute than a surgeon was guilty of violating the Bolognian law? We think not. But we would not have it understood that physicians or druggists are to be protected in an abuse of the privilege. They are not only prohibited from selling liquor in an ordinary course of business, but also from administering it as a medicine, unless it be taken in good faith and after the exercise of due caution as to its necessity as a medicine."

Liability of Practicing Physicians.—On the other hand it has been held in *Carson v. State*, 69 Ala. 235, that where a special prohibitory act does not except practicing physicians from its

operation, they are liable, if they administer intoxicating bitters to their patients, but not for using liquors necessary in compounding medicines manufactured and sold by them. The court say that they know of no principle of law which would force them to incorporate so important an exception into the statute, and add: "The facts of the case may have constituted a good reason why the grand jury should have refused to find a bill, but there is no exception to be made in the statute in favor of physicians, druggists or other persons whomsoever; and this court cannot engraft one in their favor, without the exercise of legislative power, which it does not possess. The question presented is not a novel one, though not before decided in this State. Mr. Wharton states the rule to be that 'unless there is an express exception in the statute, the fact that the liquor was sold for medicine is no defence.' 2 Whart. Cr. L., § 2439. In the case of *Com. v. Kimball*, 41 Mass. (24 Pick.) 366; s. c., 35 Am. Dec. 326, the point was made that where liquor was bought to be used *bona fide* for the purpose of medicine, the sale of it did not come within the purview of the prohibitory liquor law, general in terms. CHIEF JUSTICE SHAW, observing in answer to this suggestion: 'If it were sufficient, to avoid the prohibition of the statute, for the purchaser to say that the spirit was intended for medicine, it would in effect repeal the statute, but the decisive answer is that the legislature has made no such exception.' The same or similar points have been repeatedly settled in other cases. See *State v. Brown*, 31 Me. 522, and other authorities cited in brief of Attorney General and in 3 Whart. Cr. L., § 2439, *n.* (q). The application of any other rule would be fraught with difficulty if not impracticability. The frequency of impostures on the one hand and abuse on the other would be imminent, and sagacious foresight in this respect may have been a potent reason with the general assembly for excluding exceptions, which found place in former statutes relating to the same subject matter. We are not to be supposed as intimating that physicians or druggists would be prohibited, under such a statute as the one in question, from the *bona fide* use of spirituous liquors in the necessary compounding of medicines, manufactured, mixed or sold by them. This would not be within the evils intended to be remedied by

such prohibitory enactments, nor even within the strict letter of the statute."

Druggists—Liquors for Mixing with Other Ingredients.—The Massachusetts statute forbidding the sale or keeping for sale, without authority, all spirituous or intoxicating liquors has been held not to apply to a druggist who keeps liquors only for the purpose of mixing with other ingredients according to prescriptions of physicians to be used as medicine, and also for the purpose of manufacturing such compounds as are commonly used by druggists, to be sold for the purpose of being used as medicines for remedies for sickness and disease. *Com. v. Ramsdell*, 130 Mass. 68. The court say: "In order to determine whether the statute applies to a sale, the true test is to enquire whether the article sold is, in reality, an intoxicating liquor; if it is, the sale is illegal, although it is sold to be used as a medicine, or it is attempted to disguise it under the name of a medicine, or it is a mixture of liquor and other ingredients. *Com. v. Hallett*, 103 Mass. 452; *Com. v. Bathrick*, 60 Mass. (6 Cush.) 247; *Com. v. Sloan*, 58 Mass. (4 Cush.) 52. But that if the articles sold cannot be used as an intoxicating drink, it is not within the prohibition of the statute, although it contains as one of its ingredients some spirituous liquor." See, to same effect, *Ansley v. State*, 36 Ark. 67; s. c., 38 Am. Rep. 29; *Intoxicating Liquor Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284.

But on the other hand it has been held that under a statute prohibiting the sale of ardent spirits by any person for any purpose without a license, a druggist cannot lawfully sell such spirits even as medicine upon a prescription of a physician. *Woods v. State*, 36 Ark. 36; s. c., 38 Am. Rep. 22. See *Wright v. People*, 101 Ill. 126.

The court say in *Woods v. State*, 36 Ark. 36; s. c., 38 Am. Rep. 22, that "the power of the legislature, in the exercise of the police authority of the State, to regulate the sale of liquors, has been too well settled by the courts of the country to be now called in question." See *Dorman v. State*, 34 Ala. 216; *Ex parte Whittington*, 34 Ark. 394; *State v. Almond*, 2 Houst. (Del.) 612; *Perdue v. Ellis*, 18 Ga. 586; *Godard v. Jacksonville*, 15 Ill. 588; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *Keller v. State*, 11 Md. 525; s. c., 69 Am. Dec. 226; *Com. v. Intoxicating Liquors*, 115 Mass. 153; *Metropolitan Board v. Barrie*, 34 N. Y. 657; *License Cases*, 46 U.

that it is otherwise with intoxicating liquors intended to be sold and used as a beverage, though disguised by some tincture or preparation so as to have, to some extent, the flavor or appearance of medicine.¹ The prevailing opinion, however, seems to be to the effect that if the article sold is not changed in character, but still remains an intoxicating liquor, the addition of roots, herbs, bark, and the like, will not take it out of the operation of the statute.² It has been held that as to articles not known to a given formula and sold under a specific name as bitters, cordials, tinctures, and the like, whether they are within the statute is a question of fact for the jury and not a question of law for the court, the rule or test being that if the compound or preparation is such that the distinct character and effect of the intoxicating liquors are destroyed, and its use as an intoxicating beverage practically impossible by reason of the other ingredients, then it is

S. (5 How.) 504; bk. 12, L. ed. 256; Cooley Const. Lim. 725.

Honest Belief No Defence.—It has been held by the supreme judicial court of Massachusetts, in the case of *Com. v. Hallett*, 103 Mass. 452, that it is no defence to an indictment that the seller believed that what he sold was a medicine and not intoxicating.

1. *Russell v. Sloan*, 33 Vt. 656. See *Com. v. Ramsdell*, 130 Mass. 68; *Com. v. Hallett*, 103 Mass. 452; *Com. v. Bathrick*, 60 Mass. (6 Cush.) 247; *Com. v. Sloan*, 58 Mass. (4 Cush.) 52; *State v. Wray*, 72 N. Car. 253.

2. See *Wall v. State*, 78 Ala. 417; *Gostorf v. State*, 39 Ark. 450; *Foster v. State*, 36 Ark. 258; *Davis v. State*, 50 Ark. 17; *Kinnebrew v. State* (Ga.), 5 S. E. Rep. 56; *State v. Laffer*, 38 Iowa 422; s. c., 1 Cent. L. J. 513; *Com. v. Ramsdell*, 130 Mass. 68; *Com. v. Hallett*, 103 Mass. 452; *Com. v. Bathrick*, 60 Mass. (6 Cush.) 247; *Com. v. Sloan*, 58 Mass. (4 Cush.) 52; *State v. Wright*, 20 Mo. App. 412; *State v. Wilson*, 80 Mo. 303; *State v. Lillard*, 78 Mo. 136; s. c., 17 Cent. L. J. 17; *James v. State*, 21 Tex. App. 353.

"Home Bitters."—In the case of *King v. State*, 58 Miss. 737; s. c., 38 Am. Rep. 344, defendants were indicted for selling intoxicating liquor without a license. The liquor in question was called "Home Bitters," and was composed of thirty per cent of alcohol and the rest of water, bark, peelings, seeds, etc. The defendants alleged that they sold it as a medicine. The court charged that if the compound was intoxicating, and was sold as a beverage, the jury should convict; but if it was sold in good faith

only as a medicine, they should acquit; although the compound might be intoxicating. *Held*, correct.

"Medicated Bitters."—Under a statute prohibiting the sale, by druggists, of intoxicating liquors or of "medicated bitters containing alcohol," but which permits the sale of liquors "used wholly in the admixture of necessary medical compounds," prohibits the sale of bitters, the basis of which is alcohol, and sold by the bottle. *State v. Wilson*, 80 Mo. 303.

Charge to Jury.—Where the defendant was indicted under the Arkansas statute (Mansf. Dig. § 4511), prohibiting the sale of intoxicating liquors, or any compound thereof known as tonics, bitters, etc. The evidence showed that he had sold a bottle of a patent medicine that contained a certain per cent. of alcohol, and was intoxicating. The court held that it was not error to charge the jury that if they found the medicine was a compound of alcohol, and was intoxicating and was used, or could be used, as a beverage, they would be authorized to convict the defendant, and if it could not be so used, they would be authorized to acquit. *Davis v. State*, 50 Ark. 17, 388. In such a case it is not error for the judge to charge that though the sale or alcoholic and intoxicating spirits is a violation of law, it was not intended to prohibit the sale of medicine because they contained alcohol; and the fact that a medicine does contain a certain proportion of alcohol is not of itself evidence that the sale thereof is unlawful. *Davis v. State*, 50 Ark. 17.

"Bitters"—United States Government

outside of the statute; but if, on the other hand, the intoxicating liquor remains as a distinct force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, then it is within the statute.¹

4. Articles of Food.—A statute regulating the sale of intoxicating liquors has relation only to such articles as have a tendency to produce intoxication; and the sale of articles of food that could have no tendency to intoxicate is not within the prohibition of the statute, although such food contains, as one of its ingredients, some spirituous liquor.² It is otherwise, however, where the food is spirituous and intoxicating.³

5. Ale.—The question whether ale is a spirituous or intoxicating liquor within the meaning of statutes regulating the traffic in spirituous and intoxicating liquors, is an unsettled question, some of the courts holding that it is,⁴

License.—It is an offence against the Dramshop act for a person not having a license as a dramshop keeper to sell as a beverage, and not for medicinal purposes, "bitters," compounded in part of intoxicating liquor; and it does not matter that an excise tax has been paid on them to the government of the United States, and that the act of congress does not require one dealing in them to have a license as a liquor dealer. *State v. Lillard*, 78 Mo. 136; s. c., 17 Cent. L. J. 17.

"Nerve Tonic."—The sale of "nerve tonic" is within the prohibition of the statute regulating the sale of intoxicating liquors, where it is shown that the nerve tonic is rye whiskey. *Kinnebrew v. State* (Ga.), 5 S. E. Rep. 56.

What "Bitters," etc., Are Intoxicating. The following compounds have been held to be intoxicating and to come within the prohibition of the statute. "Busby's Bitters," and "Busby's Improved System Invigorant" (*Wall v. State*, 78 Ala. 417), "Dr. Wilson's Rocky Mountain Herb Bitters" (*State v. Wilson*, 80 Mo. 303), "Fitzpatrick's Bitters" (*Foster v. State*, 36 Ark. 258), "Home Bitters" (*Gostorf v. State*, 39 Ark. 450; *King v. State*, 58 Miss. 737; s. c., 38 Am. Rep. 344), "Home Sanitive Cordial" (*Gostorf v. State*, 39 Ark. 450), "Plantation Bitters" (*Com. v. Hallett*, 103 Mass. 452); "Tonic Bitters" (*Davis v. State*, 50 Ark. 17).

Cider is said by the supreme court of West Virginia, in the case of *State v. Oliver*, 26 W. Va. 422; s. c., 53 Am. Rep. 79, not to be distilled liquor, and that it is not a mixture known as "bitters or otherwise" which will produce

intoxication, and therefore declared for the purpose of the act, spirituous liquor.

Gum Camphor.—Defendant was indicted under a statute of West Virginia, prohibiting the sale of "spirituous liquors," and providing that all mixtures "known as bitters or otherwise, which will produce intoxication," shall be deemed spirituous liquors. The article sold was gum camphor and alcohol mixed by the seller and sold as a medicine. The court held that such sale was not a violation of the law. *State v. Haymond*, 20 W. Va. 18; s. c., 43 Am. Rep. 787.

1. *Intoxicating Liquor Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284. See *Com. v. Ramsdell*, 130 Mass. 68; *Com. v. Hallett*, 103 Mass. 452; *Com. v. Bathrick*, 60 Mass. (6 Cush.) 247; *Com. v. Sloan*, 58 Mass. (4 Cush.) 52.

2. See *Com. v. Ramsdell*, 130 Mass. 68; *Fetter v. Wilt*, 46 Pa. St. 457.

3. See *Ryall v. State*, 78 Ala. 410.

"Brandy peaches" and "brandy cherries" preserved in liquor are "spirituous liquors," the sale of which is punishable under the Alabama statute. *Ryall v. State*, 78 Ala. 410. But it has been held by the supreme court of Arkansas that the sale of brandy peaches—six peaches in a bottle with a gill of liquor—is not a sale of intoxicating liquors. *Rabe v. State*, 39 Ark. 204.

4. See *State v. Wadsworth*, 30 Conn. 55; *Com. v. Locke*, 114 Mass. 288; *Haines v. Hanrahan*, 105 Mass. 480; *Com. v. Shea*, 80 Mass. (14 Gray) 386; *State v. Lemp*, 16 Mo. 389; *State v. Adams*, 51 N. H. 563; *Walker v. Prescott*, 44 N. H. 511; *Board of Excise*

others that it is not,¹ but a liquor sold as ale may be so mixed with spirituous liquor as to fall within the meaning of a statute which prohibits the sale of "any wine or spirituous liquor," mixed or unmixed.² The question whether ale, after process of fomentation is completed, is an intoxicating liquor within the meaning of a statute which prohibits the sale of all such intoxicating liquors, is a question of fact for the jury.³

6. Alcohol.—Alcohol is neither ardent nor vinous nor spirituous liquor, nor liquor of any kind; and its sale is not in any manner restricted by a statute prohibiting the selling of liquor, without paying the special tax prescribed therein.⁴

7. Beer.—It is now well settled that the word "beer" in its ordinary sense denotes a beverage which is intoxicating, and is within the fair meaning of the words "strong or spirituous liquors" used in statutes regulating the sale of such liquors.⁵ But where a statute

Commrs. of Tompkins Co. v. Taylor, 21 N. Y. 173; *Griffith v. Wells*, 3 Den. (N. Y.) 226; *Nevin v. Ladue*, 3 Den. (N. Y.) 437; *Board of Excise of Cayuga v. Freeoff*, 17 How. (N. Y.) Pr. 442; *Briffitt v. State*, 58 Wis. 39; s. c., 46 Am. Rep. 621. Compare *People v. Crilly*, 20 Barb. (N. Y.) 246.

The provision of a statute that "ale, porter, strong beer, lager beer, cider, and all wines, shall be considered intoxicating liquors, within the meaning of this act," applies to the indictment under St. 1855, ch. 405, for a nuisance in keeping a tenement used for the unlawful sale of intoxicating liquors. *Com. v. Shea*, 80 Mass. (14 Gray) 386.

Ale is fermented liquor, and an intoxicating drink, within the meaning of the act of Missouri, 1851, amendatory to the act of March 25th, 1845, and the person selling it without license, whether it be manufactured within or without the State, is indictable. *The State v. Lemp*, 16 Mo. 389.

1. *Walker v. Prescott*, 44 N. H. 511; *People v. Crilly*, 20 Barb. (N. Y.) 246.

2. *Walker v. Prescott*, 44 N. H. 511.

3. *State v. Biddle*, 54 N. H. 379.

4. *State v. Martin*, 34 Ark. 340.

Alcohol as a Beverage.—But when sold as a beverage, alcohol is within the statutory prohibition against the sale of intoxicating liquors. *Winn v. State*, 43 Ark. 151.

Alcohol.—The essential element of all spirituous liquors is a limpid, colorless liquid; to the taste it is hot and pungent, and it has a slight and not disagreeable scent; it has but one source, the fermentation of sugar and saccharine matter. It comes through fermentation of

substances which contain sugar proper, or which contain starch which may be turned into sugar. All substances that contain either sugar or starch or both will produce it by fermentation; but it is a mistake to suppose, as many persons do, that it is produced by distillation, it is produced only by fermentation, and the process of distillation simply serves to separate the spirit—the alcohol—from the mixture, whatever it may be, in which it exists. *State v. Giersch*, 98 N. Car. 720.

5. *Netso v. State* (Fla.), 5 So. Rep. 8; *Watson v. State*, 55 Ala. 658; *State v. Jenkins*, 32 Kan. 477; *State v. Teissedre*, 30 Kan. 476; *State v. Volmer*, 6 Kan. 371; *Hansberg v. People*, 120 Ill. 21; s. c., 60 Am. Rep. 549; *Bandalow v. People*, 90 Ill. 218; *Beebe v. State*, 6 Ind. 520; *Myers v. State*, 93 Ind. 251; *State v. Yager*, 72 Iowa 421; *Hawson v. Lockhart*, 25 Ind. 117; *Com. v. Bloss*, 116 Mass. 56; *Com. v. Locke*, 114 Mass. 288; *Com. v. Anthes*, 78 Mass. (12 Gray) 29; *State v. Lemp*, 16 Mo. 689; *Kerpon v. Bauer*, 15 Neb. 150; *Rau v. People*, 63 N. Y. 279; *Commissioners v. Taylor*, 20 N. Y. 173; s. c., 19 How. (N. Y.) Pr. 259; *Nevin v. Ladue*, 3 Den. (N. Y.) 437; *Commissioner v. Freeoff*, 17 How. (N. Y.) Pr. 442; *People v. Zeiger* 6 Park. Cr. Cas. (N. Y.) 355; *Taylor v. People*, 6 Park. Cr. Cas. (N. Y.) 347; *People v. Wheelock*, 3 Park. Cr. Cas. (N. Y.) 9; *Dillman v. People*, 4 N. Y. Week. Dig. 251; *State v. Giersch*, 98 N. Car. 720; *Markle v. Akron*, 14 Ohio 586; *State v. Rush*, 13 R. I. 188; *State v. Goyette*, 11 R. I. 592; *Briffitt v. State*, 58 Wis. 39; s. c., 46 Am. Rep. 621; *State v.*

prohibits the sale of intoxicating liquors only, and not beer by name, there being some kinds of beer which are neither a malt liquor nor intoxicating, to convict for a sale of beer, it must be shown that it is one of the liquors named in the statute.¹ In the absence of evidence to the contrary, beer will always be presumed to be an intoxicating liquor.² The court will take judicial notice of the fact that lager beer is a malt liquor and intoxicating.³

Oliver, 26 W. Va. 422; s. c., 53 Am. Rep. 79. Compare *State v. Johnson*, 61 Iowa 504; *State v. Thompson*, 20 W. Va. 674.

In *Hansberg v. People*, 120 Ill. 21; s. c., 60 Am. Rep. 549, it is said: "Beer may be intoxicating, and may not be, and it will not be sufficient for the State to show that the defendant sold 'beer.' It must show that he sold intoxicating beer."

1. *Kurz v. State*, 79 Ind. 488; *Klare v. State*, 43 Ind. 483; *Hansberg v. People*, 120 Ill. 21; s. c., 60 Am. Rep. 549; *State v. Starr*, 67 Me. 242; *State v. Wall*, 34 Me. 165; *Com. v. Bloss*, 116 Mass. 56; *Com. v. Chappel*, 116 Mass. 7.

It is not competent for a defendant charged with violating the prohibitory liquor law by selling beer to prove that under a given formula a non-intoxicating liquor may be made, which is sometimes called beer, unless evidence is also offered tending to show that the liquor or beer sold was made from such formula. *State v. Jenkins*, 32 Kan. 477.

2. *Watson v. State*, 55 Ala. 158; *Myers v. State*, 93 Ind. 251; *State v. Jenkins*, 32 Kan. 477; *State v. Teissedre*, 30 Kan. 476; *Rau v. People*, 63 N. Y. 477. Compare *Hansberg v. People*, 120 Ill. 21; s. c., 60 Am. Rep. 549.

Presumption in Rhode Island.—In *State v. Boswick*, 13 R. I. 211; s. c., 43 Am. Rep. 26, it is held that there is no presumption of law that beer is a malt liquor.

Apparent Defect in Statute.—The fact that, while in other sections of the act the words used are, "strong or spirituous liquors, wines, ale or beer," the words "ale or beer" are omitted in the section containing such prohibition, does not establish a legislative intent to omit lager beer from the prohibition. The intention was to cover all intoxicating beverages within the mischiefs of the act. *Rau v. People*, 63 N. Y. 277.

3. *State v. Goyette*, 11 R. I. 592; *Watson v. State*, 55 Ala. 158; *Hansberg v. People*, 120 Ill. 21; s. c., 60 Am. Rep. 549; *Bandalow v. People*, 9 Ill.

218; *State v. Teissedre*, 30 Kan. 482; *State v. Volmer*, 6 Kan. 371; *State v. Lemp*, 16 Mo. 389; *Dillman v. People*, 4 N. Y. Week. Dig. 251; *Rau v. People*, 3 N. Y. 277; *Commissioners v. Taylor*, 21 N. Y. 173; *Nevin v. Ladue*, 3 Den. (N. Y.) 437; *Taylor v. People*, 6 Park. Cr. Cas. (N. Y.) 347; *People v. Wheelock*, 3 Park. Cr. Cas. (N. Y.) 9.

In *State v. Giersch*, 98 N. Car. 720, the court observes: "We know from observation and knowledge, and it is a generally admitted physical fact . . . that lager beer and wine contain alcohol and generally in such quantity and degree as to produce intoxication. These liquors are therefore spirituous and obviously so within the meaning, and are embraced by the words "spirituous liquors," as used in the statute, unless there is something in the latter that shows that these words were intended to have a more limited application, and to exclude such beer and wine."

Schenk Beer.—The question whether Schenk beer is intoxicating or not is a question for the jury, and the fact that alcohol is discovered in it upon chemical analysis, though strong evidence, does not necessarily prove that the liquor sold was spirituous within the meaning of the statute. *Com. v. Bloss*, 116 Mass. 56. See *Olliver v. State*, 26 W. Va. 422.

Strong Beer.—Strong beer is "a strong and spirituous liquor" within the prohibition of a statute regulating the sale of such liquors. *Commissioners v. Taylor*, 21 N. Y. 173; s. c., 19 How. (N. Y.) Pr. 359; *Nevin v. Ladue*, 3 Den. (N. Y.) 43; *Commissioners v. Freeoff*, 17 How. (N. Y.) Pr. 442; *Markle v. Akron*, 14 Ohio 586. Compare *People v. Crilley*, 20 Barb. (N. Y.) 246.

Fermented beer is not necessarily strong beer, and defendant's admission that he had sold "ale, strong beer or fermented beer" without a license, does not prove him guilty of an offence. *Nevin v. Ladue*, 3 Den. (N. Y.) 437. Modifying *Nevin v. Ladue*, 3 Den. (N. Y.) 43.

8. Cider.—There is a conflict of authority as to whether sweet or unfermented cider, when kept and sold as a beverage, is within the meaning of statutes regulating the sale of intoxicating liquors; some cases allege that cider is included;¹ others, that it is not.² It is sometimes held that whether or not cider is an intoxicating liquor is a question for the jury.³ It is thought that the sale of fermented cider is in violation of the statutes regulating the sale of intoxicating liquors.⁴

9. Gin.—Gin is an intoxicating liquor within the statute regulat-

Malt Liquors.—In *State v. Starr*, 67 Me. 242, the act held that the question of what were malt liquors intended by and embraced in the statute and prohibited from sale was one of fact for the jury and not of law for the court.

1. *State v. Hutchinson*, 72 Iowa 561; *State v. Roach*, 75 Me. 123; *State v. McNamara*, 69 Me. 133; *Com. v. Dean*, 78 Mass. (14 Gray) 99; *Shaw v. Carpenter*, 54 Vt. 155; s. c., 1 Am. Rep. 37; *Overseers v. McCann*, 20 N. Y. Week. Dig. 144; s. c., 34 Hun (N. Y.) 112.

"German Cider."—In *People v. Schwab*, 4 Hun (N. Y.) 520, it was claimed by the prosecution that the beverage sold was Rhine wine, to which the defendant gave the name of "German Cider" to evade the law. It was urged that the law did not prohibit any nonintoxicating beverages, and that there are some kinds of liquor containing so small a percentage of alcohol that the human stomach cannot contain sufficient to intoxicate; and that Rhine wine was of this character. But the contention was not sustained.

Cider in Maine.—In Maine, cider is held to be an intoxicating liquor within the statute. *State v. Roach*, 75 Me. 123.

The laws of Maine class cider as an intoxicating liquor "when kept or deposited with intent that the same shall be sold for tipping purposes," and when so sold the place of drinking and of sale must be the same.

Cider in Massachusetts.—In Massachusetts, it is held that unfermented cider is included within the words of the statute referring to "ale, cider and all wines," and defining these as intoxicating liquors. *Com. v. Dean*, 14 Gray (Mass.) 99.

Cider in Vermont.—In Vermont, cider may be legally sold except at "a place of public resort," and a wholesale bottling establishment is not necessarily such a place. *Shaw v. Carpenter*, 54 Vt. 155; s. c., 41 Am. Rep. 837.

2. *Feldman v. Morrison*, 1 Ill. App. 460; *Guptill v. Richardson*, 62 Me. 257; *State v. Oliver*, 26 W. Va. 422; s. c., 53 Am. Rep. 79.

"Crab Cider."—In West Virginia, crab cider is not within the terms of the statute referring to "spirituous liquors, wines, ale, porter, beer or any drink of like nature."

Cider in West Virginia.—In *State v. Oliver*, 26 W. Va. 422; s. c., 53 Am. Rep. 79, it was held that cider is neither produced by distillation nor by fermentation, and although liable to fermentation and when subject to the distillation is capable of producing a spirituous liquor, yet the liquid produced is no more like cider than rum is like the juice of sugar cane from which it is manufactured; neither is cider the result of any process of fermentation; therefore wine, which is in any sense a mixture of any liquor other than water which is common to all spirituous liquors, wines, ale, porter, beer, and all drinks of like nature, not being distilled liquor, neither is it a mixture known as "bitters" or otherwise which would produce intoxication, and therefore declared for the purpose of the act "spirituous liquor."

Cider in Illinois.—Cider is not within the terms of the Illinois statute referring to "spirituous, malt and vinous liquors." *Feldman v. Morrison*, 1 Ill. App. 460; *State v. Biddle*, 54 N. H. 379.

3. *State v. Biddle*, 54 N. Y. 379.

Presumption.—In Massachusetts it is held that there is no legal presumption that cider is an intoxicating liquor. *Com. v. Chappel*, 116 Mass. 7.

4. In *People v. Foster* (Mich.), 31 N. W. Rep. 596, it is said that under the Michigan statute regulating the sale by druggists of spirituous liquors, fermented cider is included, and the sale thereof as a beverage without giving bond as required by the statute, is unlawful. Compare *State v. Biddle*, 54 N. H. 379.

ing the sale of spirituous and intoxicating liquors, and the court will take judicial notice of the fact.¹

10. **Pop.**—Pop is said to be an intoxicating liquor.²

11. **Porter.**—Porter is a "strong liquor" within the meaning of a statute regulating the sale of intoxicating liquors,³ and an illegal sale thereof is punishable under such statute.⁴

12. **Rum.**—Rum is a spirituous liquor within a statute prohibiting the sale of such liquors without first paying a license fee.⁵

13. **Whiskey.**—It is common information that whiskey is a spirituous liquor distilled from grain and vegetables and is highly intoxicating. It is in no sense a drug.⁶

14. **Wine.**—Although wine has been said not to be a spirituous liquor,⁷ yet it is an intoxicating liquor.⁸ Wine is a "strong or spirituous" liquor within the prohibition of the statutes of many of the States, and evidence of its effect in this respect is unnecessary.⁹

1. *Com. v. Peckham*, 68 Mass. (2 Gray) 514.

2. *Godfreyson v. People*, 88 Ill. 284. See *State v. Oliver*, 26 W. Va. 422, 427; s. c., 53 Am. Rep. 79.

3. *Briffitt v. State*, 58 Wis. 39; s. c., 46 Am. Rep. 621; 4 Cr. L. Mag. 886.

4. *Com. v. Locke*, 114 Mass. 288.

5. *United States v. Angel*, 11 Fed. Rep. 34.

6. *Gault v. State*, 34 Ga. 533. See *Foster v. State*, 36 Ark. 258.

7. See *Smith v. State*, 19 Conn. 493; *State v. Moore*, 5 Blackf. (Ind.) 118; *Caswell v. State*, 2 Humph. (Tenn.) 402.

"**Blackberry Wine.**"—Whether blackberry wine is a spirituous liquor, was left to the jury to decide in the case of *State v. Lowry*, 74 N. C. 121.

"**Champagne Wine**" is said to be included in the words liquors in *Kizer v. Randleman*, 5 Jones (N. C.) L. 428.

"**Port Wine**" is said to be an intoxicating liquor. In *State v. Packer*, 80 N. C. 439, the court say that on proof of a sale of port wine the fact of its intoxicating quality is a matter of common knowledge and can be passed on by the jury without proof.

The selling of port wine by a less quantity than a quart at a time, without license, is not a violation of the statute which prohibits such sale of spirituous liquors. *State v. Moore*, 5 Blackf. (Ind.) 118.

8. *Jones v. Surprise*, 64 N. H. 243; *State v. Packer*, 80 N. C. 439; *Kizer v. Randleman*, 5 Jones (N. C.) L. 428.

9. *Jones v. Surprise*, 64 N. H. 243; *State v. Giersch*, 98 N. C. 720; *State v.*

Packer, 80 N. C. 439; *Hatfield v. Com.*, 120 Pa. St. 395.

Under an act prohibiting the sale of any spirituous, vinous, malt or brewed liquors within a certain district, an offence is committed by the sale of domestic wine, which need not be shown to be intoxicating. *Hatfield v. Com.*, 120 Pa. St. 395.

The supreme court of North Carolina say, in the case of *State v. Giersch*, 98 N. C. 720, that: "We know from common observation and knowledge, and it is a generally admitted physical fact, that lager beer and wine contain alcohol, and generally in such quantity and degree as to produce intoxication; these liquors are therefore spirituous and obviously come within the meaning and are embraced by the words 'spirituous liquors' as used in the statute, unless there is something in the latter that shows that these words were intended to have a more limited application and intended to exclude such beer and wine, the closest reasonable scrutiny of the statute, its terms, phraseology, connections and purpose shows no such narrow application of the words 'spirituous liquors' employed in it as to exclude such beer and wine; but we think the contrary plainly appears, the terms used which severally and taken together bear good sweeping in excepting or limiting, but in a single respect . . . and the manifest purpose is to prevent and suppress drunkenness and the attendant evils produced by the free use of intoxicating spirituous liquors."

Domestic Wines.—In Iowa, wine manufactured from grapes, currants, or

III. SUPERVISION AND CONTROL OF MANUFACTURE AND SALE—1.

Generally.—All statutes which merely assume to regulate the sale of intoxicating liquors, and to prohibit sales by persons other than those who are licensed by the public authorities, are valid and constitutional, as an exercise of ordinary police regulations, such as the State may make in regard to all classes of trade or employment,¹ and the State may absolutely prohibit the manufacture

fruits grown within the State, is not included in the term "intoxicating liquors." *Worley v. Spurgeon*, 38 Iowa 465. See also *Intoxicating Liquor Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284; *Rogers Drinks, Drinking and Drinkers*, 71, but in Pennsylvania it was held, in the recent case of *Hatfield v. Com.*, 120 Pa. St. 395, that under the Pennsylvania act of April 12th, 1867, prohibiting the sale of any "spirituous, vinous, malt or brewed liquors," within a certain district, an offence is committed by the sale of domestic wine which need not be shown to be intoxicating.

1. *Territory v. O'Connell* (Ariz.), 16 Pac. Rep. 209; *Minnehaha Co. v. Champion* (Dak.), 37 N. W. Rep. 766; *Territory v. O'Connor* (Dak.), 37 N. W. Rep. 765; *State v. Allmond*, 2 Houst. (Del.) 612; *Menken v. City of Atlanta*, 78 Ga. 668; *Kettering v. Jacksonville*, 50 Ill. 39; *Goddard v. Jacksonville*, 15 Ill. 588; *Thomasson v. State*, 15 Ind. 449; *Bode v. State*, 7 Gill (Md.) 326; *Com. v. Intoxicating Liquors*, 115 Mass. 153; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Bancroft v. Dumas*, 21 Vt. 456; *Boston Beer Co. v. Massachusetts*, 97 U. S. (7 Otto) 25; bk. 24, L. ed. 989; *License Cases*, 46 U. S. (5 How.) 504; bk. 12, L. ed. 256. See *Oviatt v. Pond*, 29 Conn. 479; *Reynolds v. Geary*, 26 Conn. 179; *State v. Wheeler*, 25 Conn. 290; *Brown v. State* (Ga.), 7 S. E. Rep. 915; *Perdue v. Ellis*, 18 Ga. 586; *Butler v. Walker*, 80 Ill. 345; *Jones v. People*, 14 Ill. 196; *O'Dea v. State*, 57 Ind. 31; *State v. Donehey*, 8 Iowa 396; *Santo v. State*, 2 Iowa 165; s. c., 63 Am. Dec. 487; *Zumhoff v. State*, 4 G. Greene (Iowa) 526; *Our House v. State*, 4 G. Greene (Iowa) 172; *Ex parte Burnside* (Ky.), 6 S. W. 276; *Anderson v. Com.*, 13 Bush (Ky.) 485; *Barrett v. Delano* (Me.), 14 Atl. Rep. 288; *Meservey v. Gray*, 55 Me. 540; *State v. Strauss*, 49 Md. 288; *Keller v. State*, 11 Md. 525; s. c., 69 Am. Dec. 226; *Com. v. Howe*, 79 Mass. (13 Gray) 26; *Com. v. Clapp*, 71 Mass. (5 Gray) 97; *Com. v. Kendall*, 66 Mass.

(12 Cush.) 414; *Com. v. Kimball*, 38 Mass. (21 Pick.) 373; s. c., 35 Am. Dec. 326; *People v. Gallagher*, 4 Mich. 244; *People v. Hawley*, 3 Mich. 330; *Butler v. Chambers*, 36 Minn. 69; *Rohrbacher v. Jackson*, 51 Miss. 735; *State v. Moore*, 14 N. H. 451; *People v. Clipperly*, 101 N. Y. 634; *Bertholf v. O'Reilly*, 74 N. Y. 509; s. c., 18 Am. L. Reg., N. S. 119; *People v. Commissioners*, 59 N. Y. 92; *Ingersoll v. Skinner*, 1 Den. (N. Y.) 540; *People v. Quant*, 12 How. (N. Y.) Pr. 83; *State v. Joyner*, 81 N. C. 534-36; *State v. Doyle*, 15 R. I. 325; *State v. Peckham*, 3 R. I. 289; *Miller v. State*, 3 Ohio St. 475, 486; *City v. Ahrens*, 4 Strobb. (S. C.) L. 241; *Johnson v. State*, 3 Lea (Tenn.) 469; *Higgins v. Rinker*, 47 Tex. 393; *State v. Four Jugs of Intoxicating Liquors*, 58 Vt. 140; *Gill v. Parker*, 31 Vt. 610; *Lincoln v. Smith*, 27 Vt. 328; *State v. Prescott*, 27 Vt. 194; *Bartemeyer v. Iowa*, 85 U. S. (18 Wall.) 129; bk. 21, L. ed. 929; *United States v. Ronan*, 33 Fed. Rep. 117. *Compare Meshmeier v. State*, 11 Ind. 484; *Beebe v. State*, 6 Ind. 501; *Wynehamer v. People*, 13 N. Y. 378.

Statutes Forbidding Sale to Minors.—

In most if not all the States, where liquor is permitted to be sold at all, there are statutes forbidding its sale to minors or to persons habitually addicted to the excessive use of intoxicating drinks, and these statutes are universally recognized to be constitutional and valid. See *Walton v. State*, 62 Ala. 197; *Hill v. State*, 62 Ala. 168; *Adler v. State*, 55 Ala. 16; *Ridling v. State*, 56 Ga. 601; *Johnson v. People*, 83 Ill. 431; *State v. Hamilton*, 75 Ind. 238; *Meyer v. State*, 50 Ind. 18; *Wiedemann v. People*, 92 Ill. 314; *Cobleigh v. McBride*, 45 Iowa 116; *Com. v. Bell*, 14 Bush (Ky.) 433; *Com. v. Davis*, 12 Bush (Ky.) 240; *Moran v. Goodwin*, 130 Mass. 158; s. c., 39 Am. Rep. 443; *Faulks v. People*, 39 Mich. 200; s. c., 33 Am. Rep. 374; *State v. Heck*, 23 Minn. 549; *Dahmer v. State*, 56 Miss. 787; *Ross v. People*, 17 Hun (N. Y.) 591; *State v. Cain*, 9 W. Va. 559.

State Regulations of Property.—The

and sale of intoxicating liquors.¹ Such legislation is not in conflict with the Fourteenth Amendment to the Federal Constitution;² and is not a denial to any person of the equal protection of the laws,³ neither is it a deprivation of property without due process of law,⁴ because the right to sell intoxicating liquors is not a privilege guaranteed by the Federal Constitution,⁵ and the injury resulting from the enforcement of such laws is *damnum absque injuria*.⁶

legislature has power to regulate the mode and manner of enjoying property, and to regulate callings, where the public interests are affected by general laws operating alike on citizens. Mayor of Mobile v. Yuille, 3 Ala. 137.

1. Butler v. Chambers, 36 Minn. 69; People v. Cipperly, 101 N. Y. 634; Powell v. Com., 114 Pa. St. 265; s. c., 60 Am. Rep. 350; Foster v. Kansas, 112 U. S. 203; bk. 28, L. ed. 629; State v. Bradley, 26 Fed. Rep. 289; *In re Brosnahan*, 18 Fed. Rep. 62; s. c., 4 McCrary, C. C. 1. See State v. Wheeler, 25 Conn. 290; Jones v. People, 14 Ill. 196; Santo v. State, 2 Iowa 165, 202; s. c., 63 Am. Dec. 487; Bode v. State, 7 Gill (Md.) 326; Com. v. Clapp, 71 Mass. (5 Gray) 97; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; Boston Beer Co. v. Massachusetts, 97 U. S. (7 Otto) 25; bk. 24, L. ed. 989.

2. Butler v. Chambers, 36 Minn. 69; State v. Bradley, 26 Fed. Rep. 289. *In re Brosnahan*, 18 Fed. Rep. 62; s. c., 4 McCrary, C. C. 1.

3. State v. Bradley, 26 Fed. Rep. 289.

4. People v. Cipperly, 101 N. Y. 634; Kidd v. Pearson, 128 U. S. 1; bk. 32, L. ed. 146; Mugler v. Kansas, 123 U. S. 623; bk. 31, L. ed. 205; Tanner v. Alliance, 29 Fed. Rep. 196; State v. Bradley, 26 Fed. Rep. 289; Weil v. Calhoun, 25 Fed. Rep. 865; *In re Brosnahan*, 18 Fed. Rep. 62; s. c., 4 McCrary, C. C. 1. See Welch v. McKane, 55 Conn. 25; Drake v. Jordan, 73 Iowa 707; Dickinson v. Heeb Brewing Co., 73 Iowa 705; Drake v. Kaiser, 73 Iowa 703; Kaufman v. Dostal, 73 Iowa 691; McLane v. Leicht, 69 Iowa 401; *Ex parte Kennedy*, 23 Tex. App. 77; Kessinger v. Hinkhouse, 27 Fed. Rep. 883.

5. See *In re Hoover*, 30 Fed. Rep. 51.

6. Menken v. City of Atlanta, 78 Ga. 668.

Validity, Effect, etc., of Particular Constitutional Amendment.—The amendment to the Kansas constitution adopted in 1880, which prohibits the manufacture and sale of intoxicating liquors, except for certain specified pur-

poses, is not in conflict with the fourteenth amendment of the U. S. constitution. Prohibitory Amendment Cases, 24 Kan. 700. The court say: "The constitution provides that propositions for its amendment may be submitted to the people by the concurrence of two-thirds of the members of each house, that such propositions, together with the yeas and nays, shall be entered on the journal, and that if a majority of the electors voting on such proposed amendments adopt them, they shall become a part of the constitution. It also provides for a "general election" to be held annually on the Tuesday succeeding the first Monday in November. From early Kansas history there has been in force a general election law. It provides all the machinery for elections, names judges, canvassing boards, prescribes forms and procedure for the election of all officers—State, district, county and township. In terms, it names only individuals and officers, and does not refer to constitutional amendments or other questions. In 1879, the legislature, by the requisite vote, submitted a proposition to amend the constitution. This proposition was not entered at length upon the journal, but was described by its title, its scope, and object. Otherwise, the submission was legal and regular. The joint resolution making the submission simply provides that the proposition shall be submitted to the electors at the general election in 1880, and prescribes the form of ballots. It does not in terms declare that the machinery of the general election law shall control, or that any particular officers or boards shall receive, count or canvass the votes cast. As a matter of fact, the full machinery of the general election law was appropriated, votes were received, counted, canvassed, and the result declared, just as fully as though it had been in terms ordered. Further, the records of the legislative action disclose that while, from 1861 to 1868, propositions for constitutional

2. Right and Property in Liquors Generally.—The control of the liquor traffic being a police regulation, no one can acquire such a vested right in that traffic by a license, that such control may not be

amendments were submitted, in which the machinery of the general election law was specifically appropriated, and from 1868 to 1873 no propositions for constitutional amendments were submitted, yet that, from 1873 to the present time, four legislatures have submitted constitutional amendments, and that during these years the same form of submission has been observed as was used in this submission; that many of the propositions so submitted have been adopted, and, without question, recognized and acted upon as parts of the constitution; that among these changes are such vital ones as the numerical organization of the legislature, length of official terms, scope of revenue laws, and biennial sessions. Frequently, also, the full text of the proposed amendment did not appear upon the journal of either house, but, like the one in question, it was referred to only by the title and object. Beyond this, it is a matter of public history, that between the submission and the vote, a period of over twenty months, this proposition for amendment was the subject of a warm and heated canvass throughout the entire State, and no suggestion, even, was publicly made that the proposition was not fully and legally presented to the people for decision. At the election, seven out of every eight voters recorded, by ballot, their views upon the question, and a majority of these ballots was in favor of the adoption of the amendment. *Held*, that, conceding the irregularity in the proceedings of the legislature, and the doubtful scope of the provisions for the election, yet, in view of the very uncertainty as to those provisions, the past legislative history of similar propositions, the universal prior acquiescence in the same forms of procedure, and the popular and unchallenged acceptance of the legal pendency before the people of the question of this amendment for decision, and also in view of the duty cast upon this court of taking judicial knowledge of everything affecting the existence and validity of any law or portion of the constitution, it must be, and it is adjudged, that such proposed amendment has become, and is, a part of the constitution.

The section of the schedule to the Ohio constitution which provides that no licence to traffic in intoxicating liquors shall hereafter be granted in the State, but the general assembly may provide against the evils resulting therefrom, applies to the wholesale as well as the retail traffic. *Senior v. Ratterman*, 44 Ohio St. 661.

The amendment to the Rhode Island constitution, prohibiting the sale of intoxicating liquors to be used as a beverage, did not take away the right to recover for the breach of the condition of a bond given pursuant to the requirements of a licence law in force before and upon the adoption of said amendment. *Coggeshall v. Groves* (R. I.), 11 Atl. Rep. 296.

Pub. Stat., ch. 87, enacts a licence system for the sale of intoxicating liquors. This system, with its dependent provisions, was annulled by the constitutional amendment, art. 5, of April 7th, A. D. 1886. Hence complaints under Pub. Stat. ch. 87, §§ 25, 56, cannot be sustained. *State v. Tonks*, 15 R. I. 385; s. c., 7 East Rep. 627.

A constitutional amendment providing that the "manufacture and sale of intoxicating liquors shall be prohibited. The general assembly shall provide by law for carrying this article into effect," did not limit the power which the general assembly previously had to enact prohibitory laws. *State v. Kane*, 15 R. I. 395; s. c., 6 Atl. Rep. 783.

This act did not limit the power the general assembly previously had to pass a prohibitory law. *Held*, also, this does not impliedly licence the manufacture and sale of intoxicating liquors for other purposes than as a beverage. *State v. Kane*, 15 R. I. 395.

Change of Tenancy.—The tenant of a beerhouse, holding a beerhouse licence, assigned his interest in the premises to another, and gave up possession to him on the 14th of February. At the general licensing sessions, on the 6th of March, the old tenant applied for a certificate for a renewal of the licence, which was refused on the ground that he had been convicted of an offence under 32 & 33 Vict., ch. 27, § 8. The new tenant had not time after the transfer to him to give the requisite notices to enable him to apply at the general

exercised when the interests of society require it.¹ While prohibition to sell intoxicating liquors cannot prevent any person from acquiring and possessing them for his own use, without any intention of selling them, and cannot prevent them from being transported from one city to another, or through the State, when there

licensing sessions. *Held*, that he was entitled to apply at a special sessions, under 9 Geo. 4, ch. 61, § 14; Reg. v. Middlesex (Justices), L. R., 6 Q. B. 781; s. c., 40 L. J., M. C. 184; 25 L. T. 41; 19 W. R. 960.

1. *LaCroix v. County Commissioners*, 50 Conn. 321; s. c., 47 Am. Rep. 648; *Schwuchow v. Chicago*, 68 Ill. 444; *Block v. Jacksonville*, 36 Ill. 301; *State v. Woodward*, 89 Ind. 110; s. c., 46 Am. Rep. 160; *McKinney v. Town of Salem*, 77 Ind. 213; *Columbus v. Cutcomp*, 61 Iowa 672; *Fell v. State*, 42 Md. 71; s. c., 20 Am. Rep. 83; *Com. v. Hamer*, 128 Mass. 76; *Com. v. Moylan*, 119 Mass. 109; *Com. v. Brennan*, 103 Mass. 70; *Calder v. Kurby*, 71 Mass. (5 Gray) 597; *Moore v. State*, 48 Miss. 147; s. c., 12 Am. Rep. 367; *State v. Holmes*, 38 N. H. 225; *People v. Board of Commissioners of Police and Excise*, 59 N. Y. 92; *People v. Wright*, 3 Hun (N. Y.) 306; *Richland County v. Richland Center*, 59 Wis. 591; s. c., 29 Alb. L. J. 412; *Stone v. Mississippi*, 101 U. S. (11 Otto) 814; bk. 25, L. ed. 1079; *Boston Beer Co. v. Massachusetts*, 97 U. S. (7 Otto) 25; bk. 24, L. ed. 980; *License Tax Cases*, 72 U. S. (5 Wall.) 462; bk. 18, L. ed. 497.

Nature of Licenses to Sell Intoxicating Liquors.—In the License Tax Cases, 72 U. S. (5 Wall.) 462; bk. 18, L. ed. 497, CHIEF JUSTICE CHASE explained the nature of the licenses required by the act of congress of 1864. He showed that those licenses did not confer any authority upon the licensee to carry on the licensed business; that they were merely receipts for taxes, and implied nothing more than that the licensee, if he paid the tax, should not be subject to any penalty under national law. WRIGHT, J., in delivering the opinion of the court in *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 667, said: "These licenses to sell liquors are not contracts between the state and the persons licensed, giving the latter vested rights protected on general principles, and by the constitution of the United States, against subsequent legislation; nor are they property in any legal or constitutional sense. They have neither the

qualities of a contract or of property, but are merely temporary permits to do what otherwise would be an offence against a general law. They form a portion of the internal police system of the state; are issued in the exercise of its police powers, and are subject to the direction of the state government, which may modify, revoke or continue them, as it may deem fit." See to the same effect *Block v. Jacksonville*, 36 Ill. 301; *Com. v. Brennan*, 103 Mass. 70; *Calder v. Kurby*, 71 Mass. (5 Gray) 597. *Compare Adams v. Hackett*, 27 N. H. 289; s. c., 35 Am. Dec. 335.

Power of Legislature to Prohibit Sale.—The legislature has the undoubted power to prohibit the sale of spirituous or fermented liquors in any part of the State, notwithstanding a party, to be affected by the law, may have procured a license, under the general license laws of the State, which has not yet expired. Such a license is in no sense a contract made by the State with the party holding the license. It is a mere permit, subject to be modified or annulled at the pleasure of the legislature, who have the power to change or repeal the law under which the license was granted. *Fell v. State*, 42 Md. 71.

Licenses to sell liquors are not contracts between the state and the persons licensed, giving the latter vested rights protected on general principles and by the United States constitution against subsequent legislation, nor are they property in any legal or constitutional sense; they are mere temporary permits to do what otherwise would be unlawful. *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 659.

A license to retail liquor is neither a contract nor a grant, but a mere permit, and a person who receives it does so with the tacit condition and knowledge that it is, at all times, within the control of the legislature of the State. *McKinney v. Town of Salem*, 77 Ind. 213.

Licenses granted for the sale of intoxicating liquors upon fees paid therefor by the persons licensed, are not a contract between the State and the persons licensed, and are not property in

is no intention to make sales of them,¹ yet the right to sell and traffic in intoxicating liquors is not a privilege so protected by the federal constitution² that it may not be abridged by State legislation.³

3. Federal Supervision, Control, etc.—The right to sell and traffic in intoxicating liquors is not one of the privileges and amunities of citizens of the United States, which, by the Fourteenth Amendment, the States were forbidden to abridge, and where the State statute authorizes or refuses to authorize the sale of liquor on such terms as it thinks proper, the courts of the United States have no control over this exercise of the police power of the State.⁴

4. State Regulation, Control, etc.—*a. POWER TO REGULATE AND RESTRICT GENERALLY.*—The power of the State to provide for the regulation and sale of spirituous liquors so as to guard against abuse and prevent disorder, is vested in the State government.⁵

any constitutional sense. *La Croix v. County Commrs.*, 49 Conn. 591.

1. *Preston v. Drew*, 33 Me. 558; s. c., 54 Am. Dec. 639.

2. U. S. Const. Amendment Fourteen.

3. *In re Hoover*, 30 Fed. Rep. 51.

4. *Edgar v. State*, 45 Ark. 356; *Robinson v. State*, 38 Ark. 641; *In re Hoover*, 30 Fed. Rep. 51. See *Nelson v. United States*, 30 Fed. Rep. 112; *Walker v. State*, 6 Ark. 656.

Congress has power in its discretion to prohibit the importation, manufacture and sale of intoxicating liquors as a beverage in the district of Alaska, and to make the violation of such prohibition a crime punishable by fine and imprisonment, or to authorize the president of the United States to make such regulations as will be necessary to carry out the provisions of the law. *Nelson v. United States*, 30 Fed. Rep. 112.

No one Has a Natural Right to Retail Spirituous Liquors.—The whole subject is within the police power of the legislature, and persons engaging in the business must submit to such regulations, terms and burthens as the legislature may have prescribed for the public good. *Robinson v. State*, 38 Ark. 641; *Walker v. State*, 6 Ark. 656. See *Walton v. State*, 62 Ark. 197.

5. *Jones v. Hilliard*, 69 Ala. 300; *Lodano v. State*, 25 Ala. 64; *Territory v. Connell (Ariz.)*, 16 Pac. Rep. 209; *Ex parte McClaim*, 61 Cal. 436; 44 Am. Rep. 554; *Reynolds v. Geary*, 26 Conn. 179; *State v. Allmond*, 2 Houst. (Del.) 643; *Goddard v. Jacksonville*, 15 Ill. 588; *Kattering v. Jacksonville*, 50 Ill. 39; *Harrison v. Lockhart*, 25 Ind.

117; *Hollenbaugh v. State*, 11 Ind. 557; *Thomasson v. State*, 15 Ind. 449; *Vonderweit v. Town of Centerville*, 15 Ind. 448; *Santo v. State*, 2 Iowa 202; s. c., 63 Am. Dec. 487; *Anderson v. Com.*, 13 Bush (Ky.) 485; *State v. Gurney*, 37 Me. 156; s. c., 58 Am. Dec. 782; *Preston v. Drew*, 33 Me. 558; s. c., 54 Am. Dec. 639; *State v. Strauss*, 49 Md. 288; *Bode v. State*, 7 Gill (Md.) 326; *Com. v. Howe*, 79 Mass. (13 Gray) 26; *Com. v. Kimball*, 41 Mass. (24 Pick.) 359; s. c., 35 Am. Dec. 326; *People v. Gallagher*, 4 Mich. 244; *People v. Hawley*, 3 Mich. 330; *Rohrbacker v. Jackson*, 51 Miss. 735; *Bertholf v. O'Reilly*, 74 N. Y. 509, 520; s. c., 30 Am. Rep. 323; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657, 666; *State v. Joyner*, 81 N. C. 534; *Adler v. Whitbeck*, 44 Ohio St. 539; *Miller v. State*, 3 Ohio St. 475, 486; *State v. Turner*, 18 S. C. 103; *Johnson v. State*, 3 Lea (Tenn.) 469; *Lincoln v. Smith*, 27 Vt. 328; *Bancroft v. Dumas*, 21 Vt. 456; *Kidd v. Pearson*, 128 U. S. 1; bk. 32, L. ed. 346; s. c., 23 Am. & Eng. Corp. Cas. 221; *Mugler v. Kan.*, 123 U. S. 627; bk. 31, L. ed. 205; s. c., 18 Am. & Eng. Corp. Cas. 614; *Bartemeyer v. Iowa*, 85 U. S. (18 Wall.) 129; bk. 21, L. ed. 929; *License Cases*, 46 U. S. (5 How.) 504; bk. 12, L. ed. 256; *Cool. Const. Lim.* (4th ed.) 727.

Those laws which undertake merely to regulate the sale, or to prohibit sales made by any other persons than those who are duly licensed by the public authorities have been everywhere upheld as constitutional. They are regarded as coming clearly within the class of police regulations which it is

universally admitted the state may establish in reference to every kind of trade or employment. The authorities on this point are numerous and uniform. *State v. Allmond*, 2 Houst. (Del.) 612; *Kettering v. Jacksonville*, 50 Ill. 39; *Goddard v. Jacksonville*, 15 Ill. 588; *Thomasson v. State*, 15 Ind. 449; *Anderson v. Com.*, 13 Bush (Ky.) 485; *State v. Strauss*, 49 Md. 288; *Bode v. State*, 7 Gill (Md.) 326; *Rohrbacker v. Jackson*, 51 Miss. 735; *State v. Joyner*, 51 N. C. 534; *Bertholf v. O'Reilly*, 74 N. Y. 509; s. c., 30 Am. Rep. 323; Metropolitan Board of Excise *v. Barrie*, 34 N. Y. 657; *Miller v. State*, 3 Ohio St. 475, 486; *Johnson v. State*, 3 Lea (Tenn.) 469; *Bancroft v. Dumas*, 21 Vt. 456; *Bartemeyer v. Iowa*, 85 U. S. (18 Wall.) 129; bk. 21, L. ed. 929; *License Cases*, 46 U. S. (5 How.) 504; bk. 12, L. ed. 256; *Cool. Const. Lim.* (4th ed.) 725.

A state has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit the sale and traffic in them in said state; to inflict penalties for such manufacture and sale; and to provide regulations for the abatement, as a common nuisance, of the property used for such forbidden purposes. *Kidd v. Pearson*, 128 U. S. 1; bk. 32, L. ed. 346; s. c., 23 Am. & Eng. Corp. Cas. 221; *Mugler v. Kansas*, 123 U. S. 627; bk. 31, L. ed. 205; s. c., 18 Am. & Eng. Corp. Cas. 614.

Such legislation by a state is a clear exercise of her undisputed police power, which does not abridge the liberties or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor in any way contravene any provision of the fourteenth amendment to the federal constitution. *Kidd v. Pearson*, 128 U. S. 1; bk. 32, L. ed. 346; s. c., 23 Am. & Eng. Corp. Cas. 221.

It is said in the case of the Metropolitan Board of Excise *v. Barrie*, 34 N. Y. 662, that "at no time in the history of the state have we been without excise laws, nor has the authority of the legislature to control, regulate and prohibit the sale of spirituous and intoxicating liquors been questioned."

"A state is not a sovereign without the power to regulate all its internal commerce as well as police. The legislature exercises and wields these sovereign police powers, as it deems the public good to require. It is a bold assertion, at this day, that there

is anything in the state or United States constitutions conflicting with or setting bounds upon the legislative discretion or action, in directing how, when, and where, a trade shall be conducted in articles intimately connected with the public morals, or public safety, or public prosperity; or, indeed, to prohibit and suppress such traffic altogether, if deemed essential to effect those great ends of good government.

In Alabama, the legislature is not restricted by the state constitution from imposing such conditions as may be deemed proper, and required by the good of the community, upon those who are allowed to retail spirituous liquors, both as regards the persons to whom, and the quantities in which, they may sell. *Lodano v. State*, 25 Ala. 64.

In California, under the late constitution, it was competent for the legislature to prohibit the sale of vinous or alcoholic liquors, within the limits specified in section 172, Penal Code, if, in its opinion, the well being of the youth being educated at the university, or the discipline and reformation of convicts, or the health of the unfortunate insane, would be thereby promoted or preserved. *Ex parte McClain*, 61 Cal. 436; s. c., 44 Am. Rep. 554.

In Ohio, the provision of the State constitution conferring upon the legislature power to provide against the evils resulting from the traffic in intoxicating liquors has ever stood, since its adoption, as a perpetual admonition to persons engaged in the traffic, that in so doing they placed their property invested in the business, subject to the power thereby conferred on the legislature. *Adler v. Whitbeck*, 44 Ohio St. 539.

Police Power.—Blackstone defines the public policy and economy to be "the due regulation and domestic order of the kingdom; whereby the individuals of the State, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious and inoffensive in their respective stations." 4 Com. 162, JUDGE COOLEY says: "The police of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good man-

ners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." Const. Lim. (4th ed.) 713.

Same — Massachusetts Doctrine. —

CHIEF JUSTICE SHAW said, in *Com. v. Alger*, 61 Mass. (7 Cush.) 85: "It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries or prescribe limits to its exercise." But while it is undoubtedly difficult to determine the exact limits to the exercise of this power, it is well settled that it belongs to the legislatures of the several States, and forms a part of the mass of residuary state powers over which congress has no direct control. 1 Kent's Com. 439; *Slaughterhouse Cases*, 83 U. S. (16 Wall.) 36, 63; bk. 14, L. ed. 394; *License Tax Cases*, 72 U. S. (5 Wall.) 462, 470; bk. 18, L. ed. 497. The chief justice delivering the opinion of the court in the case last mentioned, says: "But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by congress with the business of citizens transacted within a State is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature."

Same—Declaring Liquor Selling a

Nuisance.—It has been decided that the legislature may declare the liquor kept for sale a nuisance and provide legal process to have it condemned and destroyed, and may even authorize the building used as a dram shop to be seized and condemned as a nuisance. *Oviatt v. Pond*, 29 Conn. 479; *Lincoln v. Smith*, 27 Vt. 328; *Com. v. Intoxicating Liquors*, 107 Mass. 396; *Streeter v. People*, 69 Ill. 595; *Block v. Jacksonville*, 36 Ill. 301; *Lord v. Chadbourne*, 42 Me. 429; s. c., 66 Am. Dec. 290; *State v. Robinson*, 33 Me. 564; *Our House No. 2 v. State*, 4 G. Greene (Iowa) 172.

Same—Extent of Power.—In *Thorpe v. Rutland & B. R. R. Co.*, 27 Vt. 140, 149; s. c., 62 Am. Dec. 625, CHIEF JUSTICE REDFIELD says: "The police power of the State extends to the protection of all property within the State. According to the maxim *sic utera tuo ut alienum non laedas*, which being

of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.

Same—Espionage and Search.—The supreme judicial court of Massachusetts held, in *Com. v. Ducey*, 126 Mass. 269, that a statute conferring upon the mayor and aldermen of a city, or the selectmen of a town, or any police officer or constable specially authorized by them, power to enter upon the premises of any person licensed to sell liquors under that act, to ascertain the manner in which that person conducts his business, and to preserve order, is a reasonable exercise of the police power of the State, and constitutional. But in the case of *Wynhamer v. People*, 13 N. Y. 378, a prohibitory law of New York was held to be unconstitutional and void, because, by absolutely prohibiting the sale of intoxicating liquors, which were the property of the owner at the time the act went into effect, it virtually deprived him of his property in them. In that case it was held that intoxicating liquors, to be used as a beverage, where, when this act was passed, property, and as such entitled to constitutional protection, the same as other property. This is the only case we have been able to find supporting this doctrine. The supreme court of Connecticut, in the case of *Oviatt v. Pond*, 29 Conn. 479, expressly decided that liquors kept in that state for sale, contrary to law, are regarded by the law as having no lawful value at all. ELLSWORTH, J., who delivered the opinion of the court in that case, said: "It was worth nothing here, since it was kept contrary to our law, and for that reason was, by statute, put expressly out of the protection of the law."

It seems to be only in cases where, in framing such laws, the legislature has not taken care to observe the principles of protection that surround the persons and dwellings of individuals, securing them immunity from unreasonable searches and seizures, and accordingly to them the right of trial before being condemned, that the courts have been willing to declare that it has exceeded the legitimate province of police regulation. *Baldwin v. Smith*, 82 Ill. 162; *Hibbard v. People*, 4 Mich. 125; *Cool. Const. Lim.* (4th ed.) 728. Accordingly it has been held that it is competent for the legislature to pass an act declaring that all liquor intended by

This principle has been too long settled to now admit of question.¹

b. POWER TO PROHIBIT OWNERSHIP, SALE, ETC.—A State may prohibit the sale of spirituous and intoxicating liquors as a beverage within its borders as a police and internal regulation², excepting only the case of the importer of foreign spirituous liquors selling in the original quantity as imported.³ It is thought that the prohibition of the manufacture and sale of intoxicating liquors may be supported upon the ground that *per se* it has a deleterious effect upon good order and the peace, comfort and morals of the people of the State.⁴

c. POWER TO PROHIBIT SALES ON SUNDAY, AND TO MINORS.—It is competent for the legislature, as a police regulation, to prohibit, under penalties, the sale of liquor by retail on Sunday,

the owner or keeper thereof to be sold in violation of the act should be forfeited to the town wherein it is kept. *State v. Wheeler*, 25 Conn. 290; *State v. Brennan's Liquors*, 25 Conn. 278.

1. *State v. Turner*, 18 S. C. 103.

2. *State v. Allmond*, 2 *Houst. (Del.)* 612; *McLane v. Bonn*, 70 *Iowa* 752; *McLane v. Leicht*, 69 *Iowa* 401; *State v. Shroder*, 51 *Iowa* 197; *Santo v. State*, 2 *Iowa* 165; s. c., 63 *Am. Dec.* 487; *Prohibitory Amendment Cases*, 24 *Kan.* 700; *Preston v. Drew*, 33 *Me.* 558; s. c., 54 *Am. Dec.* 639; *State v. Pond*, 93 *Mo.* 606; *State v. Joyner*, 81 *N. C.* 534; *State v. Rauscher*, 1 *Lea (Tenn.)* 96; *Ex parte Bell*, 24 *Tex. App.* 428; *Boston Beer Co. v. Massachusetts*, 97 *U. S. (7 Otto)* 25; bk. 24, L. ed. 989; *Kohn v. Melcher*, 29 *Fed. Rep.* 433; *United States v. Nelson*, 29 *Fed. Rep.* 202.

Prohibitory Power of a State.—Notwithstanding the fourteenth amendment to the constitution of the United States, any State has a right to prohibit the manufacture and sale of intoxicating liquors for use as a beverage. *Prohibitory Amendment Cases*, 24 *Kan.* 700; *Beer Co. v. Massachusetts*, 97 *U. S. (7 Otto)* 25; bk. 24 L. ed. 989.

Laws prohibiting the manufacture or sale of intoxicating liquors, whether enacted by congress for operation in the Territories, or by the States, are police regulations established by the law making power for the abatement and prevention of intemperance. *United States v. Nelson*, 29 *Fed. Rep.* 202. But the right of a State legislature to prohibit the sale of liquor is subject to the laws of the United States regulating imports; the State is bound

to admit the article imported, but not to find a market for its sale. When sold by the importer, in the original package, or when broken up for retail sale, it becomes subject to the State laws, and may be taxed, or the sale is prohibited. *State v. Allmond*, 2 *Houst. (Del.)* 612.

A State legislature may prohibit the sale of intoxicating liquors within a specified locality; as within the limits of a county (*State v. Joyner*, 81 *N. C.* 534); or within two miles of the corporate limits of a municipality (*State v. Shroeder*, 51 *Iowa* 197); or within four miles of any incorporated institution of learning. *State v. Rauscher*, 1 *Lea (Tenn.)* 96.

Property in Liquors.—A statute providing that no person shall acquire any property in spirituous liquors, intended to be used as a beverage, is not unconstitutional, since the legislature may determine that articles injurious to public health or morals shall not constitute property within its jurisdiction. *Preston v. Drew*, 33 *Me.* 558; s. c., 54 *Am. Dec.* 639.

"Drinking Saloons."—The legislature has authority absolutely to prohibit "drinking saloons," or saloons for the purpose of carrying on the liquor traffic; and it follows that it has the power to regulate the mode, manner and circumstances in which they shall be conducted and carried on, and to surround the right with such conditions, restrictions and limitations as may appear judicious. *Ex parte Bell*, 24 *Tex. App.* 428.

3. *Santo v. State*, 2 *Iowa* 165; s. c., 63 *Am. Dec.* 487.

4. *Pearson v. International Distillery*, 72 *Iowa* 348.

as well as on election and other public days,¹ and also to prohibit sales to minors.²

d. **POWER TO AUTHORIZE ABATEMENT OF NUISANCE.**—It is within the police power of the State to decide the illegal traffic in intoxicating liquors and the assembling of idle and vicious persons for that purpose, to be a nuisance, and to authorize the abatement thereof.³

e. **REGULATION AS TO LICENSING, TAXING, ETC.**—The legislature has power to regulate the sale, by retail, of intoxicating liquors, and it is competent for such legislature in its discretion to annex any conditions to the granting of license which is deemed proper, and to prescribe causes of forfeiture.⁴

1. *Thomasson v. State*, 15 Ind. 449.

2. **Prohibiting Sales to Minors—Texas Act.**—Texas act of April 4th, 1881 (Gen. Laws, p. 113), prohibiting the permitting of a minor to enter upon and remain in a retail liquor dealer's place of business was enacted for the purpose of shielding youth from temptation, and the State has power to enact the law and provide for its enforcement in disregard of the parents' wishes when its object and tendency is to protect the child; and for such purpose if necessary, if the parents are unfitted to properly rear their offspring, the State can confide the child to the keeping of another. *Goldsticker v. Ford*, 62 Tex. 385.

3. *Streeter v. People*, 69 Ill. 595; *Mugler v. Kansas*, 123 U. S. 627; bk. 31, L. ed. 205; s. c., 18 Am. & Eng. Corp. Cas. 614.

Nuisance—Abatement of.—Under what is called the police power, the legislature may authorize the abatement of a public nuisance; and the carrying on of an illegal traffic in intoxicating liquors, and the assembling of idle and vicious persons for that purpose, is a nuisance, and may be so abated. *Streeter v. People*, 69 Ill. 595.

The State may absolutely prohibit the manufacture and sale of intoxicating liquors as a beverage, and may declare places where such liquors are manufactured or sold to be a nuisance, and may authorize their abatement upon the judicial finding to that effect, and the destruction of such liquors found therein and all property used in keeping and manufacturing such nuisances, and the fining and imprisonment of their keepers, and a perpetual injunction against the same. *Mugler v. Kansas*, 123 U. S. 627; bk. 31, L. ed. 205; s. c., 18 Am. & Eng. Corp. Cas. 614.

Such a statute is valid as to such liquors lawfully manufactured before the enactment of the statute, and although it greatly deteriorates the value of property lawfully used in such manufacture before the enactment of the statute. *Mugler v. Kansas*, 123 U. S. 627; bk. 31, L. ed. 506; s. c., 18 Am. & Eng. Corp. Cas. 614.

Declaring Place of Manufacture or Sale to be a Nuisance.—A State may declare that any place maintained for the illegal manufacture and sale of liquors shall be deemed a common nuisance and abated, and at the same time provide for the indictment and trial of the offender. *Mugler v. Kansas*, 123 U. S. 623; bk. 31, L. ed. 205; s. c., 18 Am. & Eng. Corp. Cas. 614.

4. *Streeter v. People*, 69 Ill. 595; *Keller v. State*, 11 Md. 525; s. c., 69 Am. Dec. 226; *Schulherr v. Bordeaux*, 64 Miss. 59; *Rohrbacher v. Jackson*, 51 Miss. 735; *People v. Meyers*, 95 N. Y. 223; s. c., 2 N. Y. Cr. Rep. 128; *People v. Comm'rs of Police*, 59 N. Y. 92; *Board of Excise v. Barrie*, 34 N. Y. 657; *Anderson v. Brewster*, 44 Ohio St. 576; *Adler v. Whitbeck*, 44 Ohio St. 539.

License—Requiring Petition by Majority.—Thus an act which requires an application for a license to retail dealers to be supported by a petition of a majority of the male citizens over twenty-one years and a majority of the female citizens over eighteen years of age, resident within the city, district, or town where the liquor is to be sold, is not invalid on the ground that the females are not voters. *Rohrbacher v. Mayor etc. of Jackson*, 51 Miss. 735.

The power to license and to cancel licenses is vested in the legislature, and the mode and manner in which it will be done rests in the legislative discre-

It is within the power of the legislature to tax the liquor traffic,¹ wholesale as well as retail;² and an act providing for the taxing of such liquors is not a bill to raise revenue, but simply the exercise of the police powers of the State.³

5. Constitutionality of Statutes.—Statutes regulating, restricting or prohibiting the sale or traffic in intoxicating liquors, where duly drawn and properly passed, are constitutional and valid.⁴

a. DEFENSE OF UNCONSTITUTIONALITY; TO WHOM AVAILABLE.—The defence that a law regulating, restricting or prohibiting the sale or traffic in intoxicating liquors, is invalid because of certain unconstitutional provisions contained therein, is not available to one who is not within such constitutional prohibition, and whose rights are not affected or prejudiced thereby.⁵

tion. *People v. Comm'rs of Police*, 59 N. Y. 92.

A State law requiring taking out of license by those who sell their own manufacture of lager beer in small quantities is constitutional, such a law being but the exercise of the right to regulate internal police and everything that relates to the morals and health of the community. *Keller v. State*, 11 Md. 525; s. c., 69 Am. Dec. 226.

Delegating Power to License.—A statute general in its operation confining the power to license the sale of intoxicating liquors to incorporated towns and cities, where the police force is more efficiently organized and can better control it, is not an unauthorized exercise of the police power to the State in providing against the evils resulting from the liquor traffic. *Streeter v. People*, 69 Ill. 595.

"Dow Law"—Ohio Supreme Court.—The provisions of the Ohio act of May 14th, 1886, known as the "Dow Law," that upon the business of trafficking in spirituous vinous, malt, or any intoxicating liquors, there shall be assessed yearly, and shall be paid by every person engaged therein, and for each place where such business is carried on by or for such person, the sum of \$200; and if such business continues through the year exclusively in trafficking in malt or vinous liquors, or both, \$100, and that said assessment, together with any increase thereof, as penalty thereon, shall attach and operate as a lien upon the real property on and in which such business is conducted (83 L. 157), are a valid exercise of the power conferred by the constitution of the State upon the legislature to provide against the evils resulting from the traffic in intoxicating liquors; and neither the making

of the assessment, in itself, nor the making it a lien upon such real estate, constitutes a license to traffic in intoxicating liquors, within the prohibition of the constitution against granting such license. *Adler v. Whitbeck*, 44 Ohio St. 539; *Anderson v. Brewster*, 44 Ohio St. 576.

1. *Reithmiller v. People*, 44 Mich. 280; *Adler v. Whitbeck*, 44 Ohio St. 539; *Kurth v. State*, 86 Tenn. 134.

Taxation—State and County Tax.—The enactment of a statute taxing the liquor traffic does not prevent the State, in the exercise of its sovereign powers of taxation and police, from passing further laws affecting the traffic. *Reithmiller v. People*, 44 Mich. 280.

Same—Tennessee Doctrine.—The Tennessee constitution, art. 2, § 30, provides "that no article manufactured of the products of the State shall be taxed other than to pay inspection fees." Section 28 provides "that the legislature shall have power to tax privileges as they may direct." Acts Extra Sess., 1885, p. 41, provides for a tax upon wholesale and retail liquor dealers. *Held*, that the power to tax liquor dealers, and to define who constitute them, is unquestionable. *Kurth v. State*, 86 Tenn. 134.

2. *Senior v. Ratterman*, 44 Ohio St. 661.

3. *State v. Wright*, 14 Oreg. 365.

4. *Ex parte Bernside* (Ky.), 6 S. W. Rep. 276. See *ante*, 4, a. & b.

5. *Ex parte Bernside* (Ky.), 6 S. W. Rep. 276; *Stickrod v. Com.* (Ky.), 5 S. W. Rep. 580. See *Jones v. Black*, 48 Ala. 540; *Com. v. Edinger* (Ky.); 7 Ky. L. Rep. 441; *Sullivan v. Berry's Admr.*, 83 Ky. 198; 4 Am. St. Rep. 147; *Com. v. Wright*, 79 Ky. 22; *Wil-*

b. ENTITLING STATUTES; DEFECTIVE TITLE.—Many State constitutions require that the title of statutes shall correctly indicate the purpose of the law and exclude everything from its effect and operation as law which is incorporated in the body of the act, but is not within the purpose indicated by the title. These requirements are held to be mandatory. Laws which simply provide for the regulation, restriction or prohibition of the manufacture and sale of, or trafficking in, intoxicating liquors, where such object is clearly expressed in the title, are held to be valid under such a requirement. The following cases involve this question in its application to statutes regulating intoxicating liquors.¹ Such acts are not invalidated by the fact that they declare what such liquors are² or that they provide penalties for the violation as containing provisions not within the subject of the act, but where the title expresses only that the act is to regulate the sale, giving away, etc., of spirituous liquors, but the body of the act provides as well for its prohibition as for the regulation of the sale, such act is invalid.³ And where the act is entitled "An Act to regulate the manufacture and sale of liquors," but the object of the law is to prevent such manufacture and sale in counties where a majority of the electors voting at an election to be held in accordance with the provisions of the act shall vote against the same, is thought to be unconstitutional, as not being properly entitled.⁴

c. RETROSPECTIVE AND EX POST FACTO LAWS.—Retroactive and retrospective laws, while not necessarily unconstitutional, are looked upon with disfavor by the courts, and will be construed as operating only in cases or on facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended. But all *ex post facto* laws passed either by congress or by States are unconstitutional and invalid. Acts for the suppression of intemperance are not open to the objection that they are ret-

Hamson v. Carlton, 51 Me. 449; *Turnpike Co. v. County of Norfolk*, 88 Mass. (6 Allen) 353; *Dejarnett v. Haynes*, 23 Miss. 600.

Who May Object—Party Injuriouly Affected.—Thus in *ex parte Bernside* (Ky.), 6 S. W. Rep. 276, where a petitioner applied for a license to retail intoxicating liquors and was refused, it was claimed that the law was unconstitutional because it not only forbid the sale of intoxicating liquors as a beverage, but for medical and religious purposes also. The court held, that as prescriptions are not filled in barrooms, nor the communion tables supplied from such places, the petitioners' rights were not affected by this provision, and that he could not complain.

1. *Block v. State*, 60 Ala. 493; *Watson v. State*, 55 Ala. 158; *Adner v.*

State, 55 Ala. 16; *Martin v. Blattner*, 68 Iowa 256; *Santo v. State*, 2 Iowa 105; s. c., 63 Am. Dec. 487; *Werner v. Edmiston*, 24 Kan. 147; *State v. Schweitzer*, 27 Kan. 499; *Cearfoss v. State*, 42 Md. 403; *Parkinson v. State*, 14 Md. 184; s. c., 74 Am. Dec. 522; *Keefer v. Hillsdale* (Mich.), 38 N. W. Rep. 277; *In re Hauck* (Mich.), 38 N. W. Rep. 269; *Westinghausen v. People*, 44 Mich. 265; *People v. Krushaw*, 31 How. (N. Y.) Pr. 344, note; *Hall v. Commissioners*, 31 How. (N. Y.) Pr. 33, note; *In re DeVaucene*, 31 How. (N. Y.) Pr. 289; *State v. Phenline*, 16 Oreg. 109; *Albrecht v. State*, 8 Tex. App. 216; s. c., 31 Am. Rep. 737.

2. *Howell v. State*, 71 Ga. 224.

3. *Morgan v. State*, 81 Ala. 72; *Miller v. Jones*, 80 Ala. 89.

4. *In re Hauck* (Mich.), 38 N. W.

rospective in their effect, and in conflict with the constitution of the State, even though they impose a heavier penalty for a second offence of keeping liquors unlawfully.¹

d. REQUIREMENTS AS TO AMENDING STATUTES.—Under a provision common to various State constitutions that no act shall ever be revised or amended by mere reference to its title, but the act revised or amended shall be set forth and published at full length, statutes regulating the sale of intoxicating liquors have been held to be both constitutional² and unconstitutional.³

e. STATUTES PRESCRIBING REMEDY, ETC.—A prohibitory liquor law which provides that the judgment to pay fine and costs for the violation of that law, shall be a lien upon the premises where the liquors were unlawfully sold, has been held not to be a violation of that clause of the bill of rights which provides that no conviction in the statute shall work a corruption of blood or forfeiture of the estate.⁴ A cumulative penalty being in the discretion of the legislature, the liquor law is not invalid for a cumulative penalty against certain classes of offenders.⁵ In some instances, liquor laws have been held constitutional in spite of efforts to establish that their provisions violate the constitutional requirement that excessive fines shall not be imposed. In other instances, they have been held unconstitutional as violations of this or similar

Rep. 269; *Keefer v. Hillsdale* (Mich.), 38 N. W. Rep. 277.

1. *Craig v. Floranz*, 71 Iowa 761; *McLane v. Bonn*, 70 Iowa 752; *State v. Wilcox*, 66 Ind. 557 (overruling *Houser v. State*, 18 Ind. 106); *Schlict v. State*, 31 Ind. 246; *Wiles v. State*, 23 Ind. 406; *Bolduc v. Randall*, 107 Mass. 121; *State v. Hughes*, 24 Mo. 147; *Edwards v. State*, 22 Ark. 253; *Brown v. State*, 27 Tex. 335.

Increased Punishment for Second Offence. This punishment is for the violation of the law after it is passed, with the penalty in view increased from that imposed by a former statute. *State v. Woods*, 68 Me. 407. See also *McKinney v. Salem*, 77 Ind. 213.

In *McLane v. Bonn*, 70 Iowa 752, it was held that since § 12 of the Iowa laws of 1884 for the enjoining and abatement of nuisances kept in violation of the prohibitory liquor law does not prove how the nuisances shall be abated, the method of abatement defined in ch. 66 of the Iowa laws of 1886, viz.: "By seizing and destroying the liquor therein," etc., might properly be implied in cases which were pending when the latter statute was enacted, but which was not finally determined until after that time, and in such cases the objection that the law thus becomes *ex post facto* is of no force, since actions of

this character are not criminal in their nature, and the acts done in abating nuisances of this description are not done in punishment of crime.

The Ohio statute punishing "whoever sells intoxicating liquors within two miles of the place where any agricultural fair is being held" (Rev. Stat. par. 6946, amended May 2nd, 1885, § 2 L. 222), is not, when applied to a person who was engaged, before the statute, in the business of selling such liquors in the same place, in conflict with the constitution of the state, as retroactive, the power to provide against the evils resulting from the drinking of liquor being conferred by the constitution, in terms upon the legislature; nor is the law unconstitutional, as being not uniform in its operation. *Heck v. State*, 44 Ohio St. 36.

2. Missouri act of 1883 (acts 1883, p. 90) amending Missouri act of 1881 (acts 1881, p. 130), held to be constitutional. *State v. Thurston*, 92 Mo. 325.

3. Oregon act of November 25th, 1885, amending act 1876, subd. 4, § 38, held to be unconstitutional. *State v. Wright*, 14 Ore. 365. See also *McFee v. Greenfield*, 62 Ind. 21; *Cowley v. Riceville*, 60 Ind. 327.

4. *State v. Snyder*, 34 Kan. 425.

5. *State v. Duggan*, 15 R. I. 403.

provisions.¹ A liquor law which provides that no citizen of a county where a nuisance is kept in the form of a place used for the unlawful sale of intoxicating liquors, may maintain an action in equity to enjoin and abate it, without showing that he is especially damaged by such nuisance, is not repugnant to the constitution as being an attempt by the legislature to enforce a criminal law by a civil action;² but a law which seeks to confer upon the board of commissioners judicial power to hear, try and determine a complaint against the holder of a license, and to impose a penalty by revoking such license, is void because it seeks to erect a court not authorized by the constitution.³

f. DUE PROCESS OF LAW.—Laws passed for the regulation, restriction or prohibition of the sale of or trafficking in intoxicating liquors, when confined strictly to such regulation, restriction or prohibition, are not open to the objection that they are unconstitutional because they deprive individuals of their property without due process of law.⁴

1. Florida Revenue act of 1883, § 12, imposing a fine of not less than double the amount required for the license, held to be constitutional. *Frese v. State*, 2 So. Rep. 1.

Michigan liquor law of June 28th, 1887, held unconstitutional. *People v. Hauge*, 37 N. W. Rep. 21. Compare *Luton v. Palmer*, 37 N. W. Rep. 701.

Iowa statute providing as a punishment for contempt in disobeying an injunction restraining the illegal sale of intoxicating liquor, a fine of \$500, held not unconstitutional. *Jordan v. Wappello*, Circuit Court, 69 Iowa 177.

2. *Littleton v. Fritz*, 65 Iowa 488; s. c., 54 Am. Rep. 19.

3. *State v. Brown*, 19 Fla. 563.

4. *Due Process of Law.*—See *Reynolds v. Geary*, 26 Conn. 179; *State v. Allmond*, 2 Houst. (Del.) 612; *Kettering v. Jacksonville*, 50 Ill. 39; *Goddard v. Jacksonville*, 15 Ill. 588; s. c., 60 Am. Dec. 773; *Thomasson v. State*, 15 Ind. 449; *Bepley v. State*, 4 Ind. 264; s. c., 58 Am. Dec. 628; *Santo v. State*, 2 Iowa 165; s. c., 63 Am. Dec. 487; *Anderson v. Com.*, 13 Bush. (Ky.) 485; *State v. Gurney*, 37 Me. 156; s. c., 58 Am. Dec. 782; *Preston v. Drew*, 33 Me. 558; s. c., 54 Am. Dec. 639; *State v. Strauss*, 49 Md. 288; *Bode v. State*, 7 Gill (Md.) 326; *Com. v. Howe*, 79 Mass. (13 Gray) 26; *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381; *Com. v. Kimball*, 41 Mass. (24 Pick.) 359; s. c., 35 Am. Dec. 326; *People v. Gallagher*, 4 Mich. 244; *People v. Hawley*, 3 Mich. 330; *Rohrbacher v. Jackson*, 51 Miss. 735; *Bertholf*

v. O. Reilly, 74 N. Y. 509, 520; s. c., 30 Am. Rep. 323; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *State v. Joyner*, 81 N. C. 534; *Miller v. State*, 3 Ohio St. 475, 486; *Johnson v. State*, 3 Lea (Tenn.) 469; *Lincoln v. Smith*, 27 Vt. 328; *Bancroft v. Dumas*, 21 Vt. 456; *License Cases*, 46 U. S. (5 How.) 504; bk. 12, L. ed. 256; *Bartemeyer v. Iowa*, 85 U. S. (18 Wall.) 129; bk. 21, L. ed. 929.

In the case of *Bartemeyer v. Iowa*, 85 U. S. (18 Wall) 129, counsel for the plaintiff in error contended that the law of Iowa prohibiting the sale of intoxicating liquors was in conflict with the provisions of that amendment to the constitution of the United States. The court, however, decided that the right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States which, by that amendment, the States were forbidden to abridge. It was attempted in that case to present the question, whether in case a person who was the owner of liquor in a State at the time when such a statute went into effect was absolutely prohibited from selling or disposing of it, such law would be in conflict with the provision of that amendment which forbids the State to deprive any person of life, liberty or property without due course of law. The question was admitted by the majority of the court to be a grave one, but it was not passed upon by them, because it did not properly arise in a case before the court. MR. JUSTICE FIELD, who delivered a concurring

opinion, said in reference to this question: "I have no doubt of the power of the State to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it, nor dispose of it, nor enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation, by any State, the fourteenth amendment affords protection."

One indicted under a statute for being a common seller of intoxicating liquors, cannot except to a refusal of the presiding judge to rule that, if that statute provides for a trial contrary to the course and usage of the common law, it is unconstitutional, and no verdict should be found under it. *Com. v. Rock*, 77 Mass. (10 Gray) 4.

Granting License—Requiring Written Contract.—Section 1419 of the Georgia Code as amended by the act of October 16th, 1885, providing that no license to retail spirituous liquors shall be granted, except in incorporated cities and towns, unless with the written consent of ten of the nearest *bona fide* residents, five of whom shall be freeholders, etc., is not in contravention of the fourteenth amendment to the federal constitution, because the decision of the court of county commissioners and of the ordinary in counties where no such courts exist is made final and conclusive, it being within the power of the State to authorize the issuing of license to sell intoxicating liquors and to determine the conditions upon which the person to whom and by what officials the license may be granted. *United States v. Ronan*, 33 Fed. Rep. 117.

Restricting Sale as to Place—Near Soldiers' Home.—The Michigan act of March 17th, 1887, making it unlawful to maintain a place in which intoxicating liquors are sold within one mile of the soldiers' home is not in conflict with Const. art. 6, § 52, declaring that no one shall be deprived of life, liberty or property without due process of law, or with Const. U. S., amend. 14, providing that no State shall make any law abridging the privileges or immunities of citizens, or deny to any person the equal protection of the law, and the same is true when said act prohibits the sale of intoxicating liquors in

buildings erected and occupied for such purposes before the establishment of said soldiers' home or the passage of said law. *Whitney v. Township Board*, (Mich.) 39 N. W. Rep. 40.

Prohibiting Manufacture.—Thus it has been said that statutes which make it unlawful for a citizen to distil his grain into spirituous or intoxicating liquor unless employed by the governor to do so, under such rules and regulations as he may prescribe is not unconstitutional, because it does not deprive the citizen of his property without due course of law, nor transfer legislative power to the governor. *Ingram v. State*, 39 Ala. 247; s. c., 84 Am. Dec. 782. See *Santo v. State*, 2 Iowa 165; s. c., 63 Am. Dec. 487.

But it has been held in Indiana that the right to manufacture and sell intoxicating liquor is protected by the State constitution, and that an act of the legislature prohibiting it is unconstitutional and void. See *Beebe v. State*, 6 Ind. 501; s. c., 63 Am. Dec. 391.

Taxing Business.—A statute imposing a tax upon the business of trafficking in intoxicating liquors, may provide for its collection by the treasurer of the county as other taxes are collected; may impose penalties for its nonpayment, and for the refusal engaged in the business on demand of the accessory to sign and verify the statement of certain return required by the statute. And for any injury done him in his property, such provisions do not deprive the citizen of the due course of law secured to him by section 16 of the Ohio bill of rights; nor are they inhibited by the fourteenth amendment of the constitution of the United States as a deprivation of property without due process of law. *Adler v. Whitbeck*, 44 Ohio St. 539; *Anderson v. Brewster*, 44 Ohio 576; s. c., 7 W. Rep. 210.

Requiring Removal of Curtains, Screens, etc.—A statute requiring that at times, when places where liquor is sold must be kept closed, curtains, screens, etc., obstructing the view from the street, etc., shall be removed, does not conflict with the fourteenth amendment to the federal constitution, providing that no person shall be deprived of life, liberty or property without due process of law. *Robinson v. Haug* (Mich.), s. c., 38 N. W. Rep. 668; *State v. Doyle*, 15 R. I. 325.

Same—Preventing Sale on Sunday.—Ch. 492 of April 23rd, 1885 (R. I. Pub.

But those liquor laws which are so framed as to submit one to the will of his neighbor are unconstitutional, because repugnant to the provisions of the constitution for a protection of liberty and property.¹ Thus, a law which authorizes officers to close up places for the sale of liquor, found open on certain days and at certain hours in violation of the law, and to arrest the offender without a warrant is in violation of the constitutional provision prohibiting interference with persons or property without due process of law and the issuance of warrants unsupported by oath.² And a statute authorizing imposition of a fine with alternative of imprisonment, in case of nonpayment against an owner of intoxicating liquors, is unconstitutional if it does not provide for an indictment, information or complaint in which a specific offence is charged against him so that it can be put upon record and traversed, or an issue joined thereon and tried in due course of the law.³

g. RIGHT TO TRIAL BY JURY.—In all criminal matters, the right of the defendant to a trial by a jury of his peers is of ancient standing,⁴ and is secured by the constitution of the United States,⁵ and by most, if not all, of the State constitutions. Yet

Laws, designed to prevent sales of liquor on Sunday by licensed dealers, which requires only those obstructions to be removed that may prevent a clear view of the interior, through the window, of the premises by the passer by, is not unconstitutional because it does not define what constitutes an obstruction within the meaning of the act. *State v. Doyle*. 15 R. I. 325.

Revoking License.—A statute which makes it the duty of the mayor and council to revoke the license upon conviction of the licensee of any violation of any law, pertaining to the sale of liquors, is not unconstitutional as taking property without due process of law, because a license is subject to the control of the government, and lacks the essential elements of a vested right or property. *Martin v. State*, 23 Neb. 371.

1. *People v. Haug* (Mich.), 37 N. W. Rep. 21; *Wynehamer v. People*, 13 N. Y. 378; *People v. Toynbee*, 20 Barb. (N. Y.) 168; s. c., 2 Park. Cr. Cas. (N. Y.), 329; 11 How. (N. Y.) Pr. 289; *People v. Quant*, 2 Park. Cr. Cas. (N. Y.) 410; s. c., 12 How. (N. Y.) Pr. 83.

Thus, the provisions of a law leaving it discretionary with a municipal board to deprive a person of the right of selling, and thus provide judgment as to his unfitness, is unconstitutional. *People ex rel.*; *Robison v. Miner* (Mich.), 37 N. W. Rep. 21.

Certain portions of §§ 1, 6, 7, 10, 12, 16, 17 and 25 of the act to prevent intemperance, pauperism and crime (N. Y. Laws, 1855, p. 340, ch. 231, which was repealed by 2 L. 1857, p. 416, ch. 528, § 33) held repugnant to the provisions of the constitution for the protection of liberty and property *People v. Toynbee*, 20 Barb. (N. Y.) 168; s. c., 2 Park. Cr. Cas. (N. Y.) 329; 11 How. (N. Y.) Pr. 289; *People v. Quant*, 2 Park. Cr. Cas. (N. Y.) 410; s. c., 12 How. (N. Y.) Pr. 83; *Wynehamer v. People*, 13 N. Y. 378.

2. *Baldwin v. State*, 82 Ill. 162; *People v. Haug* (Mich.), 37 N. W. Rep. 21.

Closing Saloons by Force.—Any ordinance of law which authorizes the authorities of a town to close a saloon or grocery by force, without having it first judicially declared a nuisance, and ordered to be abated, is unconstitutional. *Baldwin v. State*, 82 Ill. 162.

3. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

4. Magna Charta—Provisions in.—This right constitutes one of the fundamental articles of Magna Charta, in which it is declared, "*nullus homo capiat, nec imprisonetur, aut exulet, aut aliquo modo destruator, etc.; nisi per legale iudicium parium suorum, vel per legem terræ.*"

5. **The constitutional guarantee of a right of trial by jury in the federal**

it has been held that a statute declaring a building, where unlawful sales of intoxicating liquors are made, a public nuisance, and allowing any citizen of the county to maintain a bill for an injunction, is not unconstitutional as violating this right of trial by jury.¹ An act requiring the forfeiture of license where place is unlawfully kept, is not unconstitutional because it gives to the district court power to condemn prohibited liquors, whatever their value may be;² and an act providing for the cancellation by a board of excise, of licenses granted for the sale of intoxicating liquors, is not in contravention of the constitutional provision preserving the right of trial by jury, because the power to license and to cancel license is vested in the legislature, and the mode and manner in which it shall be done rests in its discretion.³ But a statute allowing a person to be convicted before a justice by a jury of six persons, for selling liquor without a license has been held to contravene the constitutional guaranty that "trial by jury shall be as heretofore."⁴

h. NOTICE—RIGHT TO BE INFORMED AS TO NATURE, ETC., OF ACTION.—It is a well established principle that every defendant is entitled to a notice of the nature of the action pending against him, which may affect the privileges or property. A license

constitution is restricted to the federal courts, and the States may, if they choose, provide for the trial of all offences against the State, as well as for the trial of civil causes in such courts, without the intervention of a jury or by a jury differing from that known as the common law jury. See *Hurtado v. California*, 110 U. S. 516, 533; bk. 28, L. ed. 232; *Munn v. Illinois*, 94 U. S. (4 Otto) 113; bk. 24, L. ed. 77; *Walker v. Sauvinet*, 92 U. S. (2 Otto) 90; bk. 23, L. ed. 678; *Edwards v. Elliott*, 88 U. S. (21 Wall.) 532; bk. 22, L. ed. 487; *Justices v. Murray*, 76 U. S. (9 Wall.) 274; bk. 19, L. ed. 658; *Twitchell v. Com.*, 74 U. S. (7 Wall.) 321; bk. 19, L. ed. 223.

Right to Trial by Jury—Privilege or Immunity.—The court say in *Hurtado v. California*, 110 U. S. 516, 533, bk. 28, L. ed. 232, that "a trial by jury, in suits at common law pending in State courts, is not therefore a privilege or immunity of national citizenship which the States are forbidden by the fourteenth amendment to abridge. A State cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trial from the State courts, effecting the property of persons, must be by jury; this requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. 'Due process of law' is process according to

the law of the land; this process in the State court is regulated by the law of the State." That a jury trial is not essential "to due process of law," see full discussion, 2 *Hare Am. Const. L.* 858, 864.

1. *Littleton v. Fritz*, 65 Iowa 488; s. c., 54 Am. Rep. 19.

Nuisance—Criminal Character—Effect on Abatement.—The court say, in the case of *Littleton v. Fritz*, 65 Iowa 488; s. c., 54 Am. Rep. 19, that the fact that a nuisance is a crime and punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction. See *Minke v. Hopeman*, 87 Ill. 450; s. c., 29 Am. Rep. 63; *People v. St. Louis*, 10 Ill. (5 Gilm.) 351; s. c., 48 Am. Dec. 339; *Attorney General v. Hunter*, 1 Dev. (N. C.) Eq. 12. See also *Richards v. Holt*, 61 Iowa 529; *Faucher v. Grass*, 60 Iowa 505; *Shiras v. Olinger*, 50 Iowa 571; s. c., 32 Am. Rep. 138; *Ewell v. Greenwood*, 26 Iowa 377; *State v. Iron Cliffs Co.*, 54 Mich. 350; *Catlin v. Valentine*, 9 Paige Ch. (N. Y.) 575; s. c., 38 Am. Dec. 507.

2 The reason for this is because the right of trial by jury is not invaded; the act reserving the right of appeal to the court of common pleas. *State v. Fitzpatrick* (R. I.), 11 Atl. Rep. 773.

3. *People v. Board of Commissioners*, 59 N. Y. 92.

4. *Com. v. Saal*, 10 Phila. (Pa) 496.

law which requires notice to a defendant and trial is not open to the constitutional objection that it authorizes a forfeiture or destruction of property without notifying the defendant or without trial, and as a penalty for crime which need not be proved.¹ But a statute concerning the manufacture and sale of spirituous and intoxicating liquors, which does not require the name of any person keeping or depositing the liquors with intent to sell, to be named in the complaint or in the search warrants for the liquors, is void.² And a statute which authorizes imposition of a fine, with alternative of imprisonment in case of nonpayment, against the owner of intoxicating liquors, is unconstitutional if it does not provide for an indictment, information or complaint in which a specific offence is charged against him, so that it can be put on record and traversed, or an issue joined thereon and tried in due course of law.³

2. STATUTES RELATING TO EVIDENCE; PRESUMPTIONS, ETC.

—Liquor laws providing that proof of finding the liquor named in the statute in the possession of the accused, in any place except his private dwelling house or its dependencies shall be received and acted upon as presumptive evidence that such liquor was kept or held for sale contrary to the provisions of the act, is not unconstitutional on the ground that it presumes the guilt of the accused;⁴ and a statute providing that the notorious character of the building, place or tenement, shall be evidence that such premises are nuisances within the meaning of the stat-

1. *Santo v. State*, 2 Iowa 165; s. c., 63 Am. Dec. 487; see *State v. Kane*, 15 R. I. 395.

In furtherance of the fifth amendment to the R. I. const., Pub. Laws R. I., ch. 596, were passed. Section 1 prohibits the manufacture, etc., of any intoxicating liquor, to be used as a beverage, for the purpose of sale and delivery within the State, etc. Section 15 gives the form for a complaint, omitting "and delivery," but alleging the keeping to be "without lawful authority" and "against the statute." *Held*, this complaint unmistakably informs the defendant of the nature and cause of the accusation, and meets the requirements of art. 1, § 10, of the State constitution. "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." *State v. Kane*, 15 R. I. 395.

Act May 27th, 1886, § 15, prohibiting sales of intoxicating liquors, is not repugnant to State const., art. 1, § 10, which declares that in all criminal prosecutions the accused shall be informed of the nature and cause of the

accusation. The general assembly had power before the amendment, not only to prohibit the sale of intoxicating liquors for a beverage, but also to restrict and regulate their sale for other purposes. *State v. Kane*, 15 R. I. 395.

2. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

The court say that § 14, Mass. St., 1852, ch. 322, concerning the manufacture and sale of spirituous and intoxicating liquors, violates the provisions of the declaration of rights, in that it provides for the destruction of private property, and the punishment of its owner or keeper, without his being duly charged with any offence or being summoned, unless known to the officer to appear before the magistrate, and without giving him opportunity to defend and meet the witnesses against him face to face, and providing for local proof and trial of the offence of keeping the liquors with intent to sell. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

3. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

4. *Santo v. State*, 2 Iowa 165; s. c.,

ute defining common nuisances, and that it shall not be necessary to prove an actual sale of intoxicating liquors therein, does not conflict with the constitutional provision securing to citizens the right to be confronted with witnesses.¹ A statute which imposes a penalty for keeping a place in which it is reputed that intoxicating liquors are kept for sale is not unconstitutional.² The statute treats such a reputation, where clearly established, as decisive evidence that liquors are in fact kept there for sale, but the defendant is at liberty to show that the reputation is unfounded.³ And a law providing that where a person is seen to drink intoxicating liquors on the premises of one who has simply a license to sell liquors, not to be drunk on his premises, it shall be *prima facie* evidence that the liquor was sold by the occupant or his agent with the intent that the same shall be drunk thereon, does not violate the constitutional guarantee of due process of law or trial by a jury.⁴ And a statute providing that "no allegations of any kind need be averred or proved in any complaint" under a law forbidding the sale of liquors, has been held not to violate any constitutional right of the accused.⁵

But a liquor law is unconstitutional which throws the burden of proof on the owner of liquors, and authorizes forfeiture in

63 Am. Dec. 487; *State v. Higgins*, 13 R. I. 330; s. c., 43 Am. Rep. 26, and note.

1. *State v. Waldron* (R. I.), 14 Atl. Rep. 847; s. c., 23 Am. & Eng. Corp. Cas. 288; *State v. Wilson* (R. I.), 1 New Eng. Rep. 888.

The reason for this seems to be that it is the fact that the reputation exists which is put in proof and the persons testifying as to this fact are the witnesses and not the people whose utterances created the reputation. *State v. Waldon* (R. I.), 14 Atl. Rep. 847; s. c., 23 Am. & Eng. Corp. Cas. 288.

In R. I. Pub. Stat., ch. 80, § 3, providing the character of the premises shall be evidence of sale of intoxicating liquors, "character" is synonymous with "reputation." *State v. Wilson* (R. I.), 1 New Eng. Rep. 888.

Right to be Confronted with Witnesses.—It is a well established principle of law that in criminal cases, as a general rule, the testimony of the people can be given only by witnesses who are present in court. See *State v. Thomas*, 64 N. Car. 74; *Goodman v. State*, Meigs (Tenn.) 197; *Jackson v. Com.* 19 Gratt. (Va.) 656.

Same — Documentary Evidence.—While the defendant is entitled to be confronted with the witnesses against him (see authorities last cited, and also

Johns v. State, 55 Md. 350; *Bell v. State*, 2 Tex. App. 216; s. c., 28 Am. Rep. 429), yet this rule does not preclude such documentary evidence to establish collateral facts as would be admissible under the rules in common law in other cases. *People v. Jones*, 24 Mich. 215; *U. S. v. Benner*, Bald. C. C. 234; *U. S. v. Ortega*, 4 Wash. C. C. 531; *U. S. v. Little*, 2 Wash. C. C. 159.

2. See *State v. Wilson* (R. I.), 1 N. Eng. Rep. 888.

3. *State v. Thomas*, 47 Conn. 546; s. c., 36 Am. Rep. 98.

4. *Auburn v. Merchant* (N. Y.), 14 Cent. Rep. 354; *Commrs. of Excise of Auburn v. Merchant*, 103 N. Y. 143; s. c., 57 Am. Rep. 705; *Com. v. Wallace*, 73 Mass. (7 Gray) 222.

The provision of Stat. 1855, ch. 215, § 34, that, in prosecutions for the sale spirituous and intoxicating liquors, delivery in or from any building or place, other than a dwelling house, "shall be deemed *prima facie* evidence of a sale, and be punishable as such sale," is constitutional, and applies to all cases of such prosecutions; but the presumption is liable to be rebutted by attending circumstances, or other facts. *Com. v. Wallace*, 73 Mass. (7 Gray) 222.

5. *State v. Beswick*, 13 R. I. 211; s. c., 43 Am. Rep. 26.

absence of any evidence against him or his property, or which does not provide for the framing of an issue upon the question and a trial in due course of law.¹

j. **SEARCH AND SEIZURE.**—A statute which authorizes an officer to seize intoxicating liquors under certain conditions, without a warrant, but which does not purport to confer the power of search, is constitutional.² Under such an act it is immaterial whether complaint is made before or after the seizure.³ And a statute authorizing a search warrant for intoxicating liquors is not unconstitutional on the ground that it does not require a particular description of the place to be searched or of the property to be seized, when it requires the place, person and property to be described "as particularly as may be."⁴ But a liquor law

1. *Santo v. State*, 2 Iowa 165; s. c., 63 Am. Dec. 519; *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

Forfeiture of License.—A statute authorizing forfeiture of intoxicating liquors seized by an officer unless the owner can prove that they were lawfully kept, is unconstitutional in that it violates article 12 of the Massachusetts declaration of rights, declaring that no "subject shall be arrested or deprived of his property, immunities or privileges, or of his life, liberty or estate, but by judgment of his peers, or the law of the land," because it throws the burden of proof upon the owner, and authorizes the forfeiture of his property in the absence of any evidence against him or it. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

2. *State v. Intoxicating Liquors*, 58 Vt. 594; *State v. O'Neil*, 58 Vt. 140; s. c., 56 Am. Rep. 556. See *Gill v. Parker*, 31 Vt. 610; *State v. Comstock*, 27 Vt. 553; *State v. Conlin*, 27 Vt. 318, 325, 327; *Spalding v. Preston*, 21 Vt. 9; s. c., 50 Am. Dec. 68.

3. *State v. Intoxicating Liquors*, 58 Vt. 594.

4. *Santo v. State*, 2 Iowa 165; s. c., 63 Am. Dec. 487. See *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

Fourteenth section of Massachusetts statutes of 1852, concerning manufacture and sale of spirituous or intoxicating liquors, is in conflict with the fourteenth article of the declaration of rights contained in the constitution of that State, declaring that every subject has a right "to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all

his possessions," because the statute, while it authorizes the issuing of a warrant to search dwelling houses for spirituous or intoxicating liquors, does not require the warrant nor the complaint therefor to state that such liquors are kept by the person named, nor does the statute limit the officer's right of seizure to articles described by quantity, quality or marks, or restrict his power of seizure to liquors kept for sale. The statute is further objectionable because, on complaint being made that any such liquors are kept in any store, warehouse, or other place for sale, a warrant must issue for the seizure and removal of all liquors therein, whether kept for sale there or not. The statute was also *held* to be repugnant to other provisions of the fundamental law of the statute. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

Proceedings in Rhode Island for the seizure of liquors unlawfully kept are not subject to articles 4-7, in amendment of the federal constitution, these articles being limited to their operation to the government of the United States. *State v. Fitzpatrick* (R. I.), 11 Atl. 773.

Requiring Removal of Screens, etc.—Michigan act, 1887, No. 313. § 31, requiring that at times, when places where liquor is sold must be kept closed, curtains, screens, etc., obstructing the view from the street, etc., shall be removed, does not conflict with Const., art. 6, § 26, providing that the persons, houses, papers, and possessions of every person, shall be secure from unreasonable searches and seizures. *Robison v. Haug* (Mich.), 38 N. W. Rep. 668.

in conflict with constitutional prohibition, concerning unreasonable search and seizure, is invalid.¹

k. PROPERTY RIGHTS GENERALLY—COMPENSATION.—It has recently been held by the Supreme Court of the United States, that a State has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sales and traffic in them in said State; to inflict penalties for such manufacture and sale; and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes; and that such legislation by a State is a clear exercise of her undisputed police power which does not abridge the privileges or immunities of the citizens of the United States, nor deprive any person of property without due process of law, nor in any way contravene any provision of the fourteenth amendment of the constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."² While it is undoubtedly true that the State, when providing by legislation for the protection of the public health, the public morals or the public safety is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or granted by that instrument, or interfere with the execution of the powers confided to the general government,³ yet it belongs to the legislative department to exert what are known as the police powers of the State, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health or the public safety, subject to the power of the courts to adjudge whether any particular law is an invasion of the rights secured by the constitution.⁴ A State government does not interfere with nor impair anyone's constitutional rights of liberty or of property, where it determines that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are

1. See *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

Thus, § 14, Mass. Stat. 1852, ch. 322, concerning the manufacture and sale of spirituous and intoxicating liquor, violates the declaration of rights, because it does not limit the officer's authority and right of seizure to the liquors described in the complaint nor to those intended for sale, but directs him to seize any liquors found in the place described in the complaint. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

2. See *Mugler v. Kansas*, 123 U. S. 623, 664; bk. 31, L. ed. 205; s. c., 18 Am. & Eng. Corp. Cas. 614; *Kidd v. Pear-*

son, 128 U. S. 1; s. c., 23 Am. & Eng. Corp. Cas. 221. See also *Pearson v. International Distillery*, 72 Iowa 348.

3. See *Morgan Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; bk. 30, L. ed. 237; *Yick Wo v. Hopkins*, 118 U. S. 356; bk. 30, L. ed. 220; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; bk. 29, L. ed. 516; *Walling v. Michigan*, 116 U. S. 446; bk. 29, L. ed. 691; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. (5 Otto) 465; bk. 24, L. ed. 527; *Henderson v. Mayor of New York*, 92 U. S. (2 Otto) 259; bk. 23, L. ed. 543.

4. *Mugler v. Kansas*, 123 U. S. 623, 664; bk. 31, L. ed. 205.

or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage.¹

1. REGULATION OF COMMERCE.—Congress has the absolute power to regulate commerce between the States and foreign countries, but where congress fails to make any regulation on the subject, it is thought that the traffic in an article may be lawfully regulated by the State, as soon as it is landed in its territory, and a tax imposed upon it or a license required, or its sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue.²

If the effect of a State law, enacted without previously obtaining the consent of congress for the purpose of protecting the people of the State against the evils of intemperance, is to regulate interstate commerce, it is unconstitutional.³

1. *Kidd v. Pearson*, 128 U. S. 1; bk. 32, L. ed. 346; *Mugler v. Kansas*, 123 U. S. 623, 664; bk. 31, L. ed. 205. See *La Croix v. Fairfield Co. Commrs.*, 50 Conn. 321; s. c., 47 Am. Rep. 648; *McLean v. Leicht*, 69 Iowa 401; *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381; *Hall v. Commrs. of Excise*, 31 How. (N. Y.) Pr. 331, note; *In re De Vaucene*, 31 How. (N. Y.) Pr. 289; *People v. Krushaw*, 31 How. (N. Y.) Pr. 344, note; *Anderson v. Brewster*, 44 Ohio St. 576; *Adler v. Whitbeck*, 44 Ohio St. 539.

"Dow Liquor Law."—What is known as the Dow liquor law, it has been said, does not in its application to persons, who for a time long prior to its enactment have been engaged in trafficking in intoxicating liquors, and have had a large amount of property invested in the business impair their vested rights. *Adler v. Whitbeck*, 44 Ohio St. 539. The same court say in another case that this law creating a lien upon realty upon which a saloon is established for the amount of the license imposed by the statute, is not in violation of the section of the State constitution which declares that private property shall be held invalid. *Anderson v. Brewster*, 44 Ohio St. 586.

A statute authorizing seizure and forfeiture of intoxicating liquors has been said not to be obnoxious of that part of the constitution prohibiting the taking of private property for public use without making compensation therefor; because if such intoxicating liquor can be rightfully taken at all, is on the ground that they are illegally kept and constitute a *de facto* nuisance, in which case their owner is not entitled to any compensa-

tion. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; s. c., 61 Am. Dec. 381.

A statute providing for the revocation of a license granted for the sale of intoxicating liquors and revocable in terms, is not unconstitutional as impairing the obligation of contracts, or taking away property rights, without compensation and due process of law. *La Croix v. Fairfield Co. Commrs.*, 50 Conn. 321; s. c., 47 Am. Rep. 648.

2. License Cases, 46 U. S. (5 How.) 504; bk. 12, L. ed. 256.

A State law cannot prohibit the introduction of imported liquors into the State and their sale in the original cask or package, because this would be to prohibit what congress, in its regulation of commerce, permitted. *State v. Allmond*, 2 Houst. (Del.) 612, 635; *State v. Robinson*, 49 Me. 285; *Bradford v. Stevens*, 76 Mass. (10 Gray) 379, 381; *Lincoln v. Smith*, 27 Vt. 328, 335; License Cases, 46 U. S. (5 How.) 504; bk. 12, L. ed. 256; *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419; bk. 6, L. ed. 678.

In the License Cases, 46 U. S. (5 How.) 504; bk. 12, L. ed. 256, the court say that "if the State law in question came in collision with those acts of congress, and prevented or obstructed the importation of sale of this article by the importer in the original cask or vessel in which they were imported, it would be the duty of this court to declare them void. . . . These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it is passed the line of foreign commerce and become a part of the general mass of property in the State."

3. *Bowman v. Chicago & N. W. R.*

A State legislature may properly prohibit the manufacture of intoxicating liquors in such State, and the fact that the statute fails to distinguish between sales within and those without the State, or that the manufacturer intends, at his convenience, to export the liquor so manufactured to foreign states or countries, will not render the act obnoxious to the objection that it is a regulation of interstate commerce.¹

A statute prohibiting any person from being a retailer or seller of spirituous liquors within the State, in less quantity than twenty-eight gallons, is not repugnant to that clause of the federal constitution which gives to the general government the power to regulate commerce with foreign powers and amongst

Co., 125 U. S. 465; bk. 31, L. ed. 700; s. c., 23 Am. & Eng. Corp. Cas. 236.

Prohibiting Importation of Intoxicating Liquors.—Thus a statute which in effect forbids common carriers to bring intoxicating liquors into the State from any other State or territory, without first having been furnished with a certificate under the seal of the auditor of the county, to which it is to be transported, certifying that the consignee is authorized to sell intoxicating liquors in the county, is in conflict with the provisions of the federal constitution prohibiting State legislation regulating interstate commerce. *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465; bk. 31, L. ed. 700; s. c., 23 Am. & Eng. Corp. Cas. 236.

1. *Pearson v. International Distillery*, 72 Iowa 348; *State v. Stucker*, 58 Iowa 469; *State v. Fitzpatrick* (R. I.) 11 Atl. Rep. 767; *Kidd v. Pearson*, 128 U. S. 1; bk. 32, L. ed. 346; s. c., 23 Am. & Eng. Corp. Cas. 221.

The application of a statute allowing purchasers of intoxicating liquors, illegally sold, to recover the purchase money by action, to a case where the vendor is a resident of another State, is not a violation of the constitution of the United States as regulating or restraining commerce between the States. *Connolly v. Scarr*, 72 Iowa 223.

Discrimination—Home Products—Unconstitutionality of Statute—Severance.—In the case of *State v. Marsh*, 37 Ark. 356, it was held that the first section of the Arkansas act of March 6th, 1879, regulating the sale of liquor in that State, is not in any proviso in conflict with the constitution of the United States, but that section fifteen of the act is, as it reads, in conflict with that provision of the constitution which em-

powers congress to regulate commerce with foreign nations and between the States; because it undertakes to discriminate in favor of wines made of the products of that State, and against those of other States; that the legislature has no power to make such discrimination; but that the constitutional part of the section being separable from the unconstitutional, the latter will be treated by the courts as stricken out, and the section read without the discriminating provision.

Same—Statutory Construction—Georgia Act.—In the case of *ex parte Kinnebrew*, 35 Fed. Rep. 52, JUDGE PARDEE held that the Georgia local option act of September 18th, 1885, which, after prohibiting the sale of intoxicating liquor, provides "that nothing in this act shall be so construed as to prevent the manufacture, sale and use of domestic wines or cider," etc., in excepting domestic wines from the prohibition it must be taken as also excepting other wines, and so construed, is not in violation of the federal constitution which gives to congress the power to regulate interstate commerce.

Same—Ohio Law.—In the case of *McGuire v. State*, 42 Ohio St. 580, it was held that the Ohio statute, providing that certain provisions therein shall "not extend to the sale of wine manufactured from the pure juice of the cultivated grape, within this State," was held not to be in violation of the exclusively national control of interstate commerce.

Same—Iowa Statute.—But in the case of *State v. Stucker*, 58 Iowa 496, the supreme court of Iowa held that it is incompetent to except from the general prohibition of the sale of wines of those made from fruit grown within the State. This, however, does not seem to be in

the several States;¹ neither is a law limiting to the citizens of the State license to sell intoxicating liquors.²

m. ILLEGAL DISCRIMINATION—(1) *Against Other States*.—It has been held that the State, as a police regulation, may prohibit the sale of one kind of intoxicating liquor, and allow the sale of another kind, and that the prohibition of wines made from fruit grown in other States is not unconstitutional as being an invasion of the privileges and immunities of the citizens of another State;³ but the better opinion seems to be that any law which discriminates against imported wines manufactured from grapes raised in any of the other States, or in foreign countries, and in favor of wines manufactured from grapes raised in the State is in violation of the constitution of the United States, and void.⁴ Where a law regulating the sale of liquors thus discriminates against foreign wines and is therefore unconstitutional if the unconstitutional part can be separated from that which is valid, such invalid part will be treated by the courts as stricken out, and the law read without the discriminating provision.⁵

Where a statute purports to make the sale of domestic wine lawful and that of wine imported from other States unlawful, the sale of domestic wines cannot be deemed unlawful because the discrimination is unconstitutional.⁶

A liquor law is not unconstitutional because it permits license to sell, to be issued only to residents of the State.⁷

(2) *Against Particular Persons or Liquors*.—A statute regulating the sale of intoxicating liquors, which prohibits, restricts or

harmony with *Tiernan v. Rinker*, 102 U. S. (12 Otto) 123.

1. *Com. v. Kimball*, 41 Mass. (24 Pick.) 359; s. c., 35 Am. Dec. 326.

2. *Cohn v. Mulcher*, 29 Fed. Rep. 433.

3. *State v. Stucker*, 58 Iowa 496; U. S. Const. 4, § 2. See *Powell v. State*, 69 Ala. 10; *McGuire v. State*, 42 Ohio St. 530; *Tiernan v. Rinker*, 102 U. S. (12 Otto) 123; bk. 26, L. ed. 103; *Cohn v. Melcher*, 29 Fed. Rep. 433.

4. *McCreary v. State*, 73 Ala. 480. See *Vines v. State*, 67 Ala. 73; *State v. Marsh*, 37 Ark. 356; *Welton v. Missouri*, 91 U. S. (1 Otto) 275; bk. 23, L. ed. 347; *Ex parte Kennebrew*, 35 Fed. Rep. 52.

It is said in *Powell v. State*, 69 Ala. 10: "Where an act of the legislature, prohibiting the sale or other disposition of any vinous, spirituous or malt liquors, under a penalty, contains a proviso exempting from the prohibition of the act the sale of domestic wines manufactured from grapes grown in this State, a discrimination is thereby made against wines made from grapes grown in other States, but not against foreign spiritu-

ous or malt liquors. And while it may be, that this legislative discrimination is invalid so far as concerns wines imported from other States, under the principle decided in *Welton v. Missouri*, 91 U. S. 275, and followed by this court in *Vines v. The State*, 67 Ala. 73—a point not decided—the rest of the law would be unaffected thereby, and would stand.

5. *State v. Marsh*, 37 Ark. 356. See *Ex parte Kinnebrew*, 35 Fed. Rep. 52.

6. *State v. Nash*, 97 N. C. 514.

7. *Mette v. McGuckin*, 18 Neb. 323; *Cohn v. Melcher*, 29 Fed. Rep. 433.

Thus it is said that sections 1523 and 1526 of the Iowa Code limiting the giving of license to certain classes of citizens of Iowa to buy and sell liquors for mechanical, medicinal, culinary and sacramental purposes only, do not abridge the privileges or immunities of the citizens of the United States, since the purpose and effect of the act is made a safeguard against the unlawful selling of all liquors, and not to discriminate against other citizens of other States. *Kohn v. Melcher*, 29 Fed. Rep. 433.

confines to designated individuals the sale of intoxicants in a particular district, is valid as an exercise of the police power of the State.¹ A statute taxing the business of selling liquor is not unconstitutional because not general and uniform in its operation in that it does not include manufacturers, or manufacturers selling in quantities of one gallon or more at a time.²

(3) *Against Particular Localities; Local and Special Laws.*—

It is competent for the legislature to pass a general law prohibiting the sale of intoxicating liquors, and the fact that such inhibition is confined to certain localities, though widely separate, does not render it unconstitutional;³ and such a statute is not unconstitutional for the reason that its application is limited and not general.⁴ Where an act of the legislature prohibits the sale of liquor in a particular locality, it is not essential to the validity of the act that the locality should be defined by the ordinance of the city, town or civil district.⁵

1. See *Meyers v. Baker*, 120 Ill. 567; s. c., 60 Am. Rep. 580; *Intoxicating Liquor Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284; *Sarrls v. Com.*, 83 Ky. 327; *Stickrod v. Com. (Ky.)*, 5 S. W. Rep. 580; *Keefer v. Hillsdale (Mich.)*, 38 N. W. Rep. 277; *In re Hauck (Mich.)*, 38 N. W. Rep. 269; *Adler v. Whitbeck*, 44 Ohio St. 539; *State v. Duggan*, 15 R. I. 403.

In *Cramer v. Marx*, 64 Pa. St. 151, it is said that a statute prohibiting the sale, etc., "of any kind of articles of traffic, spirituous liquors, etc.," only applies to the sale of spirituous liquors; that this application to all articles of traffic would be unconstitutional.

2. *Adler v. Whitbeck*, 44 Ohio St. 539. See *Senior v. Ratterman*, 44 Ohio St. 661.

3. *Territory v. Connell (Ariz.)*, 16 Pac. Rep. 209; *Howell v. State*, 71 Ga. 224; *State v. Shroeder*, 51 Iowa 197; *Adler v. Whitbeck*, 44 Ohio St. 539; *State v. Berlin*, 21 S. C. 292; s. c., 53 Am. Rep. 677; *State v. Rauscher*, 1 Lea (Tenn.) 96; *State v. Fisher*, 33 Wis. 159.

Prohibiting Sale of Malt Liquors—Two Mile Limit.—Thus a law prohibiting the sale of malt or vinous liquors within two miles of the incorporate limits of any municipality. *State v. Shroeder*, 51 Iowa 197. And an act prohibiting the selling of intoxicating liquor within four miles of an incorporated institution of learning, although excepting sales within the limits of an unincorporated town, does not contravene the constitutional provision which prohibits partial legislation, if it extends to all persons who may come into like situation. *State v. Rauscher*, 1 Lea (Tenn.) 96.

A law taxing all of a class alike, as

liquor dealers within five miles of a town, at one price, and liquor dealers at wayside inns at a less price, is not invalid for want of uniformity. *Ter. v. Connell (Ariz.)*, s. c., 16 Pac. Rep. 209.

The legislature may, in providing against the evils resulting from the traffic of intoxicating liquors, levy a tax upon such forms of the traffic as in its wisdom may seem best, without infringing the constitutional requirement that all laws of a general nature shall be uniform in their operation throughout the State. So held in regard to the law which, in its provision, made distinctions as to the regulations imposed on distilleries and breweries on the one hand and saloons on the other. *Adler v. Whitbeck*, 44 Ohio 539.

There is nothing in the Wis. Stat. (laws of 1872, ch. 127) regulating the sale of intoxicating liquors, which shows an intention to exempt from the provisions thereof any portion of the State. It is co-extensive in its operation with the original excise law (R. S., ch. 35), of which it is amendatory; and no municipality can be held exempt therefrom, unless there is something in its charter creating such an exemption. *State v. Fisher*, 33 Wis. 159.

4. *Howell v. State*, 71 Ga. 224. See *Senior v. Ratterman*, 44 Ohio St. 661; *Anderson v. Brewster*, 44 Ohio St. 576; *Adler v. Whitbeck*, 44 Ohio St. 539.

The Ohio act, taxing the traffic in intoxicating liquors, is not in conflict with the provision of the constitution, that laws of a general nature shall have a uniform operation. *Senior v. Ratterman*, 44 Ohio St. 661.

5. *Sarrls v. Com.*, 83 Ky. 327; *United*

There is no constitutional objection to a law which prohibits the sale of liquors outside of town and city, and permits its sale under license within towns and cities.¹

Laws regulating the sale of intoxicating liquors, where otherwise valid, are not in conflict with that article of the constitution which requires that all laws of a general nature shall have a uniform operation.²

n. TAXATION—(1) Taxing Power and Legislation Generally.—A statute imposing a tax upon the retailing of spirituous liquors is not in conflict with that clause of the constitution which confers upon the legislature the power to impose taxes upon incomes, occupations and the like,³ and will not prevent the State, in the exercise of its sovereign powers, from passing further laws affecting the traffic.⁴ A liquor license fee is not a tax, and is therefore not void because it does not conform to the constitutional restriction upon the taxing power.⁵

(2) Taxation of Imports; Discrimination.—A statute prohibiting any person from being a retailer or seller of spirituous liquors, in less quantities than a specified number of gallons, unless first licensed as a retailer of spirituous liquors, is not violative of the provisions of the federal constitution prohibiting the several States from laying any duties of imposts upon imports or exports, except such as may be absolutely necessary to enforce

States *v. Ronan*, 33 Fed. Rep. 117; *In re Hoover*, 30 Fed. Rep. 51.

1. State *v. Berlin*, 21 S. C. 295; s. c., 53 Am. Rep. 677. See Davis *v. State*, 68 Ala. 58; s. c., 44 Am. Rep. 128; State *v. Turner*, 18 S. C. 103; State *v. Mancke*, 18 S. C. 81.

Exception in Favor of Towns and Cities.—A State statute providing that no liquor license shall be granted except in incorporated cities or towns, unless with the consent of a certain number of freeholders, is not unconstitutional as denying liquor dealers in counties equal protection of the laws, under the federal constitution. *United States v. Ronan*, 33 Fed. Rep. 117.

The Georgia act of October 16th, 1885, regarding the manner of granting license for the sale of liquors is not unconstitutional because of discriminating in favor of persons residing in incorporate towns, since the statute provides that such persons need not obtain the consent of their neighbors, and as to them the county commissioners have no power to deny the license. *In re Hoover*, 30 Fed. Rep. 51.

The act of congress of May 17th, 1884, prohibiting the importation, manufacture and sale of intoxicating liquors in Alaska, except for mechanical, me-

dicinal and scientific purposes, concerning which latter the president is authorized to make proper regulations, is not invalid because it applies only to the district of Alaska, and such statute supersedes or repeals all former laws on the subject of intoxicating liquors in Alaska. *Nelson v. U. S.*, 30 Fed. Rep. 112; *U. S. v. Nelson*, 29 Fed. Rep. 203.

Same—Local and Special Laws.—But a statute establishing a license and excise department in certain cities of more than 15,000 inhabitants, and in which the granting of licenses was not already vested in a board of excise or court of common pleas, being local and special, is unconstitutional. *State v. Trenton*, 48 N. J. L. (19 Vr.) 438; *nom. Closson v. Trenton*, 48 N. J. L. (19 Vr.) 438.

2. *Groesch v. State*, 42 Ind. 547; *Martin v. Blattner*, 68 Iowa 286.

3. See *Napier v. Hodges*, 31 Tex. 287.

4. *Reithmiller v. People*, 44 Mich. 280.

5. *State v. Hudson*, 78 Mo. 302. See *Pleuler v. State*, 11 Neb. 547.

Dram Shop Licenses—Police and Taxing Power.—The license fee exacted by the general law regulating dramshops and the amendatory act of March 24th, 1883 (Sess. acts 1883, p. 86, § 3), is not a tax. It is a price paid for the privi-

and carry into effect those laws providing for the peace, safety, health, morals and general welfare of the community.¹

(3) *Uniformity*.—Under a constitutional provision which requires that “the general assembly shall have power to tax peddlers . . . liquor dealers,” and the like, in such manner as it shall from time to time direct by general law, uniform as to the class which it affects, the term “liquor dealers” is used in the generic sense, and it is competent for the legislature to classify the different kinds of liquor dealers, and impose differential taxes upon such classes. The rule as to uniformity will not be violated so long as the tax imposed is the same upon all members of the particular class.² And it has been said that a statute which creates a lien upon realty upon which a saloon is established for the amount of the licence imposed by the statute is not in con-

lege of carrying on a business which is detrimental to public morals and which the legislature, in the exercise of the police power, has the right to prohibit altogether. The act, therefore, is not void because it does not conform to the restrictions of §§ 1, 3 and 10 of art. 10 of the constitution in relation to the exercise of the taxing power. *State ex rel. Troll v. Hudson*, 78 Mo. 302.

Texas Bell Punch Law.—The levy by the Texas “Bell Punch law” of 1879, of both a State and a county tax, and its prohibition of interference by the county authorities are provisions germane to its subject, and within the comprehensive, though specific, taxing powers conferred by the constitution upon the legislature. County commissioners’ courts, except as boards of equalization, have conferred and may resume. *Albrecht v. State*, 8 Tex. App. 216; s. c., 37 Am. Rep. 737.

In Oregon, a bill providing for an increase of the amount for a license for the sale of liquors is not a bill for raising revenue, so that under § 18, art. 4, Const., it must originate in the house; but an exercise of the police power of the State. *State v. Wright*, 14 Oreg. 365.

1. *Com. v. Kimball*, 41 Mass. (24 Pick.) 359; s. c., 35 Am. Dec. 326. See *Tiernan v. Rinker*, 102 U. S. 123. Compare *Locke’s App.*, 72 Pa. St. 491; 13 Am. Rep. 716.

The act of the Texas legislature entitled “an act regulating taxation,” approved June 3rd, 1873, providing in § 3, that “there shall be levied on and collected from every person, firm, or association of persons, pursuing the selling of spirituous, vinous, malt and other intoxicating liquors in quantities less

than one quart \$200, in quantities of a quart and less than ten gallons \$100; provided that this section shall not be so construed as to include any wines or beer manufactured in this State,” is unconstitutional only so far as it discriminates against wines or beer, for the selling of either of which a person cannot be subjected to a higher tax than that imposed for selling wines or beer manufactured in the State. *Tiernan v. Rinker*, 102 U. S. 123.

2. *Timm v. Harrison*, 109 Ill. 593. See *State v. Rolle*, 30 La. An., pt. 2, 991; *Kaliski v. Grady*, 25 La. An. 576; *Senior v. Ratterman*, 44 Ohio St. 661; *Adler v. Whitbeck*, 44 Ohio St. 539; *Albrecht v. State*, 8 Tex. App. 216; s. c., 34 Am. Rep. 737.

Bars on Steamboats.—Thus a law imposing a smaller license tax on the proprietors of bars or drinking saloons kept on steamboats owned and registered in this State than on owners of bars kept on land does not violate the clause of the constitution prescribing equality and uniformity of taxation. *State v. Rolle*, 30 La. An., pt. 2, 991.

In Louisiana, it has been held that a law is not unconstitutional because it levies a tax of \$85 on persons dealing in distilled liquors, or retailing spirituous liquors on land, while a tax of only \$50 is levied on persons following a like occupation on steamboats, although they may only ply within the limits of a single parish of the State. *Kaliski v. Grady*, 25 La. Ann. 576.

“Dow Liquor Law”.—**Constitutionality**.—The Ohio act of May 14th, 1886, known as the “Dow law,” does not violate the provision of the State constitution requiring taxation of property to be by a uniform rule according to its

flit with the constitutional provision which requires that property shall be taxed by a "uniform rule."¹

o. STATUTES VIOLATIVE OF CONSTITUTIONAL PROHIBITIONS

(1) *Laws Authorizing and Regulating Traffic Generally.*—While it is competent for the general assembly of a State to impose a tax upon the business of trafficking in intoxicating liquors as a means of providing against evils resulting therefrom,² yet an amendment to a constitution prohibiting the sale of beer or other liquors which is submitted to the people, but not lawfully adopted, is void; and no one can be convicted and punished for a sale of such liquors, under a statute passed in pursuance of the provisions of such amendment.³

Statutes regulating or imposing a tax upon the business of trafficking in intoxicating liquors, and providing that it shall attach as a lien upon the property in which the business is conducted, does not constitute a license within the provision of the constitution which prohibits the granting of liquor licenses.⁴

true value in money and assessment provided for therein, not being a tax upon property, but upon the business of trafficking in intoxicating liquors in the State which is within the legislative power of taxation. *Adler v. Whitbeck*, 44 Ohio St. 539.

And as applied to wholesale dealers in such liquors is not in conflict with the provisions of the State constitution requiring uniformity of taxation. *Senior v. Ratterman*, 44 Ohio St. 661.

Texas "Bell Punch Law."—The tax imposed by the Texas "Bell Punch law" of 1879 is a tax upon the occupation of a retailer of liquors, and not a tax of his stock in trade, like an *ad valorem* assessment. That it extracts more money from some dealers than from others does not impugn its equality and uniformity in a constitutional sense; and to automatic contrivance known as the "register" or "bell punch" is legitimately furnished at each dealer's expense, to count the drinks he dispenses, and thus adjust the tax he must pay. *Albrecht v. State*, 8 Tex. App. 216; s. c., 34 Am. Rep. 737.

1. *Anderson v. Brewster*, 44 Ohio St. 576.

The Ohio act, May 14th, 1886 (83 Ohio Laws 157), imposing a tax upon the business of trafficking in intoxicating liquors, or upon certain forms thereof, which tax shall attach as a lien on the property in which it is conducted,—such tax and provision for lien not constituting a license, within Const., art. 15, § 9,—and providing that the tax may be collected by the county

treasurer, as other taxes are collected, and imposing penalties for nonpayment and refusal of persons engaged in the business, on assessor's demand, to sign and verify the statement of the return,—is not in violation of the Const., art. 2, § 26, providing for uniformity of laws. *Adler v. Whitbeck*, 44 Ohio St. 539; *Anderson v. Brewster*, 44 Ohio St. 576.

2. *Adler v. Whitbeck*, 44 Ohio St. 539.

3. See *State v. Johnson*, 61 Iowa 504.

4. *Anderson v. Brewster*, 44 Ohio St. 576; *Adler v. Whitbeck*, 44 Ohio St. 539; *State v. Frame*, 39 Ohio St. 399. See *State v. Clark*, 15 R. I. 383; *State v. Kane*, 15 R. I. 395, 541.

Tax on Liquor Business—Lien on Property.—Thus it has been held that a statute (Ohio statute of April 17th, 1883), providing against the evils resulting from intoxicating liquors, and authorizing an annual assessment of the business, and also providing that such assessment shall be a lien upon the real property "in which such business is conducted," and shall at a particular time, and that "whoever shall engage or continue in the business of selling liquors in or upon such land or premises, not owned by him and without the written consent of the owner thereof, shall be held guilty of a misdemeanor," is not a license law within the constitutional prohibition that "no license to tax any traffic in intoxicating liquors shall hereafter be granted in this State. *State v. Frame*, 39 Ohio St. 399. This case, however, was over-

A law relative to the licensing and sale of intoxicating liquors which requires applicants for license to procure the assent of a majority of the registered voters of the district in which the sale is to be made, is not unconstitutional.¹

However, a statute regulating the liquor traffic which requires from all engaged therein money and a bond, is said to be within the inhibition of a constitution providing that "no license to traffic of intoxicating liquors shall hereafter be granted in this State," and is, therefore, void.²

(2) *Statutes Void or Unconstitutional in Part.*—Where a statute is void or unconstitutional in part, and the part which is valid can be separated from the part which is invalid or unconstitutional, that part which is separable will be valid.³

6. Construction of Statutes.—Where the selling of liquor without license is clearly prohibited under penalties, the context, the surroundings and the evils intended to be remedied may be considered for the purpose of ascertaining the territorial limits intended to be affected.⁴

ruled in the case of *Butzman v. Whitebeck*, 42 Ohio St. 223; *State v. Sinks*, 42 Ohio St. 345, in which it was held that such an enactment was in effect a license law, whether the laws was executed before or after the passage of the act, and that, therefore, the law was unconstitutional. Compare *King v. Capellar*, 42 Ohio St. 218.

1. *State v. Brown*, 19 Fla. 563.

Granting License—Arbitrary Discretion.—The *Georgia* act of October 6th, 1885, regarding the manner of granting licenses for the sale of spirituous liquors, is not unconstitutional as being in violation of the constitution of the fourteenth amendment to the federal constitution, because it gives an arbitrary discretion to the county commissioners to prevent an applicant from engaging in an occupation legalized by the State, and without any sort of regard to his fitness for the business, or the property and merits of his application. *In re Hoover*, 30 Fed. Rep. 51.

2. *State v. Hipp*, 38 Ohio St. 199.

3. See *McCreary v. State*, 73 Ala. 480; *State v. Amery*, 12 R. I. 64; *State v. Clark*, 15 R. I. 383.

Sale on Sunday.—Thus it has been said that a statute providing that no sale of enumerated liquors shall be made on Sunday except by pharmacists upon a physician's prescription, is not so closely connected with other sections of the same chapter, authorizing licenses, as to render the whole act unconstitutional and void. *State v.*

Clark, 15 R. I. 383. And the proviso of an act (Alabama act of February 23d, 1881) prohibiting the sale of liquor, except wine raised from grapes grown in the State, is unconstitutional because being a discrimination against the foreign wines; but the unconstitutionality of this section does not affect the remainder of the act. *McCreary v. State*, 73 Ala. 480.

However, a statute prohibiting the sale of liquors therein named, in violation of such statute, has been held to be so connected with the portion of the chapter which enacts a license system that it is within the fifth amendment of the constitution and therefore void. *State v. Tonks*, 15 R. I. 385.

4. *State v. Cofield*, 22 S. Car. 301. See *Amos v. State*, 73 Ala. 498; *State ex rel., Edwards v. Sumpter Co.*, 22 Fla. 1; *Intoxicating Liquor Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284; *State v. Higgins*, 53 Vt. 191.

Election Day—Statute Prohibiting Sale of Liquor on—Interpretation.—Where a statute defining the offence of selling or giving away intoxicating liquors on election day, is absolutely free from ambiguity, and expresses clearly the minds of the framers, there is no occasion and no authority to resort to other means of interpretation, since the interpretation resulting from the ordinary nature of the words is not repugnant to sound and acknowledged principles of national or State policy. *Smith v. State*, 18 Tex. App. 454.

7. Operation and Effect of Various Statutes—*a.* PROSPECTIVE AND RETROACTIVE OPERATION.—It has been said that a law providing for the granting of licenses to merchants and grocers to traffic in intoxicating liquors is applicable to those licenses only which were granted after it took effect;¹ but such law extends to sales of liquors owned by the sellers at the time of its passage.²

b. AS TO PARTICULAR PERSONS AND CLASSES.—An act to regulate the sale of malt, spirituous and vinous liquors, applies

Amendment of Statute.—Where a law establishes license for liquor selling, and it is amended by striking out the words "twenty-five nor more than one hundred and fifty dollars," and inserting in lieu thereof the words "seventy-five nor more than two hundred," and in a recital of how the section as amended shall read, omits the maximum upon the licence fee fixed in the first part of the act, establishes the license fee at \$200; the act having declared what the amendment shall be, and the omission in the recital being evidently a mistake. *Custin v. City of Viroqua*, 67 Wis. 314.

"Or Otherwise Disposed of."—Where a statute makes it unlawful "to sell, give away, or otherwise dispose of," designated liquors, the words "or otherwise dispose of," following the more specific or particular words "sell or give away," must be construed, a larger legislative intention not being clearly expressed, as extending only to a disposition *eiusdem generis* with a sale or gift; they cannot be extended to any and every act which may be said to be a disposition. *Amos v. State*, 73 Ala. 498.

The expression "third offence," as used in the prohibitory liquor law, signifies the third offence which has been legally ascertained and determined, and in that sense is equivalent to "third conviction." *Matter of Buddington*, 29 Mich. 472.

"Keeping for sale," under the Rhode Island act, May 27th, 1886, § 9, means "keeping for sale and delivery." Section 1 is construed as if the words "and delivery" were not in it. *State v. Kane*, 15 R. I. 395 and 541.

Prohibiting Sale of Spirituous Liquors—Police Regulation Not a Revenue Law.—Ala. Rev. Code, § 3618, a statute forbidding the retailing of vinous or spirituous liquors in quantities less than a quart, without a license, or selling the same to a per-

son of known intemperate habits, etc., is not a mere revenue law, but rather a police regulation for the protection of the public morals and peace. *McPherson v. State*, 54 Ala. 221.

"Immorality or Other Unfitness"—"As Specified in This Act."—In the last sentence of Ind. Rev. Stat. 1881, § 5314, permitting a remonstrance against the granting of a licence on account of "immorality or other unfitness, as is specified in this act," the phrase "as is specified in this act" qualifies and limits the word "unfitness," and not "immorality." *Groscof v. Rainier*, 111 Ind. 361.

1. *State v. Andrews*, 26 Mo. 171.

2. *Com. v. Logan*, 78 Mass. (12 Gray) 136. See *Bennett v. People*, 16 Ill. 160.

Thus it has been *held* that an indictment is sustainable under such a law for selling by retail any intoxicating or spirituous liquors or wines, while the act governing such liquors was in force. *People v. Safford*, 5 Den. (N. Y.) 112.

It is otherwise, however, as to sales made prior to the passage of the law. *Bennett v. People*, 16 Ill. 160.

An act "to prohibit the sale of intoxicating liquors in the vicinity of certain manufacturing establishments in the counties of Scio, Lawrence and Jackson," must be confined to such manufacturing establishments as existed at the time of its passage. *Town of Ottawa v. County of La Salle*, 12 Ill. 339.

Where an act provides that all procedures under the act for the suppression of intemperance shall be *held* to be proceedings *in rem*, and not criminal proceedings, applies to proceedings pending when the act was passed. *Hine v. Belden*, 27 Conn. 384.

Where, in such a proceeding, a party had been cited to appear before a justice of the peace on a certain day and show why certain liquors seized should not be forfeited, and the act above referred to took effect between

alike to all persons who are engaged in the sale of such liquors, either at wholesale or at retail.¹

c. AS TO PARTICULAR TIMES, LOCALITIES, ETC.—A general statute declaring the sale of spirituous or intoxicating liquors without a license to be unlawful, applies to incorporated cities, towns or villages of the State as well as to the county.²

8. **Repeal**—a. OPERATION AND EFFECT—(1) *Generally*.—The effect of repealing a statute to which a subsequent prohibitory statute refers for a penalty is to render the latter inoperative.³

(2) *As to Existing Licences, Permits, etc.*—Where a law has been adopted prohibiting the sale of intoxicating liquors for

the time of issuing the citation and the day appointed for the trial, and the justice was absent from the town on the day appointed, it was *held* that the justice had authority, on his return, to issue a notice to the defendant, under a statute, relating to civil suits, appointing another day for the trial, and to proceed on the day so appointed with the trial of the case. *Hine v. Belden*, 27 Conn. 384.

1. *State v. Cummings*, 17 Neb. 311. *Senior v. Ratterman*, 44 Ohio St. 661; *Read v. Storey*, 6 H. & N. 423; s. c., 30 L. J. M. C. 110; 7 Jur. N. S. 344; 3 L. T. 674; 9 W. R. 418. *Compare* *Brittain v. Bethany*, 31 Miss. 331.

"The Slocum law," approved February 28th, 1881, applies alike to all persons engaged in the sale of such liquors, whether by wholesale or retail. *State v. Cummings*, 17, Neb. 311.

Sale to Inn Keeper.—Where there is nothing in the law prohibiting the sale to an inn keeper, by one who has no license to sell, and who is neither an importer, a commission auctioneer, producer, brewer, distiller or druggist prohibits the sale. *Evans v. Hall*, 45 Pa. St. 235.

Intemperate Persons, Habitual Drunkards and Minors.—As to laws prohibiting sale to, see *Parkinson v. State*, 14 Md. 184; s. c., 47 Am. Dec. 522; *State v. Richter*, 23 Minn. 81.

Annual assessments upon business of trafficking in intoxicating liquors, does not operate where the real property in which the business is conducted by a tenant is held by such tenant, under the law for a permit executed before the passage of the statute. *State v. Frame*, 39 Ohio St. 399.

Dram shop acts apply only to persons having a dram shop license. *State v. Hambright*, 33 Mo. 394.

2. *State v. Cofield*, 22 S. Car. 301.

A statute concerning groceries, authorizing the sale of spirituous liquors in quantities not less than one quart, at a distance of one mile from a town or village, and not to be drunk on the premises where sold, is valid. *Bledsoe v. State*, 10 Mo. 388.

Sale on Sunday—A statute which declares that the permit granted under an act shall not authorize the person receiving it to sell intoxicating liquors on Sunday or at certain other days, and that sales made on such days are unlawful; and that upon conviction a fine shall be imposed upon a person selling on any such days, section 1 of which acts makes it unlawful for any person to sell liquors to be drunk upon the premises, without having first obtained a permit therefor, is construed to be a limitation as to the times when sales shall be made to be drunk in, upon or about the building or premises where sold. *Morris v. State*, 47 Ind. 503.

It has been said that the Indiana act of 1851, § 7, enacted for the purpose of regulating the sale of spirituous liquors in Tippecanoe county, does not create a distinct offence, but only prescribes a new rule of evidence for trials of the offence. *State v. O'Conner*, 4 Ind. 299.

3. See *Com. v. Gedikoh*, 101 Pa. St. 354.

So held as to the Texas Code, art. 423, e, referring to art. 423, d, prohibiting the sale of liquors less than one quart to be drunk on the premises. *Smith v. State*, 7 Tex. App. 286. See *Sullivan v. People*, 15 Ill. 233; *Ingersoll v. State*, 11 Ind. 464; *King v. State*, 2 Ind. 523; *Hannibal v. Guyott*, 18 Mo. 515; *Reed's Appeal*, 114 Pa. St. 452.

A statute relating to the establishment, etc., of commissioners of excise, in each of the cities, villages and towns of the State, does not alter or abolish

other than medical, scientific and mechanical purposes, all sales made after the passage and taking effect of such act will be unlawful, although made under a license issued before such law was adopted.¹ But it has been said that the repeal of a law granting licenses to grocers and the like to sell spirituous liquors, under certain restrictions, does not affect the validity of an unexpired term of such a license; it takes away the power to punish grocers dealing in liquors by virtue of those licenses for a violation of it.²

(3) *As to Prescriptive Rights*.—The right of custom, prescription or charter to sell beer or other liquors at fairs, without an excise retail license, is abrogated by a law providing for the regulation of the sale and traffic in intoxicating liquors, prohibiting all sales by persons not authorized by a license.³

(4) *Upon Rights of Action—Pending Prosecutions*.—The repeal of a statute pending the prosecution of an indictment for selling liquor without a license will not affect the proceedings.⁴

the county board of commissioners of excise, existing under prior laws. *Cattaraugus Comms. of Excise v. Willey*, 2 Lans. (N. Y.) 427.

1. Prohibitory Amendment Cases, 24 Kan. 700. See *State v. Fairfield*, 37 Me. 517; *Pleuler v. State*, 11 Neb. 547; *Reg. v. Whiteley*, 3 Hurls. & N. 143.

Thus it is held by the supreme court of Nebraska, in the case of *Pleuler v. State*, 11 Neb. 547, that privileges granted under a former license law of Nebraska, which law was repealed by the act of February 28th, 1881, passed "to regulate the license and sale of malt, spirituous and vinous liquors," were absolutely revoked upon the taking effect of the latter act.

2. *State v. Andrews*, 28 Mo. 14, 19. See *Cassett v. State*, 9 Ind. 87; *State v. Mullenhoff*, 74 Iowa 271; *State v. Holmes*, 38 N. H. 225; *Adams v. Hackett*, 27 N. H. (7 Fost.) 289; s. c., 59 Am. Dec. 376; *Hirn v. State*, 1 Ohio St. 15; *Sanders v. Com.* 117 Pa. St. 293.

Previous Permit—Effect of New Law On.—The supreme court of Iowa has held that where a defendant is indicted for keeping a place for the sale of intoxicating liquors, in violation of an act of the assembly, it is no defence that the sale was made under a permit issued prior to the taking effect of the act, because such permit is not protected by a provision of the statute, which provides that the repeal of a statute shall not affect a right accrued under the statute repealed. *State v. Mullenhoff*, 74 Iowa 271.

The supreme court of Indiana say in *Cassett v. State*, 9 Ind. 87, that an act regulating trafficking in and sale of intoxicating liquors does not repeal the provisions of a license bond previously issued.

In the case of the *Village of Rome v. Knox*, 14 How. (N. Y.) Pr. 268, overruling *People v. Tiphaine*, 13 How. (N. Y.) Pr. 74, under an act declaring that no license, except as therein provided, should thereafter be granted, and the system of licenses therein provided for did not take effect until a later date; the court held that one whose former license expired after the passage of the statute, and before it took effect, was not liable to a penalty for selling without a license until after the date when the statute went into operation. See *Lehritter v. State*, 42 Ind. 482.

But it has been said by the supreme court of Mississippi, in the case of *Trost v. State*, 64 Miss. 188, that the seller cannot justify, under a license which at the time of the sale charged does not protect him, because retailing has become unlawful.

3. See *Huxham v. Wheeler*, 3 Hurls. & C. 75; s. c., 33 L. J., M. C. 153; 10 Jur., N. S. 545; 10 L. T. 342; 12 W. R. 713.

4. *People v. Townsey*, 5 Den. (N. Y.) 70. See *Leyner v. State*, 8 Ind. 490; *Gray v. Kimball*, 42 Me. 299; *Com. v. McKenney*, 80 Mass. (14 Gray) 1; *Com. v. Edwards*, 70 Mass. (4 Gray) 1; *Teague v. State*, 39 Miss. 516; *Sanders v. Com.*, 117 Pa. St. 293.

(5) *As to Fines and Penalties, and Actions Therefor.*—Where the repealing statute contains a clause, in express terms, reserving the rights which have accrued under the repealing statute as to any offences committed against the former law, or as to any act done or punishment incurred or any right accrued, such repeal will in no wise affect the peoples' right to prosecute for penalties under the repealed statute;¹ but where such repealing statute has no saving clause, no penalty can be enforced or punishment inflicted for a violation of its provisions committed while it was in operation.²

9. Municipal Control; Local Option³—*a. MUNICIPAL REGULATION AND CONTROL.*—Cities may exercise police power by ordinance regulating the sale of intoxicating drinks, beyond those authorized by the general laws of the State, and may affix greater penalties;⁴ and the enactment of a liquor tax law does not es-

A liquor law was passed February 16, 1855, which repealed all acts inconsistent with its own provisions, but provided that the act should not take effect until from and after the 12th day of June then next. This suit was commenced the 1st of June. Held, that the repealing clause took effect from the said 12th day of June, up to which day a previous law remained in force, and therefore this action, which was instituted under that law, was well brought. *Leyner v. State*, 8 Ind. 490.

Particularly is this so where the repealing statute contains a saving clause. Thus the defendant was indicted for selling liquors in violation of a statute which prohibited the sale of vinous and spirituous liquors within a certain locality in any quantity whatever; he entered into recognizance for his appearance, which was forfeited, and judgment *nisi* was entered against him and his sureties. The act under which he was indicted was then repealed, but the repealing act provided that "it should not be so construed as to release or discharge from punishment any who had violated the act intended to be repealed, by selling vinous and spirituous liquors in less quantities than one gallon." Held, that this last act must be construed so as to save a prosecution under the first act, although the indictment did not charge the sale in less quantities than a gallon, and that, on trial of that indictment after the date of the repealing act, the State would be held to prove that the sale was in less quantities than a gallon; and therefore the judgment *nisi* might be made final. *Teague v. State*, 39 Miss. 516.

1. *Mullinix v. People*, 76 Ill. 211. See *Parsons v. Bridgham*, 34 Me. 240; *Keller v. State*, 11 Md. 525; s. c., 69 Am. Dec. 226; *Wright v. Smith*, 13 Barb. (N. Y.) 414; *Cattaraugus Comms. v. Willey*, 2 Lans. (N. Y.) 427; *State v. Fleming*, 7 Humph. (Tenn.) 152.

The Pennsylvania act of February 26th, 1855, a general act prohibiting the sale of intoxicating liquors on Sunday, under a penalty of \$50, recoverable in an action of debt, was repealed as to Alleghany county by the act of 1872. The general act of May 13th, 1887, repeals "all local laws fixing a license rate or fee less than" therein provided. The license rate fixed by the act of 1872 was less than that fixed by the act of 1887. Held, that the act of 1887 repealed the act of 1872, but that as it did not supply the provisions of the act of 1855 it left that act in force; that by the repeal of the act of 1872 Alleghany county was brought within the operation of the act of 1855, and an action for debt therein, for the penalties imposed by that act, was well brought. *Durr v. Com. (Pa.)* 12 Atl. Rep. 507.

2. *Cooley's Const. Lim.* 471; 1 Kent Com. 465.

Securities for Costs.—Repeal of Law not a Release.—However it is said in *McGowan v. Deyo*, 8 Barb. (N. Y.) 340, that the repeal of the act of May 14th, 1845, without any saving clause, did not abrogate the security for costs given by a person prosecuting for penalties for the indemnity of the overseers of the poor.

3. See title LOCAL OPTION

4. *Dennehy v. Chicago*, 120 Ill. 627; *Pekin v. Smelzel*, 21 Ill. 464; s. c., 74

top the State from empowering municipal councils to further regulate the sale of liquor by requiring saloon keepers to take out licenses.¹ In the exercise of such powers, cities and villages may prohibit absolutely the sale of or trafficking in intoxicating liquors,²

Am. Dec. 105. See *Morris v. City Council of Rome*, 10 Ga. 532; *Gunnarssohn v. Sterling*, 92 Ill. 571; *Martin v. People*, 88 Ill. 390; *Kettering v. Jacksonville*, 50 Ill. 39; *Strauss v. Pontiac*, 40 Ill. 301; *Block v. Jacksonville*, 36 Ill. 301; *O'Leary v. Cook County*, 28 Ill. 534; *Byers v. Olney*, 16 Ill. 35; *Godard v. Jacksonville*, 15 Ill. 588; *King v. Jacksonville*, 3 Ill. 305; *New Hampton v. Conroy*, 56 Iowa 498; *Wolf v. City of Lansing*, 53 Mich. 367; *State ex rel. Fairchild v. Andrews*, 11 Neb. 523; *Phillips v. Tecumseh*, 5 Neb. 312; *State v. Fav*, 44 N. J. L. (15 Vr.) 474. Compare *Carr v. Fowler*, 74 Ind. 590.

Ordinance Imposing Penalties.—When Void.—Where the sale of intoxicating liquors other than vinous or malt is prohibited by the State, and cities and towns incorporated under the general law have power to regulate or prohibit the sale of liquors not prohibited by the State, if such a town enact an ordinance to regulate the sale of wine and beer, making it a condition of granting a license that liquors prohibited by law shall not be sold, nor gambling permitted on the premises, and imposing penalties for the violation of such conditions, to be collected by action on a bond, such ordinance is void, and no action can be maintained on the bond. *New Hampton v. Conroy*, 56 Iowa 498.

Ordinances Regulating Validity.

Where the charter incorporating the city of Rome gave power and authority to the mayor and council to pass all by-laws and ordinances that should appear to them necessary and proper for the security, welfare and interest of said city, or for preserving the peace, health, order and good government thereof, and also authorize said mayor and council to license persons to retail spirituous liquors within the said city; it was held, that it was competent for said mayor and council to pass an ordinance not essentially impairing the right to retail under the license granted, but only regulating the exercise of it for the benefit of the peace, order and good government of the city. *Morris v. City Council of Rome*, 10 Ga. 532.

Same.—Power by City Councils.

Where a town was empowered by its

charter to make ordinances "to license, regulate and prohibit inns or taverns, and to prohibit all traffic in or sale of intoxicating drinks," it was held that the power was only to prohibit, and not to regulate, the sale of liquor. *State v. Fay*, 44 N. J. L. (15 Vr.) 474.

Where, under the statute, the traffic in liquor within the limits of cities and villages can only be carried on under ordinances duly passed by the corporate authorities thereof until such ordinances are passed, no application can be made and no other step can be taken towards the procurement of a license to sell liquors within the limits of such corporation. *State v. Andrews*, 11 Neb. 523.

"As hereinafter Provided."—The Illinois statute (Priv. Laws 1869) gives corporate authority of a particular town "complete and exclusive control as hereinafter provided over the selling," etc., of liquors. The words "as hereinafter provided" do no refer to the power to declare the sale a nuisance but to the limitation as to druggists, and the punishment. *Martin v. People*, 88 Ill. 390. And the fact that in such case the sale is declared a nuisance does not limit their exercise of such exclusive control. *Martin v. People*, 88 Ill. 390.

The authority of county commissioners in Nebraska to license the sale of liquors is confined to portions of the county not within any incorporated town or city; within these the municipal authorities control the subject. *Phillips v. Tecumseh*, 5 Neb. 312.

The excise board of a city, and not the common council, has the sole power to regulate the sale of liquors, under the New Jersey acts of 1884 and 1886. *State, Featherstone v. Lambertville* (N. J.), 14 Atl. Rep. 599.

1. *Wolf v. City of Lansing*, 53 Mich. 367.

2. See *Hill v. Mayor*, 72 Ga. 314; *Gunnarssohn v. Sterling*, 92 Ill. 569; *Pekin v. Smelzel*, 21 Ill. 464; s. c., 74 Am. Dec. 105; *Sweet v. City of Wabash*, 41 Ind. 7; *State ex rel. Rossell v. Garon*, 13 Atl. Rep. 26; *Trustees of Clintonville v. Keeting*, 4 Den. (N. Y.) 341; *Bronson v. Oberlin*, 41 Ohio St. 476;

or they may authorize,¹ or license a traffic in such liqu-

Compare Hill v. Commissioners, 22 Ga. 203.

A city charter, like that of the city of Pekin, which authorizes the passage of ordinances to restrain or prohibit the sale of intoxicating drinks, supposes that the usual means by penalty will be resorted to. The passage of an ordinance which declares that liquor shall not be sold is not within the spirit of the charter. *Pekin v. Smelzel*, 21 Ill. 464; s. c., 74 Am. Dec. 105.

The city of Dalton has power to pass an ordinance providing that no person or persons shall be allowed to sell spirituous, intoxicating, fermented or malt liquors in the incorporate limits of the city, in any quantity either directly or by selling any other commodity, and giving away liquor, nor under any other device or disguise whatever; and imposing a penalty for this violation. *Hill v. Mayor*, 72 Ga. 314.

Imposing fines, etc.—The act incorporating the village of Clintonville (N. Y. Sts. 1845, p. 172) authorized the trustees to make such by-laws as they should deem proper relative to "the regulating, restraining and suppressing of all manner of shops and places for the sale of ardent spirits by retail," and to impose a fine of not more than fifteen dollars for the violation of such by-laws; and this power was by a subsequent act declared to be "exclusive" of the powers of the town officers of the town in which the village was situated. *Held*, that the trustees might make a valid by-law imposing a fine of fifteen dollars for selling ardent spirits in a quantity less than five gallons without having a license from the trustees of the village; that they might prohibit altogether the selling of spirituous liquors, even by persons having a license from the town authorities; and that, after the passing of the by-law first mentioned, a retailer of spirits must have a license both from the town authorities and the trustees of the village. *Trustees of Clintonville v. Keeting*, 4 Den. (N. Y.) 341.

1. *Brown v. State*, 79 Ga. 473; *Douglasville v. Johns*, 62 Ga. 423; *Coulterville v. Gillen*, 72 Ill. 599; *Bennett v. People*, 30 Ill. 389; *Sweet v. City of Wabash*, 41 Ind. 7; *Keokuk v. Dressell*, 47 Iowa 597; *State v. City of Leavenworth*, 36 Kan. 314; *State v. Pfeifer*, 26 Minn. 175; *Mundy v. New York Excise*

Commissioners, 9 Abb. (N. Y.) N. C. 117; *In re Mundy*, 59 How. (N. Y.) Pr. 359; *Portland v. Schmidt*, 13 Oreg. 17. *Compare* *Sanders v. Town Commissioners*, 30 Ga. 697; *State v. Fleckenstein*, 26 Minn. 177.

Incorporated towns have the exclusive privilege of granting license to sell spirituous liquors, and of prescribing the terms on which they may be sold within the corporate limits, and no person need have any other license than the town ordinances. If he bring himself within their provisions he is not liable to indictment under the state law. *Bennett v. People*, 30 Ill. 389.

A city may, in effect, authorize the sale of liquor, contrary to the prohibition of the constitution, by the action of its officers, so as to render it liable to proceedings against it to oust it from the exercise of such usurped powers, although not doing so expressly by granting written or printed licenses. *State v. City of Leavenworth*, 36 Kan. 314.

The power to license, tax, regulate, and restrain bar rooms and drinking shops, carries with it, without any express provision, authority to provide by ordinance the terms and conditions upon which such license should be issued, the amount of tax to be imposed, and the mode of collecting it, and to establish reasonable rules to be observed in conducting the business, and implies the power to inhibit the carrying on of that kind of business without obtaining such license. *Portland v. Schmidt*, 13 Oreg. 17.

How construed.—Where the legislature has declared that incorporated towns shall have the exclusive privilege to grant license within the incorporated limits of the town, the county authorities have no right or power to interfere in any manner whatever, with the granting of licenses. The refusal of a town to grant any licenses does not confer power upon the county authorities to issue them. *Coulterville v. Gillen*, 72 Ill. 599.

The power of municipal corporations under the Iowa law 1868, ch. 154, sec. 2, "to regulate or prohibit the sale of intoxicating liquors not prohibited by State law," and "to impose a tax on such sale," imports a power to license their sale. *Keokuk v. Dressell*, 47 Iowa 597.

uors.¹ But under such powers a city or village is not authorized by ordinance to make it an offence for any person within the city to have in his possession any intoxicating liquors.² And a legislative provision authorizing a town to prohibit tippling houses, or dram shops, does not authorize such town to forbid sales in any county, or for any purpose except for medical or mechanical purposes.³ Municipal corporations empowered to license and regulate the sale of intoxicating liquors may prohibit the sale of liquor on particular days or at particular places,⁴ and may prohibit the sale of such liquors in licensed houses after ten o'clock in the evening.⁵ And it has been said that the power granted

1. See *Dennehy v. Chicago*, 120 Ill. 627; *Lutz v. Crawfordsville*, 109 Ind. 466; *State ex rel. Rossell v. Garen*, (N. J.), 13 Atl. Rep. 26. Compare *Walter v. Columbia City*, 61 Ind. 24.

The power to license places for the sale of liquors, granted to a city, where such places are unrestrained by general law, justifies an ordinance prohibiting the sale of liquors of unlicensed places. *State ex rel. Rossell v. Garen* (N. J.), 13 Atl. Rep. 26.

The Illinois general incorporation law for cities, etc., and the Dram Shops act, authorize a city to impose a license upon wholesale liquor dealers. *Dennehy v. Chicago*, 120 Ill. 627.

The Indiana statute providing that an incorporated city shall have power, within its corporate limits, and over a territory two miles beyond those limits, to regulate all shops or other places where intoxicating liquors are kept for sale for use on the premises, and to exact a license from persons keeping such shops (Rev. Stat., §§ 3106, 3154), empowers a city to exact such licenses from persons who have State or county licenses, as well as others, no constitutional provision prohibiting the legislature from fixing the jurisdiction of municipal corporations, and the grant of a license by one jurisdiction not authorizing the person to whom it is granted to violate the law of another jurisdiction. *Lutz v. Crawfordsville*, 109 Ind. 466; s. c., 8 Ind. 33.

2. *Sullivan v. City of Oneida*, 61 Ill. 242.

But a city may constitutionally be authorized by the legislature to enact, and may enact an ordinance that no intoxicating liquors shall be used or kept in any refreshment saloon, or restaurant within the city for any purpose whatever. *State v. Clark*, 28 N. H. (8 Fost.) 176.

3. *Strauss v. Pontiac*, 40 Ill. 301. See *State ex rel. Rossell v. Garen* (N. J.), 13 Atl. Rep. 26; *McCrea v. Village of Washington*, Fayette County (Ohio), 18 Week. L. Bull. 66.

Thus it has been said that the New Jersey act authorizing the borough of Pemberton to license lager beer saloons, does not carry with it the right to prohibit the sale of beer by the quart. *State ex rel. Rossell v. Garen* (N. J.), 13 Atl. Rep. 26.

A prohibitory ordinance passed by the common council of a municipal corporation in Ohio, under the Dow law, against the traffic of intoxicating liquors within such corporation, is within the power of such corporation so far as the retail traffic in liquor is concerned. But a municipality has no power, under the Dow law or any other law of Ohio, to pass an ordinance prohibiting the sale of liquor by the wholesale or compelling druggists to keep lists of persons to whom they furnish liquors on prescription. *McCrea v. Village of Washington*, Fayette County (Ohio), 18 Week. L. Bull. 66.

4. *Piqua v. Zimmerlin*, 35 Ohio St. 507; *Portland v. Schmidt*, 13 Oreg. 17.

Sunday Closing Ordinance.—It has been said that a statute conferring express power on municipal corporations to regulate beer shops, etc., authorizes such corporation by ordinance to prohibit keeping such places open on Sunday, without exempting from its operation cases of necessity and charity, or conscientious observance of the seventh day of the week. *Piqua v. Zimmerlin*, 35 Ohio St. 507. Such ordinance would not be necessarily void, if on prescribing that the lighting part of the beer shop on Sunday should be *prima facie* evidence of guilt. *Piqua v. Zimmerlin*, 35 Ohio St. 507.

5. *Staates v. Washington*, 44 N. J. L.

to the common council of a city to fix the rates of license for the privilege of transacting business is a branch of the taxing power which is not affected by the constitutional requirement that taxes shall be uniform, and that, therefore, the council in fixing such rates may discriminate and impose a larger license tax upon the business of retailing liquors than on any other.¹

b. LEGISLATIVE POWER TO ENACT LOCAL OPTION LAWS.—Municipal corporations and townships may be invested with authority to regulate or prohibit the retail of intoxicating drinks;² and the legislature may authorize such townships and municipal corporations to determine by vote of the inhabitants, or in the case of a city, by the vote of the city council, whether the sale of a particular kind or kinds of liquor within its limits shall be

(15 Vr.) 605; s. c., 43 Am. Rep. 402.

"Ten o'clock Ordinances."—The court say: "This conclusion is not without express authority. In 1 Dill. Mun. Corp., § 400 (333) the author says: Under a general power to pass" any other by-laws for the well being of the city, "its council may, by ordinance, prohibit saloons, restaurants and other places of public entertainment to be kept open after ten o'clock at night. The objections that such a by-law was unreasonable, and deprived the citizens of the constitutional right of acquiring property, were considered not to be well taken. It regulates but does not deprive the party of his rights." He cites the following authorities, and an examination sustains the statements in the section quoted: *State v. Welch*, 36 Conn. 215; *Morris v. Rome*, 10 Ga. 532; *State v. Freeman*, 38 N. H. 426; *State v. Clark*, 28 N. H. (8 Post.) 176; *Hudson v. Geary*, 4 R. I. 485; *Platteville v. Bell*, 43 Wis. 488.

A contrary doctrine, however, was held in the case of *Ward v. Greeneville*, 8 Baxt. (Tenn.) 228; s. c., 35 Am. Rep. 700, where it is maintained that a town ordinance prohibiting licensed retailers of spirituous liquors from selling such liquors from six o'clock in the afternoon and six o'clock in the morning, is unreasonable and invalid.

1. *Ex parte Hurl*, 49 Cal. 557.

2. See *Boyd v. Bryant*, 35 Ark. 69; s. c., 37 Am. Rep. 6; *State v. Wilcox*, 42 Conn. 364; s. c., 19 Am. Rep. 536; *Caldwell v. Barrett*, 73 Ga. 604; *Gunarssohn v. Sterling*, 92 Ill. 569; *Schwuchow v. Chicago*, 68 Ill. 444; *Erlinger v. Boneau*, 51 Ill. 94; *Com. v. Weller*, 14 Bush (Ky.) 218; s. c., 29 Am. Rep. 407; *Anderson v. Com.*, 13 Bush (Ky.) 485; *Marshall v. Donovan*, 10

Bush (Ky.) 681; *Stickrod v. Com.*, 86 Ky. 286; s. c., 9 Ky. L. Rep. 563; *State v. Strauss*, 49 Md. 288; *Fell v. State*, 42 Md. 71; s. c., 20 Am. Rep. 83; *Com. v. Blackington*, 41 Mass. (24 Pick.) 352; *Com. v. Dean*, 110 Mass. 357; *Com. v. Bennett*, 108 Mass. 27; s. c., 11 Am. Rep. 304; *Com. v. Martin*, 108 Mass. 29; s. c., *State v. Cooke*, 24 Minn. 247; s. c., 31 Am. Rep. 344; *State v. Noyes*, 30 N. H. 279; *State ex rel. Sanford v. Court of Common Pleas*, 36 N. J. L. (7 Vr.) 72; s. c., 13 Am. Rep. 422; *Metro-politan Board of Excise v. Barrie*, 34 N. Y. 657; *Cincinnati W. & Z. R. Co. v. Com'rs of Clinton Co.*, 1 Ohio St. 77; *Locke's Appeal*, 72 Pa. St. 491; s. c., 13 Am. Rep. 716; overruling *Parker v. Com.*, 6 Pa. St. 507; *State v. Parker*, 26 Vt. 357; *Bancroft v. Dumas*, 21 Vt. 456; *Bull v. Read*, 13 Gratt. (Va.) 78; *Slingef v. Henneman*, 38 Wis. 504; *Smith v. Janesville*, 26 Wis. 291; *State v. O'Neill*, 24 Wis. 149; *Thurlow v. Massachusetts*, 46 U. S. (5 How.) 504; bk. 12, L. ed. 256. *Compare Ex parte Wall*, 48 Cal. 279; s. c., 17 Am. Rep. 425; 10 Alb. L. J. 284; *Rice v. Foster*, 4 Harr. (Del.) 479; *Mesmeier v. State*, 11 Ind. 482; *Maize v. State*, 4 Ind. 342; *State v. Weir*, 33 Iowa 134; s. c., 11 Am. Rep. 115; *State v. Baum*, 33 La. An. 981; *Lammert v. Lidwell*, 62 Mo. 188; s. c., 21 Am. Rep. 411; *Parker v. Com.*, 6 Pa. St. 507; s. c., 47 Am. Dec. 480; overruled by *Locke's Appeal*, 72 Pa. St. 491; s. c., 13 Am. Rep. 716; *State v. Swisher*, 17 Tex. 441.

Precluding Fulfilment of Existing Contracts—Effect of.—The fact that such laws may tend to prevent or may absolutely preclude the fulfilment of contracts previously made has been said to be no objection to their validity (see *People v. Hawley*, 3 Mich. 330; *Rey-*

prohibited or permitted;¹ for this subject, while not embraced within the ordinary power to make by-laws and ordinances, falls within the class of police regulations which may be entrusted by the legislature by express enactment to municipal authority.²

c. CONSTITUTIONALITY OF LOCAL OPTION LAWS.—A law regulating the sale of intoxicating liquors which provides for a submission to the vote of the people to determine whether the sale of intoxicating liquors shall be licensed or not in a particular place at a given time is constitutional where such law is complete in itself, being a perfect act requiring nothing further to give it validity;³ but where a statute is not a perfect law and depends upon some act of the people, or some other body, before it becomes a law, it is invalid.⁴

An act authorizing county courts,⁵ municipal villages,⁶ or police juries of parishes,⁷ to prohibit the sale of intoxicating liquors on particular days and at particular places is constitutional and valid. But it has been said that under a provision in the constitution providing for the enactment of a local option law, the legislature is without power to prohibit the gift as well as the sale of intoxicating liquors.⁸

nolds v. Geary, 26 Conn. 179), because contracts cannot hamper or impede the police power of the State (Beer Co. v. Massachusetts, 97 U. S. (7 Otto) 25; bk. 24, L. ed. 989), and such laws are simply a police regulation established by the legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances. Oviatt v. Pond, 29 Conn. 479; Reynolds v. Geary, 26 Conn. 179; State v. Wheeler, 25 Conn. 290; Jones v. People, 14 Ill. 106; State v. Donehey, 8 Iowa 396; Our House v. State, 4 G. Greene (Iowa) 172; Zumhoff v. State, 4 G. Greene (Iowa) 526; Santo v. State, 2 Iowa 202; s. c., 63 Am. Dec. 487; Com. v. Clapp, 71 Mass. (5 Gray) 97; Com. v. Kendall, 66 Mass. (12 Cush.) 414; People v. Gallagher, 4 Mich. 244; People v. Hawley, 3 Mich. 330; Gill v. Parker, 31 Vt. 610; State v. Prescott, 27 Vt. 194; Lincoln v. Smith, 27 Vt. 328. Compare Meshmeier v. State, 11 Ind. 484; Beebe v. State, 6 Ind. 501; s. c., 63 Am. Dec. 391; Wynehamer v. People, 13 N. Y. 378.

1. Stickrod v. Com., 86 Ky. 285; s. c., 9 Ky. L. Rep. 563; Anderson v. Com., 13 Bush (Ky.) 485; Com. v. Bennett, 108 Mass. 27; s. c., 11 Am. Rep. 304. See also MUNICIPAL CORPORATIONS.

Local Option.—Delegation of Legislative Power.—Supreme court of California say, in the case of Ex parte Wall, 48 Cal. 279; s. c., 17 Am. Rep. 425, that

"the power to make law conferred by the constitution on the legislature cannot be delegated by the legislature to the people of the State, or to any portion of the people."

2. Com. v. Bennett, 108 Mass. 27; s. c., 11 Am. Rep. 304; Com. v. Turner, 55 Mass. (1 Cush.) 493, 495; State v. Simonds, 3 Mo. 414; State v. Noyes, 30 N. H. 279; Tanner v. Trustees of Albion, 5 Hill (N. Y.) 121; s. c., 40 Am. Dec. 337; Bancroft v. Dumas, 21 Vt. 456.

3. State v. King, 37 Iowa 462; Slymer v. State, 62 Md. 240; Fell v. State, 42 Md. 88; s. c., 20 Am. Rep. 83; Hammond v. Haines, 25 Md. 541; s. c., 90 Am. Dec. 77; Com. v. Fredericks, 119 Mass. 199; Com. v. Dean, 110 Mass. 357; People v. Collins, 3 Mich. 343; Locke's Appeal, 72 Pa. St. 491; s. c., 13 Am. Rep. 716; Steele v. State, 19 Tex. App. 425; Ex parte Lynn, 19 Tex. App. 293. See also authorities in (1) under last title.

4. Bancroft v. Dumas, 21 Vt. 456. See Hammond v. Haines, 25 Md. 541; s. c., 90 Am. Dec. 77; Com. v. Kimball, 41 Mass. (24 Pick.) 359; s. c., 35 Am. Dec. 337.

5. Trammell v. Bradley, 37 Ark. 374.

6. Bronson v. Oberlin, 41 Ohio St. 476; s. c., 52 Am. Rep. 90.

7. State v. Bott, 31 La. An. 663; s. c., 33 Am. Rep. 224.

8. Holley v. State, 14 Tex. App. 505.

(1) *Grounds of Holding Local Option Laws Valid or Invalid.*—Local option laws have been held to be invalid (1) where their title was defective in not complying with a statutory requirement that no law shall relate to more than one subject, which shall be expressed in the title.¹ (2) Because it is a delegation of the legislative power to the people, and for that reason is in conflict with the constitutional provisions which vest all legislative powers in the legislature.² (3) Where it is left to a vote of the people to determine whether the act shall become a law.³

See *Steele v. State*, 19 Tex. App. 425.

1. *Ex parte Burnside v. Lincoln Co. Ct.*, 86 Ky. 423.

2. *State v. Baum*, 33 La. An. 981 (overruling *State v. Bott*, 31 La. An. 663; s. c., 33 Am. Rep. 224; *Lessman v. Territory*, 3 Wash. Tr. 452; *Thornton v. Territory*, 3 Wash. Tr. 482. See *Com. v. Kimball*, 41 Mass. (24 Pick.) 359; s. c., 35 Am. Dec. 337 and note.

As to what acts are not invalid as a delegation of the legislative power to the people, or some body of the people, see *State v. Wilcox*, 42 Conn. 364; s. c., 19 Am. Rep. 536; *Groesch v. State*, 42 Ind. 547; *Fell v. State*, 42 Md. 71; s. c., 20 Am. Rep. 83; *Savage v. Com.* (Va.); 5 S. E. Rep. 563.

Same—Washington Territorial Act.—In *Thornton v. Territory*, 3 Wash. Tr. 482, it was held that the local option act giving to precincts of Washington Territory the power to repeal the existing law, and prohibit the sale of intoxicating liquors by a petition and vote of the majority of the voters of any precinct, is invalid as a delegation of the legislative authority, precincts not being municipal corporations capable of receiving such grant, or of exercising the power granted. To the same effect see *Lessman v. Territory*, 3 Wash. Tr. 452.

Same Louisiana Police Juries Act.—The supreme court of Louisiana held in the case of *State v. Baum*, 33 La. An. 981 overruling *State v. Bott*, 31 La. An. 663; s. c., 33 Am. Rep. 224, that the Louisiana acts of 1878, No. 84, authorizes police juries to prohibit the sale of liquors on Sunday, in the various parishes of the State invalid, because delegating to the police juries the authority of the general assembly to legislate, and that of the State to prosecute.

3. See *Ex parte Wall*, 48 Cal. 279; s. c., 17 Am. Rep. 425; *State v. Weir*, 33 Iowa 134; s. c., 11 Am. Rep. 115; *Santo v. State*, 2 Iowa 165; s. c., 63 Am. Dec. 487; *Prohibitory Amendment Cases*, 24 Kan. 700.

A statute empowering townships to decide by a popular vote whether or not the sale of spirituous liquors should be allowed within their precincts, such vote to be taken at a special election to be called on petition, by the board of supervisors of the county, was held unconstitutional in *Ex parte Wall*, 48 Cal. 279; s. c., 17 Am. Rep. 425.

It was said by the supreme court of Iowa, in the case of *State v. Weir*, 33 Iowa 134; s. c., 11 Am. Rep. 115, that the legislature have no power to make the operation or repeal of a law depend upon the vote of the people, and therefore an act prohibiting the sale of ale, wine, etc., the operation of which is made to depend upon the vote of the people in each county, was unconstitutional.

Calling Aid of People to Legislature.—But it is thought that the better doctrine is that an act of the legislature, which calls to its aid the people of a particular district, as a means of ascertaining the utility of a measure without delegating to the people the power to make the law, is valid and constitutional. See *State ex rel. Sanford v. Court of Common Pleas of Morris*, 36 N. J. L. (7 Vr.) 72; s. c., 13 Am. Rep. 422; *Locke's Appeal*, 72 Pa. St. 491; s. c., 13 Am. Rep. 716.

Thus it is said in *State ex rel. Sanford v. Court of Common Pleas of Morris*, 36 N. J. L. (7 Vr.) 72; s. c., 13 Am. Rep. 422, that what is known as the Chatham local option law, declaring the retailing of ardent spirituous liquors to be unlawful, and providing that no license shall be granted if the township vote that a majority is for "no license" is constitutional. And it is said by the supreme court of Pennsylvania, in *Locke's Appeal*, 72 Pa. St. 491; s. c., 13 Am. Rep. 716, overruling *Parker v. Com.*, 6 Pa. St. 507; s. c., 47 Am. Rep. 480, that an act was unconstitutional which authorized voters to vote "for license" or "against license."

Local option laws are within the police power and constitutional,¹ and are not open to the objection that they take private property for public use without compensation, and without due course of law;² or that they are a regulation of commerce,³

the tickets to be counted and returned certified to the quarter sessions; the voting to be conducted as in other relations; that the returns show a majority "against license" which should "not be lawful for any license to issue for the sale of intoxicating liquors."

1. See *Minnehaha County v. Champion* (Dak.), 37 N. W. Rep. 766; *Territory v. O'Connor* (Dak.) 37 N. W. Rep. 765; *Burnside v. Lincoln Co. Ct.*, 86 Ky. 423; *Falmouth v. Watson*, 5 Bush (Ky.) 660; *Com. v. Ducey*, 126 Mass. 269; *Lemon v. Peyton*, 64 Miss. 161; *Schulherz v. Bordeaux*, 64 Miss. 59; *Ex parte Kennedy*, 23 Tex. App. 77.

Validity of Local Option Laws—Kentucky Doctrine.—The supreme court of Kentucky held, in the case of *Falmouth v. Watson*, 5 Bush (Ky.) 660, that authority conferred on the trustees of a town by act of the legislature to exact payment of not more than \$300 from any person selling spirituous liquors by retail within one mile of the town is a police regulation and is not unconstitutional. The same court held, in the recent case of *Burnside v. Lincoln Co. Ct.*, 86 Ky. 423, that an act prohibiting the sale of liquor in a designated county, is not interdicted by the bill of rights of Kentucky, or the fourteenth amendment of the constitution of the United States, because the sale of liquor never has been a right but a privilege merely the creature of license, and the legislature of the State may, under its police power, not only regulate but restrict or entirely prohibit the retail liquor traffic.

Same—Massachusetts Doctrine.—The supreme judicial court of Massachusetts say, in the case of *Com. v. Ducey*, 126 Mass. 269, that a statute conferring upon the mayor and aldermen of a city, or the select men of the town, or any police officer, or constable "specially authorized by them," power to enter upon the premises of any person licensed to sell under this act, to ascertain the manner in which such person conducts his business, and to preserve order is a reasonable exercise of the police power of the commonwealth, and is constitutional.

2. *Menken v. City of Atlanta*, 78

Ga. 668; s. c., 36 Alb. L. J. 6; *McKinney v. Salem*, 77 Ind. 213; *Ex parte Kennedy*, 23 Tex. App. 77; *Steele v. State*, 19 Tex. App. 425; *Ex parte Lynn*, 19 Tex. App. 293; *Ex parte Kinnebrew*, 35 Fed. Rep. 552.

Taking Private Property.—The Texas court of appeals say, in the late case of *Ex parte Kennedy*, 23 Tex. App. 77, that the local option law being within the scope of the police power of the State, does not "take, damage, or destroy" private property for public use within the meaning of section 1 of the Texas bill of rights.

Destruction of Breweries—Damnum Absque Injuria.—It is said in the case of *Menken v. City of Atlanta*, 78 Ga. 668; s. c., 36 Alb. L. J. 6, that the local option legislation of Georgia is constitutional as a valid exercise of the police power, and that the effect of such law upon the value of the property, such as a brewery and its fixtures resulting from the inability of the owners to adjust their old business to the new law is *damnum absque injuria*; that the law does not take or damage such property for the use of the public, but only prevents the owners from taking or damaging the public for their use.

Licenses Already Granted—Property Rights.—The supreme court of Indiana say, in the case of *McKinney v. Salem*, 77 Ind. 213, that the Indiana act giving towns the right to license the sale of intoxicating liquors, is not unconstitutional as violating the rights of sellers already licensed by county officers, because a liquor license is at all times subject to the control of the legislature.

3. **Prohibiting Sale of Intoxicating Liquors—Regulation of Commerce.**—The United States circuit court for the northern district of Georgia, in passing upon the Georgia local option act of September 18th, 1885, which, after prohibiting the sale of intoxicating liquors, provides "that nothing in this act shall be so construed as to prevent the manufacture, sale and use of domestic wine, cider, etc.," held, that in excepting domestic wines from the prohibition must be taken as excepting other wines and that so construed it is not in violation of the federal constitution, art. 1, §

or that they are local or special laws,¹ and unjustly discriminating.²

d. ADOPTION OF LOCAL OPTION; ELECTIONS, ETC.—Where a statute provides for the adoption or rejection of local option by a vote of the people of the particular district or county, held at a general election, the general election referred to is one which is general throughout the State.³ But the officer charged with the duty of calling an election, under a local option law, cannot order such an election for the purpose of determining whether or not the gift or exchange of intoxicating liquors shall be prohibited. Their authority is limited to ordering an election to determine the prohibition of the sale of intoxicating liquors.⁴

Where the legislature provides for an election to determine the question of prohibiting the sale of liquors in a certain county, and no provision is made in the law for judicial interference, and there is no statute authorizing such interference, and no authority exists at common law, neither a court of law nor of equity has power or jurisdiction over the matter. The matters arising out of such elections must be determined alone by the tribunal constituted by the legislature for that purpose. The courts are powerless to interfere, unless the legislature shall see proper to confer such power upon them.⁵

A local option law, being for a particular locality, depends for its validity upon its adoption in conformity with prescribed regulations, and unless so adopted is void, and although promulgated

8, giving to congress the power to regulate interstate commerce." *Ex parte Kinnebrew*, 35 Fed. Rep. 52.

1. See *Tatum v. State*, 79 Ga. 176; *Higgins v. State*, 64 Md. 419; *Ex parte Swann*, 96 Mo. 44; *State ex rel. Maggard v. Pond*, 93 Mo. 606; *Whisenhunt v. State*, 18 Tex. App. 491.

"Local and Special Laws."—The Missouri local option law of 1887, which provides that any county or town, or city having a population of 2,500 or more, may by majority vote, put such county, town or city under its operation applies to all the counties in a State and to all incorporated cities or towns having a population of 2,500 or more inhabitants as a class and does not violate § 53 of art. 4 of the Missouri constitution, which provides "that no local or special law shall be passed when a general law can be made applicable." *State v. Pond*, 93 Mo. 606. The same court say in the later case of *Ex parte Swann*, 96 Mo. 44, that this statute does not contravene § 1 of art. 14 of the federal constitution prohibiting a State from denying to any person within its jurisdiction the

equal protection of the law, the statute being applicable alike to all persons within the locality in which it is adopted, although for violation of the dramshop law which remains in force in other localities, whatever penalties are imposed.

2. *In re Hauck*, (Mich.); 38 N. W. Rep. 269; *Ex parte Swann*, 96 Mo. 44; *State v. Pond*, 93 Mo. 606.

3. *Mackin v. State*. 62 Md. 244.

Yet it has been said that under the Texas local option law the qualified voters of a precinct may assert their right to adopt or reject local option, independent of the wishes of the people of the county, and that voters of the whole county may do the same without reference to the wishes of the people of a particular precinct. *Whisenhunt v. State*, 18 Tex. App. 491.

4. And this limitation will not be affected by the fact that it is provided that when the election has resulted in favor of prohibition, the effect is that the sale, exchange and gift within a particular locality is prohibited and made penal. *Steele v. State*, 19 Tex. App. 425.

5. *Caldwell v. Barrett*, 73 Ga. 604.

by proper authority, is neither binding upon nor notice to anyone.¹

To be valid and binding the election must be regularly and properly ordered.²

Under a statute providing that liquorselling may be prohibited upon the petition of a majority of the adult inhabitants residing within a particular district, without such a petition there is no power to take action under the local option act, and an order made for an election thereunder without a sufficient petition is a nullity.³

In such petition it is only necessary that the requisite number of qualified persons shall, in writing, indicate to the proper officers their desire that an election be held in a particular locality for the purpose of determining whether or not the sale of intoxicating liquors shall be prohibited in that locality; it is not essen-

1. *Donaldson v. State*, 15 Tex. App. 25. See *Hammond v. Haines*, 25 Md. 541; s. c., 90 Am. Dec. 77, 83; *Phillips v. State*, 23 Tex. App. 304.

2. *Com. v. King*, 86 Ky. 436; *Dawson v. State*, 25 Tex. App. 670; *Ex parte Sublett*, 23 Tex. App. 309, 312.

Elections—Under the Texas Local Option Law.—An election held pursuant to an order issued at a term of commissioners' court, subsequent to the first term held after the petition thereafter is void. *Ex parte Sublett*, 23 Tex. App. 312.

In *Com. v. King*, 86 Ky. 436, it is said that where the local option law provides that upon petition of twenty legal voters in any district, town or city, the county judge shall make an order directing the sheriff or other officer, whose duty it may be to hold an election, to open a poll at the next State, town, city or county election for the purpose of taking the sense of the voters, whether or not liquor shall be sold, and that an election under this provision to take the sense of the city, held by the sheriff or coroner, at a State election is unauthorized and void, the act intending that in a city or town the vote was to be taken at a city or town election under the control of those directly interested in the municipal elections.

Second Election.—Under a statute providing that a second election under the local option law shall not be held in less than two years after the first election, which is an amendment to a prior statute permitting an election to be held one year thereafter, applies only to those localities thereafter adopting the law,

and does not nullify a county election repealing the law held a year after this adoption which occurred before the passage of the latter act. *Dawson v. State*, 25 Tex. App. 670.

3. *Akin v. State*, 14 Tex. App. 142. See *Tally v. Grider*, 66 Ala. 119; *Williams v. Citizens*, etc., 40 Ark. 290.

Who May Sign.—In Arkansas it has been held that adult females, as well as adult males, may join in a petition for an order prohibiting the sale or giving away of liquor under a statute providing that liquor selling may be prohibited, upon the petition of a majority of the adult inhabitants of a particular district, and the finding of the county court in regard to this matter cannot be impeached upon a trial for a violation of the act. *Blackwell v. State*, 36 Ark. 178.

Contents of Petition.—A petition under the Alabama local option law authorizing probate judges to order elections to determine whether the sale of spirituous liquors shall be licensed, which fails to aver that "in the interest of the petitioner, the public good will be promoted by a prohibition of the sale or giving away of vinous or spirituous liquors within the limits" designated, is defective and confers no jurisdiction on the probate judge to order an election. *Tally v. Grider*, 66 Ala. 119.

Territory to be Included.—Under an act providing that liquor selling may be prohibited upon the petition of a majority of the adult inhabitants residing within three miles of any school-house, church, etc., two points as centers cannot be designated in the same petition,

tial that the petition should refer to or designate the statute under which the election should be ordered.¹ No notice is required to be given of the filing of such petition.²

Where a remonstrance or counter petition to a petition for the prohibition of the sale of liquor under the local option law is not provided for by the statute, such remonstrance or counter petition cannot be admitted as evidence to apprise the court that the petition does not contain a majority of the inhabitants.³

The order for an election under the local option law should be made in accordance with the provisions of such law, but such order will not be invalid because it specifies voters qualified to vote for members of the legislature, where such voters are qualified for any election under the constitution.⁴ The requirements of the local option law regarding the posting of notices of election under such an order must be strictly complied with or the election will not be valid.⁵ In the absence of proof to the contrary it will be presumed that the notices were posted in the manner required by law; but such presumption may be overcome by proof.⁶

The statute providing for the prohibition of the sale of intoxicating liquors in any town or city by vote of its inhabitants does not require that they shall take the vote by ballot or shall previously determine by a formal vote the manner of taking it;⁷ and where the voters are not asked the precise question prescribed by the act under which the vote is being taken, this will not invalidate the vote.⁸ The number of votes required by the statute must in each instance be cast to render the election valid.⁹

the signers secured from within three miles of either. *Williams v. Citizens*, etc., 40 Ark. 290.

Supervisors Canvassing for Signers—Disqualification.—The supreme court of Mississippi say, in *Lemon v. Peyton*, 64 Miss. 161, that a member of the board of supervisors, who canvasses for or signs a petition for an election under the local option law, is not thereby disqualified from acting on such petition in his official capacity, in pursuance of the terms of the law; that the interest which qualifies a judge is pecuniary, not political.

1. *Steele v. State*, 19 Tex. App. 425.

Referring to Statute—Incorrect Description.—Where a petition for an election under the local option law, unnecessarily refers to such law and incorrectly describes it, the erroneous reference to the statute is mere surplusage, and does not invalidate the petition. *Steele v. State*, 19 Tex. App. 425.

2. *Blackwell v. State*, 36 Ark. 178.

3. *Williams v. Citizens*, etc., 40 Ark. 290.

4. *Lemon v. Peyton*, 64 Miss. 161.

5. *Ex parte Kennedy*, 23 Tex. App. 77; *Smith v. State*, 9 Tex. App. 444.

6. *James v. State*, 21 Tex. App. 189. **Posting—Placing in Hands of "Good Men."**—The clerk does not "post" notices of a local option election by placing them "in the hands of good men to be posted." If he is shown to have done this, that fact rebuts the presumption that he did his duty. *James v. State*, 21 Tex. App. 189.

Same—Number of Notices.—An election under a local option law is not valid if the statutory requisites are not complied with as to a certain precinct, although the mere fact that two of the five notices posted in the county were posted in a single precinct, would not of itself invalidate the election. *Ex parte Kennedy*, 23 Tex. App. 77.

7. *Com. v. Doe*, 108 Mass. 418.

8. *Gayle v. Owen County Court*, 83 Ky. 62.

9. See *Siloam Springs v. Thompson*, 41 Ark. 456; *Walker v. Oswald*, 68 Md. 146; *English v. State*, 7 Tex. App. 171; *Chalmers v. Funk*, 76 Va. 717.

Number of Votes Required.—In the

Where the law makes no provision as to how the result of the election shall be proclaimed, a verbal proclamation by the clerk at the court house door that the local option law as carried is sufficient.¹

An order declaring the result of an election under the local option law is valid, although not in the words of the statute, if it contains all the essential requisites;² but an order of the county court forbidding the sale of liquor "within three miles of a church house and schools" in a town, is void for designating more than one point as the centre of the district.³

It is essential to the validity of an election under a local option law that it appear from the face of the records that the forms of

absence of any special provision it would seem that the vote of a majority of the voters of the county or district voting at such election will be sufficient. *Siloam Springs v. Thompson*, 41 Ark. 456; *Walker v. Oswald*, 68 Md. 146; *Chalmers v. Funk*, 76 Va. 717.

Where There Is No Vote.—Under a statute providing that if a majority of the votes cast in any county be not for license, the county court cannot grant a license. Where no vote is taken no license can be granted. *Siloam Springs v. Thompson*, 41 Ark. 456.

1. *Mackin v. State*, 62 Md. 244.

Result of Election.—It is thought that when the vote under the local option law is in favor of selling, the fact need not be certified to the county court otherwise, where it is adverse. *Com. v. Hoke*, 14 Bush (Ky.) 668.

2. *James v. State*, 21 Tex. App. 353. See *Lipari v. State*, 19 Tex. App. 431.

Limitation.—Where the limitation of the prohibition under the election is fixed by law, it cannot be affected by the order of the court. *Lipari v. State*, 19 Tex. App. 431.

Form of Order.—If an election under the "local option" law results in favor of prohibition, it is sufficient for the order declaring the result to state that fact and to prohibit the sale of intoxicating liquors (except for certain purposes specified in the statute) within the limits of the locality. It was not essential to the sufficiency of the order that it should declare that the prohibition should continue until such time as the qualified voters of the locality, by a majority vote, at an election held therefor, should decide otherwise. Such limitation is fixed by law, and cannot be affected by the order of the court.

Language of the order, that the sale of intoxicating liquors "is absolutely

prohibited, except for the purposes and under the regulations prescribed by law," is sufficiently specific and definite. *Ex parte Burrage*, 26 Tex. App. 35.

Clerical Error in Order.—An order of the commissioners' court declaring the adoption of local option, which, through manifest inadvertence or a clerical error, shows that less than a majority of the votes cast were for prohibition, when as a matter of fact it is apparent from other parts of the same order that there was a majority for prohibition, is not invalidated thereby. *Ex parte Burrage*, 26 Tex. App. 35.

An order of the commissioners' court in Texas, declaring the result of an election adopting the provisions of the local option law regulating the sale of intoxicating liquors, was published in four successive issues of a newspaper, to wit, July 4th, 11th, 18th and 25th, 1885. On trial for violation of the law, the court charged that the publication of said order for four successive weeks was completed July 25th, 1885, and that the law took effect and became operative on that date. Held, error. *Phillips v. State*, 23 Tex. App. 304; s.c., 4 S. W. Rep. 893.

Same—Subsequent License to Sell.—Where an order has been made by the county court upon a petition of a majority of the adult residents of the township, prohibiting the selling of liquor within three miles of an academy in violation of Arkansas act of March 2, 1875, a subsequent license to sell liquor is no protection against a prosecution for selling within the prohibited limits, although a subsequent order revoking the prior order has been made by the county court, the latter order being without authority. *Wilson v. State*, 35 Ark. 414.

3. *Gazola v. State*, 45 Ark. 458.

the law were complied with in holding the election;¹ but where the records show that the officers were duly appointed before the election, the presumption obtains that they held it.²

c. **VALIDITY OF ORDINANCES ADOPTING LOCAL OPTION.**—A city ordinance passed for the purpose of regulating the traffic of intoxicating liquors adopting local option is valid.³ And an

1. *Tally v. Grider*, 66 Ala. 119; *Carnes v. State*, 23 Tex. App. 449; *McMillan v. State*, 18 Tex. App. 375; *Stallworth v. State*, 18 Tex. App. 378.

It devolves upon the State, in prosecuting violations of the local option law, to establish the fact that the order of the commissioners' court for the holding of the election was based upon a legal petition; and that proof must appear of record on appeal. *Carnes v. State*, 23 Tex. App. 449.

On an indictment charging the violation of the local option law the defendant objected that the election at which the law was adopted was not held in accordance with the provisions of Code North Carolina, § 3114, which makes it the duty of the board of county commissioners to order elections upon the petition of one-fourth of the qualified voters, etc. The evidence showed that the election in question was ordered by the board; that it was held, and the returns made and canvassed, and the result proclaimed according to law, but there was no proof that an election had been ordered upon petition as aforesaid. Held, that the result of the election as decided and proclaimed is conclusive upon any collateral proceeding. *State v. Emery*, 98 N. C. 768.

2. *James v. State*, 21 Tex. App. 353.

Appeal.—Upon appeal from a judgment of the county court, upon a petition under the three mile law, the circuit judge, in determining whether the petition contains a majority of the adult inhabitants, should attach great weight to the judgment of the county court and sustain it, unless quite clearly erroneous. *Williams v. Citizens*, 40 Ark. 290.

3. *Franklin v. Westfall*, 27 Kan. 614; *Salena v. Seitz*, 16 Kan. 143; *Beasley v. Beckley*, 28 W. Va. 81; *Tanner v. Alliance*, 29 Fed. Rep. 196. *Compare* *Cantril v. Sainer*, 59 Iowa 26; *State v. Leavenworth*, 36 Kan. 314.

In *Salena v. Seitz*, 16 Kan. 143, an ordinance of a city of the third class, providing for the issuance of licenses upon certain terms and conditions, to sell intoxicating liquors, and for punishing such persons as should sell with-

out taking out, or having such licenses, was held valid.

Local Option—Village Ordinance—Injunction Against Enforcement.—In *Tanner v. Alliance*, 29 Fed. Rep. 196, by an ordinance of a village in Ohio, passed under the authority of the State legislature, the keeping of "ale, beer, and porter houses, and other places where intoxicating liquors are sold at retail," was prohibited within the village. The United States circuit court held that a citizen of the State engaged in the business of selling liquors, and who had paid the tax required by such act of the legislature, to be paid to carry on the business of the village, and had acquired and fitted property for that purpose, and had built up an extensive business, the good will of which was of large pecuniary value to him, was not therefore entitled to an injunction from a United States circuit court to restrain the village from enforcing the ordinance on the ground that it was a violation of the constitution to the State, and of the United States.

Defective Title—Discrepancy Between Title and Subject.—Where an ordinance is entitled "regulating the use and sale of intoxicating liquors," but the substance of the ordinance is found in the body of it, is entirely prohibitory with no pretence of regulation, it is invalid for want of compliance with the law requiring the subject of an ordinance to be clearly expressed in its title. *Cantril v. Sainer*, 59 Iowa 26.

Prospective and Retroactive Operation.—An ordinance passed after the issuance of a licence to a retailer of spirituous liquors, imposing a penalty for its violation by keeping his saloon open after ten o'clock P. M., is not an *ex post facto* or retroactive law, unless the act sought to be punished was committed antecedent to its passage. *State v. Isabel*, 40 La. An. 340. See *Tanner v. Alliance*, 29 Fed. Rep. 196.

In *State v. Isabel*, 40 La. An. 340, the court observes: "It is an established fact that the alleged violation of the ordinance occurred long after its adop-

ordinance of a town declaring the selling of intoxicating liquors to be a nuisance, and imposing a fine for the offence is valid in those cases where the legislature conferred upon the town power to authorize the adoption of such an ordinance.¹

Towns have power to prohibit the sale of such intoxicating liquors only as are not prohibited by statute, and an ordinance which prohibits the sale of all kinds of intoxicating liquors will be void as to such liquors as are prohibited by statute;² but

tion. We cannot understand in what respect it is an *ex post facto* law, when it is intended to punish crimes or offences committed antecedent to its enactment; and it is said to be retroactive when it is applied to past transactions. But neither view has any application here, because the act sought to be punished occurred subsequent to the adoption of the ordinance. We are referred to no provisions of law in force at the time the defendant procured his licenses, under the authority of which he was entitled to keep open his establishment until twelve o'clock at night, and the privilege of enjoying which the ordinance in question purports to abridge. And we are not aware of any. But if there was, it would not result therefrom that the ordinance in question was either an *ex post facto* or retroactive law."

Prohibiting Absolutely or for Certain Purposes.—It is said in *Bronson v. Oberlin*, 41 Ohio St. 476; s. c., 52 Am. Rep. 90, that a village council acting under a statute (act of March 29th, 1882, 79 Ohio Laws, 59), authorizing incorporated villages having within their limits a college, university or the like, to provide against the evils resulting from selling intoxicating liquors therein, exceeds its power when it makes an ordinance prohibiting the sale of liquors to all persons for all purposes except medical or medicinal; and the sections of the ordinance so providing are void.

But it is said in *Hill v. Mayor*, 72 Ga. 314, that if the offence prohibited by a municipal ordinance prohibiting the sale of liquors in the corporate limits in any county either directly or selling any other commodity, or giving away liquor or any other device or disguises whatever, and imposing a penalty for such violation with the same punishments as those prohibited by section 5465 of the Georgia Code, the power having existed prior to the constitutions of 1868 and 1877, in the incorporate authorities to try parties for such

offences, that for that reason the ordinance was valid.

1. *Harbaugh v. City of Monmouth*, 74 Ill. 369; *Kettering v. City of Jacksonville*, 50 Ill. 41; *Dingman v. People*, 51 Ill. 280; *Block v. Town of Jacksonville*, 36 Ill. 301; *Roberts v. Ogle*, 30 Ill. 461; s. c., 83 Am. Dec. 201; *City of Pekin v. Smelzel*, 21 Ill. 469; s. c., 74 Am. Dec. 105; *Byers v. President etc. of Town of Olney*, 16 Ill. 36; *Goddard v. Jacksonville*, 15 Ill. 588; s. c., 60 Am. Dec. 773; *City of Frankfort v. Aughe*, 114 Ind. 77; *Vonderweitz v. Centerville*, 15 Ind. 447; *Hollenbaugh v. State*, 11 Ind. 556.

Declaring Sale to be a Nuisance.—A municipal ordinance declaring the sale of intoxicating liquors, beer, etc., to be a nuisance, forbidding such sale, and prescribing punishment therefor, is valid. *Vonderweitz v. Centerville*, 15 Ind. 447; *Hollenbaugh v. State*, 11 Ind. 556.

Imposing Fine.—An ordinance of a town declaring the sale of intoxicating liquors a nuisance, may impose a fine for such sale. *City of Pekin v. Smelzel*, 21 Ill. 469; s. c., 74 Am. Dec. 105; *Goddard v. President etc. of Town of Jacksonville*, 15 Ill. 588; s. c., 60 Am. Dec. 773.

2. *Town of Eldora v. Burlingame*, 62 Iowa 32; *Cantril v. Sainer*, 59 Iowa 26.

Ordinance Prohibiting Sale of Beer—Repugnancy to Statute.—A town ordinance prohibiting the sale of beer is not repugnant to the general laws of the State, beer of some kinds being an intoxicating drink. *Pekin v. Smelzel*, 21 Ill. 464. But a town ordinance prohibiting the sale of beer within three miles of the corporate limits, is void unless specially authorized by the legislature. *Strauss v. Pontiac*, 40 Ill. 301.

Same—Fixing Punishment.—A statute which prohibits towns or cities from making acts punishable by ordinance which are made public offences, and punishable by the State, does not apply

will be enforced as to such liquors as the town council has power to regulate the sale of by ordinance.¹

Where, by statute or by charter, municipal corporations are authorized to prohibit the sale of spirituous and intoxicating liquors, at particular times, such prohibition must be for a definite time,² and be reasonable.³ But it has been said that so much of an ordinance as in effect prohibits the sale of strong and spirituous liquors and wines by licenced inn keepers to lodgers and lawful travellers on Sunday is void.⁴

(1) *Ordinances Relating to Licencing, Fees, etc.*—An ordinance providing that a licence shall be granted only by applying to the

to an ordinance making it an offence to sell intoxicating liquors within the limits of a city without first obtaining a city license therefor. *City of Frankfort v. Aughe*, 114 Ind. 77.

Limit as to Quantity.—A city ordinance forbidding the sale of liquors of the amount of more than one quart to be drunk on the premises, where inconsistent with the State law, is unauthorized by the city charter and void. *Adams v. Albany*, 29 Ga. 56. An amendment to the city charter allowing the mayor to try offences, does not increase the power of the city to make laws creating offences. *Adams v. Albany*, 29 Ga. 56.

Same — Repugnancy to Statute.—Where the ordinance of a municipal corporation prohibiting the sale of pure Ohio wine, ale, beer, and cider to be drunk where sold, and prohibiting the sale of such liquors in less quantities than one gallon, was held in *Thompson v. Mount Vernon*, 11 Ohio St. 688, to be void, because inconsistent with and against the policy of the general statute of the State "to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio."

Same — Unreasonable Quantity.—Where the legislature, by enactments authorizing the council of a town to pass such ordinance as they may deem necessary for controlling the retail of spirituous liquors, and they passed an ordinance that no one should sell spirituous liquors in less quantities than twenty gallons, it was held that the act did not grant the power to pass such ordinance, twenty gallons being too great a quantity to embrace the word "retail." *Harris v. Livingston*, 28 Ala. 577.

However, it is said in the supreme court of Illinois, in the case of *Byers v. President etc. of Town of Olney*, 16 Ill. 36, that a town ordinance providing

against the sale of vinous and spirituous liquors, etc., in a less quantity than one barrel without a licence, is not repugnant to the general law prohibiting the sale without licence in less quantity than one quart.

1. *Town of Eldora v. Burlingame*, 62 Iowa 32.

2. **Definite Time.**—Thus where a statute authorized the board of police commissioners of a particular town to order all drinking saloons to be closed temporarily, whenever in their judgment public peace required it, and making it a misdemeanor to disobey such order "during such period as such board shall so forbid," and the board issued an order that drinking saloons "be so temporarily closed until further notice," it was held that although the legislature had in no way exceeded its authority in conferring such power upon the board of police commissioners, yet such board being authorized by statute to close the drinking saloons only for a short and definite interval, that consequently the order to "close them" until "further notice" was void. *State v. Strauss*, 49 Md. 288.

3. **Prohibition Must be Reasonable.**—Thus it has been held that an ordinance of a municipal corporation forbidding licensed retailers of spirituous liquors to sell between the hours of six o'clock P.M. and six o'clock A.M., is unreasonable and invalid. *Ward v. Greenville*, 8 Baxt. (Tenn.) 228. Also that an ordinance forbidding the sale after six o'clock P.M. on the first three days of each term of the circuit court, on the days when the county court is held, when a public show takes place, or fairs are held near the town, is void as being unreasonable. *Grills v. Jonesboro*, 8 Baxt. (Tenn.) 247.

4. *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425.

city council, upon petition of the applicant, accompanied by a certificate as to his character, and that the applicant should be entitled to a license, if the city council find that he was qualified to carry on the business, is reasonable and valid;¹ but where it is required that the application shall be accompanied by a petition of the majority of the adult residents, it has been held to be void.²

(2) *Property Rights; Due Process of Law, etc.*—The right to pursue a lawful employment is not abridged within the meaning of the fourteenth amendment of the United States constitution by a municipal ordinance which merely regulates the sale of liquors and imposes a license thereon without prohibiting their sale absolutely;³ and it has been said that an ordinance prohibiting the sale of liquors in the incorporate limits of the city, and imposing a penalty for the violation thereof is not unconstitutional, because no provision is made for a jury trial on a prosecution for the violation of such ordinance.⁴

(3) *Restraint of Trade; Regulation of Commerce.*—Where a town is authorized by a statute or by its charter to regulate or suppress the sale of intoxicating liquors, an ordinance prohibiting such sale without a license is not in derogation of the common rights of the citizens, and is not open to the objection that it seeks to regulate commerce or is in restraint of trade.⁵

(4) *Unlawful Search, etc.*—A city ordinance prohibiting the sale of intoxicating liquors, except by druggists for sacramental, chemical, mechanical or medicinal purposes, and requiring such druggists, under a heavy penalty, to furnish the city clerk a statement in writing of the kind and quantity thereof, and when and to whom sold, verified by the oath of every servant in the druggist's employ, has been held to be an invasion of the sanctity of private business, and contravenes the constitutional guaranty

1. *Amador Co. v. Kennedy*, 70 Cal. 458; *In re Bickerstaff*, 70 Cal. 35; *Ex parte Hurl*, 49 Cal. 557; *Wolf v. City of Lansing*, 53 Mich. 367.

License Fees.—Constitutional Law.—It is said in *Ex parte Hurl*, 49 Cal. 557, that a city ordinance requiring the payment of a license fee of \$50 every ninety days, for the privilege of retailing spirituous liquors, does not violate any provision of the constitution, and that it cannot be assumed judicially that such an ordinance is a virtual prohibition of the sale of such liquors.

Discrimination.—Wayside Tavern or watering place.—An ordinance passed by the board of supervisors of a county, imposing license taxes upon the business of selling liquors at retail, is not invalid because it fixes a less rate of license for the business of retailing at a wayside tavern or watering place than

for the same business carried on in a village, town or city. *Amador Co. v. Kennedy*, 70 Cal. 458.

2. *Eureka v. Davis*, 21 Kan. 578.

3. *In re Bickerstaff*, 70 Cal. 35; *Tanner v. Alliance*, 29 Fed. Rep. 196.

4. *Hill v. Mayor*, 72 Ga. 314.

5. *Carthage v. Buckner*, 4 Ill. App. 317; *City Council v. Ahrens*, 4 Strob. (S. C.) 241.

It is said by the supreme court of South Carolina, in *City Council v. Ahrens*, 4 Strob. (S. C.) 241, that a city ordinance prohibiting the sale of intoxicating liquors without a license, is not in derogation of the common rights of the citizens, but is a restraint of the trade of a few for the benefit of the many; that such an ordinance is not unconstitutional, because the articles prohibited are articles of commerce, admitted by the revenue laws of the

against unreasonable searches;¹ but it has been said that an order of the board of police commissioners, by which the police officers of a city are authorized to enter at any time upon the premises of any person licensed to sell intoxicating liquors under the statute, to ascertain the manner in which such person conducts his business, and to preserve order, is legal and valid.²

f. REPEAL OR REVOCATION.—Where a license has been granted by public authorities in accordance with the provisions of a statute or ordinance, such licence is in no sense a contract by the State, county or city with the person taking out the license; it is simply a permit granted to do business under the license, and the license may be repealed or revoked at any time.³ Where, in accordance with the constitution and the statutory provisions on the subject, a local option law has been adopted and put in force, it operates as a repeal, within the locality in question, of all laws and parts of laws in conflict with it. And unless otherwise provided will exempt from punishment all previous offenders against the repealed laws.⁴ But where authority

United States, and because after the article is admitted into the country it becomes the property of a citizen of the state which has power to regulate or prohibit its sale.

1. *City of Clinton v. Phillips*, 58 Ill. 102; s. c., 11 Am. Rep. 52.

2. *Com. v. Carter*, 132 Mass. 12; *Com. v. Ducey*, 126 Mass. 269.

Supervision of licensed articles.—It is held by the supreme judicial court of Massachusetts, in the case of *Com. v. Carter*, 132 Mass. 12, that "private property is held subject to the exercise of such public rights, for the common benefit; and in the case of licensed dealers in merchandise, the injury suffered by inspection is accompanied by advantages which must be regarded as sufficient compensation. *Bancroft v. Cambridge*, 126 Mass. 438, 441. Instead of requiring all milk offered for sale to be first inspected, the legislature for obvious reasons has permitted licensed dealers to sell milk without inspection, has imposed penalties for selling adulterated milk, and has provided that when the inspector of milk has reason to believe that any milk has been adulterated he may take specimens thereof in order that by analysis or otherwise he may determine whether the milk has been adulterated. Such a seizure of milk for the purposes of examination is a reasonable method of inspection, and does not require a warrant. It is a supervision under the laws by a public officer of a trade which concerns the

public health, and is within the police power of the commonwealth. *Com. v. Ducey*, 126 Mass. 269; *Jones v. Root*, 72 Mass. (6 Gray) 435. The same is true of all spirituous, vinous, fermented or malt liquors, where licensed.

3. *Brown v. State* (Ga.), 7 S. E. Rep. 915. See *Huffsmith v. People*, 8 Colo. 175; s. c., 54 Am. Rep. 550; *Seibold v. People*, 86 Ill. 33; *Bennett v. People*, 30 Ill. 389; *McKinney v. Town of Salem*, 77 Ind. 213; *State v. Neepser*, 3 G. Greene (Iowa), 337; *Com. v. Jarrell* (Ky.), 5 S. W. Rep. 763; *Com. v. Weller*, 14 Bush (Ky.) 218; *Fell v. State*, 42 Md. 71, s. c., 20 Am. Rep. 83; *Calder v. Kurby*, 71 Mass. (5 Gray) 597; *Wheeler v. State*, 64 Miss. 462; *Hearn v. Brogan*, 64 Miss. 334; *State v. De Bar*, 58 Mo. 395; *State v. Clarke*, 54 Mo. 17; s. c., 14 Am. Rep. 471; *Metropolitan Board of Excise v. Berrie*, 34 N. Y. 657; *Boone v. State*, 12 Tex. App. 184; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 32; *Cooley Const. Lim.* 343, 474.

4. *Boone v. State*, 12 Tex. App. 184. See *State v. Yewell*, 63 Md. 120; *Wheeler v. State*, 64 Miss. 462; *Rauch v. Com.* 78 Pa. St. 490; *Compare Com. v. Weller*, 14 Bush (Ky.) 218.

Repeal by Implication—*Mississippi Doctrine.*—However, it is held that the Mississippi local option law, approved March 11th, 1886, does not repeal the former laws except so far as it is inconsistent with them; also that where the result of an election is against the

is conferred upon the city council to regulate selling and trafficking in intoxicating liquors, such power does not enable the city council to nullify or abrogate the general law of the State.¹

A municipal ordinance prohibiting the sale of "any spirituous, intoxicating, fermented or malt liquors within the city limits," does not provide for the same offence as a statute which prohibits the retailing of spirituous liquors without a license.² But a general statute on the subject of licensing the sale of intoxicating liquors and making their unlicensed sale punishable as a mis-

sale of liquors, the former law is thereby suspended for the time being; but if the result is in favor of the sale, the former law remains in full force, modified as to the terms on which the license may be obtained. *Wheeler v. State*, 64 Miss. 462; *Hearn v. Brogan*, 64 Miss. 334.

Same—Kentucky Rule.—The Kentucky local option law of 1874 has been held not to repeal or modify the local act of 1871 to prohibit the sale, etc., in Bullitt county, nor to authorize a new vote therein on the question of license. *Com. v. Weller*, 14 Bush (Ky.) 218.

1. *Angerhoffer v. State*, 15 Tex. App. 613. See *Ambrose v. State*, 6 Ind. 351; *State v. Nolan*, 37 Minn. 16; *State v. Langdon*, 31 Minn. 316; *Craddock v. State*, 18 Tex. App. 567; *Corbett v. Territory*, 1 Wash. Tr. 431. Compare *Huffsmith v. People*, 8 Colo. 175; s. c., 54 Am. Rep. 550; *Com. v. Luck*, 2 B. Mon. (Ky.) 296.

Conflict of Laws—Ordinance Does Not Repeal Statute.—An act giving municipal authorities the right to regulate liquor selling does not repeal a general law prohibiting sales without a license from county commissioners. *Corbett v. Territory*, 1 Wash. Tr. 431. Neither will it enable the municipality to shelter from penalties imposed by a general law for selling liquors at any hour on Sunday. *Angerhoffer v. State*, 15 Tex. App. 613. See *Craddock v. State*, 18 Tex. App. 567.

It is said in *State v. Langdon*, 31 Minn. 316, that the general law making the sale of intoxicating liquors by persons not licensed a criminal offence remained in force within the village of Worthington, notwithstanding provisions of a special act of incorporation; but by force of the special act, the sale of such liquors as a beverage was prohibited, and a penalty prescribed therefor. Upon an indictment under the general law, for selling without a license, it appeared that the sale for which the defendant was indicted was made as a

beverage, and the court held that this fact did not render the general law inapplicable to the case. See *Ambrose v. State*, 6 Ind. 351.

It is said in *State v. Nolan*, 37 Minn. 16, that by the charter of the village of Windom, it was not intended to abrogate, as respects that locality, the general law of the State prohibiting the sale of intoxicating liquors without a license, although the village council alone were authorized to grant licenses, and were authorized to restrain, regulate and control, "to the entire exclusion of any control or right to regulate or restrain any said matters, by any board, officer, person or municipality in the county."

Where a general statute prohibited keeping open tippling houses on Sunday, and subsequently a city charter gave the city "exclusive power to license, tax, restrain, prohibit and suppress tippling houses" in the city, and the city enacted an ordinance prohibiting the keeping open of any place for the sale of intoxicating liquors "between midnight and five o'clock A.M. of the day following," the defendant was convicted under the statute of keeping open a tippling house on Sunday in that city, but the court held this to be error, the general statute having been suspended as to that city. *Huffsmith v. People*, 8 Colo. 175; s. c., 54 Am. Rep. 550. See *Com. v. Luck*, 2 B. Mon. (Ky.) 296.

2. *Hill v. Mayor*, 72 Ga. 314.

Where a statute takes from cities and towns the power to license the sale of ale, porter and beer, their illegal sale having been punishable under a prior statute, the penalty of which was not repealed by the act giving cities and towns power to license, their illegal sale may be punished under such prior statute. *Com. v. Locke*, 114 Mass. 288.

In *Village of Gloversville v. Howell*, 70 N. Y. 287, it is said that the special charter provisions as to granting license

demeanor, operates to repeal the provisions of an existing municipal charter upon that subject;¹ but a grant of power conferred by the legislature in the charter of a municipal corporation to pass and enforce ordinances to suppress and punish the sale of adulterated drinks, is not regulated by a subsequent general statute providing for the prosecution of the same offence throughout the State.²

Where a local option law has been adopted in a certain district by vote, and thereafter by act of the general assembly, the district was divided and a new voting district was created out of the territory, this does not change the law in the old district as it was left,³ and the prohibition will continue in force in the new district.⁴ Where local option has been adopted by a vote of the county, it is within the power of the qualified voters of any subdivision of such county, such as a justice's precinct, town or city, to repeal the local option law within the limits of such subdivision, justice's precinct, town or city in the manner provided by

and suing for penalties passed after the general excise law of 1857, and before that of 1874, are not abrogated by the law.

1. *Plattville v. McKernan*, 54 Wis. 487. See *State v. Brady*, 41 Conn. 588; *Minnehaha County v. Champion*, (Dak.) 37 N. W. Rep. 766; *Franklin v. Westfall*, 27 Kan. 614; *State v. Sannerud*, 38 Minn. 229; *State v. Olson*, 38 Minn. 150; *State v. Peterson*, 38 Minn. 143. Compare *Town of Ottawa v. La Salle*, 12 Ill. 339; *State v. Neeper*, 3 G. Greene (Iowa), 337.

Thus where the provisions of the statute relating to intoxicating liquors are applicable to cities, they supersede all provisions of the city charters inconsistent therewith, and no legislation by way of ordinance is necessary to give them effect. *State v. Sannerud*, 38 Minn. 229; *State v. Olson*, 38 Minn. 150; *State v. Peterson*, 38 Minn. 143.

Keeping Open Saloon at Night—Conflict of Ordinance and State Law.

Where a city by-law imposed a penalty for keeping open any shop for the sale of liquors after half-past ten o'clock at night, and a State law subsequently enacted provided for the licensing of persons to sell liquors, and forbade, under a penalty, the keeping open by any person licensed under the act, of any place for the sale of liquors between twelve o'clock at night and five o'clock in the morning, and repealed all laws inconsistent with the act; upon a prosecution for the violation of the city by-

law, it was held that such by-law was superseded by the State law, only in its application to persons licensed under the law, and that it must be shown affirmatively in the defence that the party prosecuted was so licensed. *State v. Brady*, 41 Conn. 588.

Partial Repeal.—Where the ordinance of a city authorizing the granting of licenses to sell intoxicating liquors has been impliedly repealed by subsequent provisions of the constitution and statute, the remainder of the ordinance, which provides for punishing persons for selling intoxicating liquors in violation of law and in violation of the ordinance, and without having any license or permit therefor, not being repealed by implication or otherwise, is still in force, and illegal sales may be punished thereunder. *Franklin v. Westfall*, 27 Kan. 614. See *Corporation of Aberdeen v. Saunderson*, 16 Miss. (8 Smed. & M.) 663.

2. The court say, in *State v. Labatut*, 39 La. An. 516, that "under the jurisprudence firmly established in this State, a general law thus characterized does not repeal a particular law, unless they be so repugnant that they cannot stand together under any circumstances. *State v. Natal*, 39 La. An. 439; *St. Martin v. New Orleans*, 14 La. An. 113; *Beridon v. Barbin*, 13 La. An. 458; *State v. Kitty*, 12 La. An. 805; *De Armas' Case*, 10 Mart. (La.) 170."

3. *Jones v. State*, 67 Md. 256.

4. *Jones v. State*, 67 Md. 256; *Higgins v. State*, 64 Md. 419.

law, notwithstanding the fact that the latter was adopted and is enforced throughout the county.¹

If a county adopted and afterwards rescinded the local option law, the abrogation of its provisions in this manner is tantamount to a legislative repeal, and exempts offenders from punishment, whether their cases were pending in the courts of original jurisdiction, or in the court of appeals at the time the county rescinded its adoption of the law.² The removal of constitutional prohibition against licensing the sale of liquor does not authorize a town council to license drinking saloons under a municipal charter granted before the constitutional amendment.³

g. VIOLATION OF LOCAL OPTION LAWS AND ORDINANCES.—The sale of liquor in violation of local option law being an indictable offence,⁴ may be prosecuted, even after a

1. *Woodlief v. State*, 21 Tex. App. 412. See *Higgins v. State*, 64 Md. 419; *Whisenhunt v. State*, 18 Tex. App. 491.

Thus where the State constitution required the enactment of a law whereby the qualified voters of any "county, justices' precinct, town or city" might from time to time determine whether the sale of intoxicating liquors should be prohibited within the prescribed limits, and a subsequent statute provided that a local option law should remain in force until such time as the qualified voters might decide, otherwise a county adopted local option, and a year later a justice's precinct therein repealed it as to that precinct, and the court held that this might be done, a vote of the whole county not being necessary. *Whisenhunt v. State*, 18 Tex. App. 491.

But in the case of *Com. v. King*, 86 Ky. 436, where a district embracing a city and including many voters outside of the city boundary had voted in favor of local option in 1882, and in 1884 the city, without legislative authority, again voted upon the question and a majority voted against local option, the licenses were granted, and indictments found against the licensees. The court held that the action of a part of the city was erroneous because a district could not be severed, except by the will of the legislature, and the vote in part of the district on the same question was not a protection to the licensees.

2. *Monroe v. State*, 8 Tex. App. 343. See *Dawson v. State*, 25 Tex. App. 670; *Woodlief v. State*, 21 Tex. App. 412; *Prather v. State*, 14 Tex. App. 453; *Freese v. State*, 14 Tex. App. 31; *Halfin v. State*, 5 Tex. App. 212.

Effect of Abrogation of Local Option.

—After a county has rescinded its local option law pending prosecutions must be dismissed as well as pending appeals, former convictions for its violation while in force must be dismissed, and convictions of judgment reversed, because such abrogation nullifies the conviction. See *Dawson v. State*, 25 Tex. App. 270; *Woodlief v. State*, 21 Tex. App. 412; *Prather v. State*, 14 Tex. App. 453; *Freese v. State*, 14 Tex. App. 31; *Halfin v. State*, 5 Tex. App. 212.

Repeal of Penal Law—Effect of.—The repeal of a penal law, when the repealing statute substitutes no other penalty, exempts from punishment all persons who have offended against the provisions of such repealed law, unless it be declared otherwise in the repealing statute. Wherefore, in a county which adopted and has rescinded a local option law there is no legal authority for the punishment of persons who sold liquor in the county while it sustained the local option law. *Halfin v. State*, 5 Tex. App. 212.

3. *Dewar v. People*, 40 Mich. 401.

4. *Garner v. State*, 8 Blackf. (Ind.) 568; *Com. v. Hoke*, 14 Bush (Ky.) 668; *State v. Emery*, 98 N. Car. 768; s. c., 3 S. E. Rep. 810.

In conformity with an act of 1846, a vote was taken in Centre township, Marion county, relative to the granting of licenses to retail spirituous liquors in that township, and the voters determined, by a large majority, against the granting of such licenses. The county commissioners were duly notified of said vote. Held, that the retailing of spirituous liquors afterwards, in said

vote has been taken revoking the former vote against the sale.¹

IV. LICENSE²—1. **Definition.**—A license is a permission granted by some competent authority to do an act which without such permission would be illegal.³ The object of a license

township, without a license, was, under the act of 1843, on the subject, an indictable offence. *Garner v. State*, 8 Blackf. (Ind.) 568.

A conviction under an ordinance of a corporation empowered to prohibit the sale of intoxicating liquors by section 2, chapter 154 of the Iowa laws of 1868, of violating the ordinance by selling ale, beer and wine without license is not invalidated by the fact that the city had no power to license the sale of ale, such sale being prohibited by the State statute. *Keokuk v. Dressell*, 47 Iowa 597.

That the offender will be liable to prosecution under a statute for unlawfully selling, when the sale is consummated, will not hinder his being punished under the ordinance for keeping for unlawful sale. *Menken v. City of Atlanta*, 78 Ga. 668; s. c., 36 Alb. L. J. 6.

1. *Com. v. Hoke*, 14 Bush (Ky.) 668.

A conviction for violating the local option act cannot be sustained where there is no proof that the act has been put in operation in the county where it is charged that the offence was committed. *Bryant v. State*, 65 Miss. 435. Such law not being a general law must be shown to be applicable to him who invokes it in a prosecution for selling intoxicating liquors. *Donaldson v. State*, 15 Tex. App. 25.

2. Contract rights secured by license. See III. 2; effect upon subsequent legislation. See III. 4, e; III. 7, a; III. 8, a, (2); III. 9, a; III. 9, f, (5); power of municipalities to exact and grant licenses. III. 9, a.

3. See LICENSES.

What Constitutes a License.—A conviction and fine for retailing liquor without a license does not operate as a license to retail for a year. *State v. McBride*, 4 McC. (S. Car.) 332. And a certificate of the clerk of the county commissioners that a person has been licensed by them as an innholder is not *per se* a license. *Com. v. Spring*, 36 Mass. (19 Pick.) 396.

Permit to Druggists.—Where a village ordinance prohibits the sale or giving away of intoxicating liquors within the limits of the village, con-

cluding with the provisos that druggists may sell such liquor for purely medical, medicinal and sacramental purposes, and fails to provide for the issue of any written permit, this will within the meaning of the statute be of itself a permit to all druggists in the village to sell such liquor for the purposes named. *Moore v. People*, 109 Ill. 499.

Order of Selectmen Closing Saloons.—An order of the selectmen of a town to an officer directing him to cause all saloons to be closed at a certain hour, and containing an intimation of an intent to prosecute offenders against the law in certain contingencies, is not a license to sell intoxicating liquors at times and under circumstances not mentioned in the order. *Com. v. Matthews*, 129 Mass. 485.

Tax by General Assembly of Business.—Where the general assembly of a State imposes a tax on the business in trafficking in intoxicating liquors as a means for providing against evils resulting therefrom, neither the tax so imposed nor a provision that the same shall attach as a lien on the property in which the business is conducted, constitutes a license within the meaning of a constitutional provision forbidding licensing. *Anderson v. Brewster*, 44 Ohio St. 576; *Adler v. Whitbeck*, 44 Ohio St. 539.

The act of April 5th, 1882, entitled "An act more effectually to provide against the evils resulting from the traffic in intoxicating liquors" (79 Ohio Laws, 66), which requires every person engaged or engaging in such traffic to pay a specified sum of money annually and execute a bond as therein required, and also provides that "every person who shall engage or continue in such traffic, without having executed the bond . . . or after his bond shall have been adjudged forfeited . . . shall be deemed guilty of a misdemeanor," is in its operation and effect, as to the traffic not already prohibited, a license, within the inhibition of the section of the constitution which provides that "no license to traffic in intoxicating liquors shall hereafter be granted in this State," and is, therefore, void. *State v. Hipp*, 38 Ohio St. 199.

is to confer a right which does not exist without a license.¹

2. Necessity of Obtaining License Generally.—In those cases where a statute requires a license and imposes a penalty, one who sells spirituous liquors while such statute is in force must see to it that he obtains a license from those clearly authorized to grant it;² but a license to a vendor of spirituous liquors from either a city or county authority exclusively authorized by the legislature to grant such license, is all that can be required.³

3. Number of Licenses; County and Town Licenses.—The grant of a license by one jurisdiction, such as a State or county, does not interfere with the power of another jurisdiction, such as an incorporated city or town, to exact a license, the exacting of a license being in the nature of a restraint upon the traffic;⁴ and where a liquor dealer procures a license under a municipal ordinance, this will not relieve him from his obligation to procure a similar one from the State or county.⁵

1. Youngblood v. Sexton, 32 Mich. 406; s. c., 20 Am. Rep. 654; *Chilvers v. People*, 11 Mich. 43, 49; *Anderson v. Brewster*, 44 Ohio St. 576, 588.

JUDGE COOLEY says, in the case of *Youngblood v. Sexton*, 32 Mich. 406; s. c., 20 Am. Rep. 654, that "the popular understanding of the word 'license' undoubtedly is a permission to take something which without a license would not be allowed, and adds that this is a legal meaning also." See *Adler v. Whitbeck*, 44 Ohio St. 539, 558.

In *State v. Frame*, 39 Ohio St. 399, JUSTICE MCILVAINE says that a license is essentially the granting of a privilege to one or more persons, not enjoyed by citizens generally, or at least not enjoyed by a class of persons to which the licensee belongs. A common right is not a creature of a license. *Adler v. Whitbeck*, 44 Ohio St. 539, 558.

2. Cronin v. Stoddard, 97 N. Y. 272. See *Hunter v. State*, 79 Ga. 365; *Johnson v. State*, 60 Ga. 634; *Moore v. People*, 109 Ill. 499; *Haug v. Gillett*, 14 Kan. 140; *State v. Pittman*, 10 Kan. 593; *Overseers etc. v. Warner*, 3 Hill (N. Y.) 150; *State v. Cofield*, 22 S. C. 301.

Where a statute declares that no license shall be granted outside of the cities and towns, and that it shall be unlawful for anyone to sell without such license, liquors may not be sold in cities and towns without a license.

But it was said in the case of *State v. Pittman*, 10 Kan. 593, that under the Kansas Dramshop act a person desiring to keep a dram shop, tavern or grocery

in an incorporated town or city, was not required to procure a license therefor from a tribunal transacting county business.

Written Permit.—Where an ordinance providing for the sale of liquor makes no mention of a written permit being required, none is required. *Moore v. People*, 109 Ill. 499.

Inn Keeper.—One may keep an inn without a license, but he cannot sell spirituous liquors therein without such a license. *Overseers etc. v. Warner*, 3 Hill (N. Y.) 150.

3. Hetzer v. People, 4 Colo. 45.

4. Lutz v. City of Crawfordsville, 109 Ind. 466; *Hedderich v. State*, 101 Ind. 564; s. c., 51 Am. Rep. 768; *McKinney v. Town of Salem*, 77 Ind. 213. See *City of Huntington v. Cheesbro*, 57 Ind. 74; *City of Lawrenceburg v. Wuest*, 16 Ind. 337; *Smith v. City of Madison*, 7 Ind. 86; *State v. DeBar*, 58 Mo. 395; *State v. Clarke*, 54 Mo. 17; s. c., 14 Am. Rep. 471.

5. See Page v. State, 11 Ala. 849; *State v. Estabrook*, 6 Ala. 653; *Furman v. Knapp*, 19 Johns. (N. Y.) 248; *State v. Propst*, 87 N. C. 560; *Parsley v. Hutchins*, 2 Jones (N. C.) L. 159; *Com. v. Yetter*, 3 Pa. County Court 179.

It is said in *Page v. State*, 11 Ala. 849, that to legalize the retailing of spirituous liquors it is necessary that a license should first be obtained for that purpose from the county court; a license to keep a tavern does not confer that right.

The provision in the charter of the city of Montgomery, Alabama, that retailers who procure a license from the

4. Effect Upon Right to Sale of Refusal of, or Inability to Obtain License.—We have seen above that all who wish to sell intoxicating liquors in a district in which laws regulating such sales are in force must, at their peril, procure the necessary license;¹ the fact that the commissioners refused to license any persons within their district does not justify any person in selling without a license.²

city council shall be exonerated from paying anything to the county for the privilege, does not relieve them from obtaining a license from the county court. *State v. Estabrook*, 6 Ala. 653.

The New York supreme court say in the case of *Furman v. Knapp*, 19 Johns. (N. Y.) 248, that according to the true construction of the New York act "lay a duty on spirituous liquors and to regulate inns and taverns," a retailer of spirituous liquors in New York must obtain a license from the mayor and also from the commissioner of excise.

It is said in *Parsley v. Hutchins*, 2 Jones (N. C.) L. 159, that permission granted by town commissioners to an individual to retail spirituous liquors, does not grant the full right to retail; but he must also get a license from the county court; and such court license will protect him, although it runs beyond the time embraced in the permission of the town commissioners.

In Pennsylvania, it has been said that a bottlers' license procured by paying the county treasurer the amount stipulated in the Pennsylvania act of 1875 does not authorize one to sell without a license from court of quarter sessions. *Com. v. Yetter*, 2 Pa. County Ct. 179. Compare *Ex parte Schmitker*, 6 Neb. 108.

1. *Supra*, IV, 2.

2. See *State v. Tucker*, 45 Ark. 55; *Brock v. State*, 65 Ga. 437; *Reese v. City of Atlanta*, 63 Ga. 344; *Bolduc v. Randall*, 107 Mass. 121; *Com. v. Blackington*, 41 Mass. (24 Pick.) 352; *State v. Cron*, 23 Minn. 140; *Com. v. Jamison*, 23 Mo. 330; *State v. McNeary*, 88 Mo. 143; *Mayor etc. of N. Y. v. Mason*, 1 Abb. (N. Y.) Pr. 344; s. c., 4 E. D. Smith (N. Y.) 152; *Village of Rome v. Knox*, 14 How. (N. Y.) Pr. 268; *Palmer v. Doney*, 2 Johns. Cas. (N. Y.) 346; *State v. Downer*, 21 Wis. 274.

Illegal Sale—Defence—Inability to Procure License.—It is no defence to an indictment for selling liquor without a license that the sale was made where license are not granted under any circumstances. *State v. Tucker*, 45 Ark.

55. Neither is it any defence that the county court refused to grant a license; the conduct of the court in that particular cannot be enquired into. *State v. Jamison*, 23 Mo. 330.

Same—It is no defence to an indictment under the statute (*Wisconsin Rev. Stat.*, ch. 35, § 5, as amended by law of 1862, ch. 147) charging that one selling intoxicating liquors without a license to aver that he had applied for a license, which had been refused on other than personal objections, town board having determined not to license any sale of liquors. *State v. Downer*, 21 Wis. 274.

It is said in the case of *State v. Cron*, 23 Minn. 140, that the liability of a person who sells intoxicating liquors to punishment under Minnesota Gen. Stat., ch. 16, § 4, is in no way affected by the fact that the town in which such sale was made has voted "in favor of license," under a statute providing therefor, nor by the fact that the board of county commissioners of the county in which the sale is made refused to grant a license to any person whomsoever to sell liquors in towns which have not voted against license.

Premature Sale.—Where a license for selling intoxicating liquors had been petitioned for by the seller, before the sale, though not granted till after the sale, the licensing commissioners not being appointed till then, the court held that this fact did not protect the sale. *Bolduc v. Randall*, 107 Mass. 121. See *Com. v. Welch*, 144 Mass. 356.

No One Authorized to Grant.—The fact that there is no officer or tribunal authorized to grant a license, cannot justify keeping a dram shop in violation of law. *State v. McNeary*, 88 Mo. 143.

Refusal of Commissioners.—If it had been the duty of the county commissioners under the statute to license one or more persons in each town to retail spirituous liquors, their refusal to license any person whatever does not annul the statute and authorize every person to retail spirits without a license. *Com. v. Blackington*, 41 Mass. (24 Pick.) 352. See *State v. Downer*, 21 Wis. 274.

the remedy is by *mandamus*.¹

5. Right to Sell Before Payment of Money or Giving of Bond or Issuing of License.—Although a person has been granted a license for the retail of spirituous liquors, and may have paid his money for such license, it is not proper for him to begin retailing before the license has actually been issued and delivered to him.² The au-

Illness of Officer.—Where a city ordinance requires a license to retail spirituous liquors, in a prosecution for retailing without a license it is no protection to show that defendant's license expired at a time when he could not renew it by reason of the illness of the city clerk; that when the clerk subsequently recovered, he took out a license covering the time in which the sale was made, and the money therefor was paid by him to the clerk, and by the clerk paid into the city treasury. If dealers continue to sell while they are unable to procure a license, they become liable to prosecutions. *Reese v. City of Atlanta*, 63 Ga. 344. See *Com. v. Welch*, 144 Mass. 356.

Inn Keepers' License—Neglect of Commissioners to Meet.—It has been said that after an inn keeper's license expires he is not liable for selling without a license by reason of the commissioners' neglect to meet. *Palmer v. Doney*, 2 Johns. Cas. (N. Y.) 346. See *Mayor etc. N. Y. v. Mason*, 1 Abb. (N. Y.) Pr. 344; s. c., 4 E. D. Smith (N. Y.) 142.

1. *Brock v. State*, 65 Ga. 437; *Kadgihn v. Bloomington*, 58 Ill. 229; *Com. v. Blackington*, 41 Mass. (24 Pick.) 352.

What Constitutes the Offence.—A wrongful refusal to grant a license does not justify the applicant in selling without a license, he having a remedy by *mandamus*. *Kadgihn v. Bloomington*, 58 Ill. 229. Following *Com. v. Blackington*, 41 Mass. (24 Pick.) 352.

2. See *State v. White*, 23 Ark. 275; *Reese v. City of Atlanta*, 63 Ga. 344; *Prather v. People*, 85 Ill. 36; *Dudley v. State*, 91 Ind. 312; *State v. Wilcox*, 66 Ind. 557; *Vannoy v. State*, 64 Ind. 447; *Houser v. State*, 18 Ind. 106; *Com. v. Welch*, 144 Mass. 356; *Bolduc v. Randall*, 107 Mass. 121; *State v. Bach*, 36 Minn. 234.

Sale Before Issuance of License—Liability for.—One who has not taken out his license and has not paid the fee may be indicted in an unlawful sale, although the license has been granted and the bond has been given. *Dudley v. State*, 91 Ind. 312. And when a

person has been granted a license by the county court to retail spirituous liquors, and has paid for it, he is not entitled to retail before the clerk has issued the license. *State v. White*, 23 Ark. 275.

It is well settled that where a license has not been issued until after the act complained of, it is no protection in a prosecution for selling liquors without a license. *Com. v. Welch*, 144 Mass. 356. See *Reese v. City of Atlanta*, 63 Ga. 344; *Bolduc v. Randall*, 107 Mass. 121.

Same—Vote of Aldermen Granting License.—It is said in *Com. v. Welch*, 144 Mass. 356, that where a person to whom the board of aldermen have voted to issue a license for the sale of intoxicating liquors, makes sales before the license fee has been paid, and before a bond has been filed as required by statute, such sales are illegal and at the trial of a complaint charging such person with the illegal sale of intoxicating liquors where the date upon the license is earlier than that upon which the sales are alleged to have been made, it is competent for the government to prove that the license fee was not paid; but that the bond was not given, and that the license was not issued until after the date of the alleged sale.

Sale Before Paying License Fees.—In a prosecution for the sale of intoxicating liquors without a license, where it appeared that the defendant's license had been granted by the authorities, but that without any intention of violating the law he had made the sale before paying his license fee, and taking out the license, although he had taken these steps before the prosecution was instituted, it was held that the sale was illegal and that he might have been prosecuted for it at the time, and that he was not liable to a subsequent prosecution therefor after he had paid his license fee and had taken out his license. *Vannoy v. State*, 64 Ind. 447.

In a prosecution for an unlawful sale of intoxicating liquor, in a less quantity than a quart, the facts that the defendant had, prior to such sale, upon proper

thority granted by license to sell liquor arises upon the issuing of the written license, and not upon the vote or order granting it, or upon the completion of the instrument by the signatures of the proper officer.¹

6. Written and Parol Licenses.—A license to retail intoxicating liquors must be in writing,² and the defendant cannot justify under a parol license from the proper officer to whom he paid the required sum.³

7. Form and Condition of License.—Where a license to retail vinous and spirituous liquors is signed by a proper local officer and countersigned by the collector, it is all that the law requires, and the presumption will be that the county authorized and issued the license upon a proper petition presented therefor.⁴ And it is said that if the license recites that the licensee shall conform to all the conditions or requirements of the act under which it is granted, or the license shall become forfeited, null and void, and the text of the act is appended in full, the licensee on fully complying with the conditions of the license and displaying it in his premises according to law, is legally licensed.⁵

notice, and after having given the bond required by the statute, obtained from the proper county board an order granting him license to sell such liquor in a less quantity than a quart at a time, for the term of one year, are not sufficient to constitute any defence, when it appears that the offence was committed and the indictment against him was returned before he had paid the requisite fee for, or taken out, his license. *Dudley v. State*, 91 Ind. 312.

Where an order, for the issue of a license to one to sell intoxicating liquors, has been made, a failure to procure such license, or of its issue by the officer, would not subject the licensee to prosecution for subsequent sales; but, if he has not paid his money into the treasury, nor filed his bond, he is subject to prosecution. *Houser v. State*, 18 Ind. 106.

Same—Conviction of Clerk.—It is said in *State v. White*, 23 Ark. 275, that when a person is granted a license by the county court to retail spirituous liquors, and has paid for it, though his clerk cannot be found guilty of a criminal violation of the statute by selling before the clerk has issued a license and empowering the principal to sell.

Same—Sale After Payment of License Fee and Before Issuing of License.—It is said in *State v. Wilcox*, 66 Ind. 557, that a liquor licensee cannot be prosecuted for a sale made after the payment of his license and grant thereof, but

before its issuance. *Distinguishing Wiles v. State*, 33 Ind. 206; *Schlict v. State*, 31 Ind. 246; *Houser v. State*, 18 Ind. 106.

But it is said by the supreme court of Illinois, in *Prather v. People*, 85 Ill. 36, that a party who strictly complies with the ordinance of a village having power to license and regulate the sale of intoxicating liquors by paying the money required for the privilege, and giving bond which is accepted, will be protected in selling although the clerk may have neglected to give him a license in such cases. The court held, the ordinance is the authority to sell, the license being only evidence of such authority, and a former license not being necessary.

Same—After Execution of Bond.—Where the defendant executed a liquor bond, and offered to pay the fee required on an application for a license, the supreme court of Minnesota held, in *State v. Bach*, 36 Minn. 234, that until he had received the license he had no right to sell.

1. *Com. v. Welch*, 144 Mass. 356.

2. *State v. Moore*, 14 N. H. 451.

3. *Lawrence v. Gracy*, 11 Johns. (N. Y.) 179.

4. *State v. Brandon*, 28 Ark. 410.

5. *Murphy v. Nolan*, 126 Mass. 542.

Closing on Sunday.—Application for License.—A condition requiring licensed premises to be closed during the whole of Sunday cannot be

8. Designation of Place or Building.—A license to retail spirituous liquors should fully set forth and describe the place in which the business is to be carried on;¹ but a license to sell liquors is not void because it fails to specify the house where the liquors are sold.²

9. Validity and Effect.—A license is valid and protects the holder thereof, so long as it remains uncanceled, unreversed, and is not appealed from.³ The fact that the license was obtained through fraud will not invalidate it unless the fraud is practiced by the

inserted in a new license, unless the applicant for the license applies for the insertion. *Reg. v. Justices of Kirkdale*, L. R., 18 Q. B. Div. 248; s. c., 56 L. J. M. C. 24.

A license granted by a town to keep a dram shop is impliedly subject to such lawful ordinances of the town as are in existence at the time it was granted, without words in the license expressly referring to the ordinances. *Baldwin v. Smith*, 82 Ill. 162.

Limitations, Restraints and Conditions in Licenses.—The officers composing the board of excise cannot insert in a license a limitation, restriction or condition which is repugnant to the statute; and a clause inserted in the licenses of hotel keepers or inn keepers absolutely prohibiting the sale of liquors upon certain days named in them is unauthorized and nugatory. *In re Breslin*, 45 Hun (N. Y.) 210.

1. See *Com. v. Merriam*, 136 Mass. 433; *Goforth v. State*, 60 Miss. 756.

2. *Goforth v. State*, 60 Miss. 756.

Change of Place of Business.—Where the licensee desires to change his place of business, leave for such change must be endorsed upon the license, and must be authenticated in the same way as the original license. *Com. v. Merriam*, 136 Mass. 433. See *Pope v. State*, 2 Swan. (Tenn.) 611.

Endorsing Oath.—A license issued under the Tennessee act of 1846 is void under such statute, unless the oath required to be administered to the retailer is endorsed thereon, although it was in full administered and recorded in the clerk's office. *Pope v. State*, 2 Swan. (Tenn.) 611.

Record of License.—Under the Wisconsin statute it is the duty of the town clerk to keep a record of all licenses granted to the town board for the sale of intoxicating liquors. *Hepler v. State*, 58 Wis. 46.

3. *Com. v. Graves*, 18 B. Mon. (Ky.) 33.

Licensing Inns and Taverns.—A license to keep an inn and store granted by the proper authority, is valid and will protect the person licensed notwithstanding the anterior proceedings may have been illegal. *Goff v. Fowler*, 20 Mass. (3 Pick.) 300.

In Com. v. Graves, 18 B. Mon. (Ky.) 33, upon a presentment for retailing spirituous liquors, it was held that a tavern license granted by the county court to the defendant could not be impeached as being properly granted.

In City of Independence v. Noland, 21 Mo. 394, under a statute authorizing the government of a city to restrain the sale of liquor, it was held that a tavern license issued by a county court could not authorize the grantee to sell within the limits of a city in violation of laws previously made by the city government.

Same—Ability to Accommodate.—In New York, there is a prohibition against licensing persons not having ability and accommodations to keep a tavern. *People v. Hartmann*, 10 Hun (N. Y.) 602.

Sale for Medical Purposes.—The supreme court of New Hampshire say in *State v. Emerson*, 16 N. H. 87, that under the New Hampshire statute a license to sell spirituous liquors for medical purposes solely, is not void.

New License as Common Victualer.—In *Com. v. Rourke*, 141 Mass. 321, it is said that the acceptance of a license describing the licensee as a common victualer estops him from setting up any defence of the violation of another condition of his license that he was not a duly licensed common victualer.

Sale Under Prior License.—In *Trost v. State*, 64 Miss. 188, the statute required a licensee to sell liquors in certain counties, provided that the act should not apply to dealers in places where retailing was permitted under the general laws. A special plea to an indictment for unlawfully selling in a

party to whom it is granted.¹ And where a party has paid for a license which is void through some informality, and it is subsequently corrected the licensee is entitled to a new license for the unexpired term.²

A license takes effect from the time the written license is issued, and not upon the vote granting it, or from the completion of the instrument by the signature of the proper officers.³ A license to sell spirituous liquors cannot be antedated so as to cover offences already committed.⁴ A sale unlawful when made is not legalized by a subsequent license nor by a previous license which did not by its terms extend to the time of sale, although that time was within a year of the granting of the license.⁵

certain city alleged that at a time when liquors were being retailed in such city under the general laws defendants had procured a license which had not yet expired. The court held that the plea was properly stricken out as the facts stated constituted no defence.

Release of Penalties.—The supreme court of South Carolina say in the case of *Charleston v. Corleis*, 2 Bail. (S. Car.) L. 186, that a license to retail spirituous liquors from a day passed is a release of the penalties incurred subsequent to that day.

1 *Rex v. Minshull*, 1 N. & M. 277. See *Com. v. Graves*, 18 B. Mon. (Ky.) 33; *Goff v. Fowler*, 20 Mass. (3 Pick.) 300.

2 *State v. Cornwell*, 12 Neb. 470.

A license by a county to sell liquors is no bar to a prosecution for selling without the license required by a city ordinance. And one's liability under a territorial law for selling on Sunday does not shield him from a penalty therefor imposed by a city ordinance. *Elk Point v. Vaughn*, 1 Dak. 113.

3. *Keiser v. State*, 78 Ind. 430; overruling *Vannoy v. State*, 64 Ind. 447; *State v. Wilcox*, 66 Ind. 557; *Com. v. Welch*, 144 Mass. 356; *State v. Hughes*, 24 Mo. 147; *Brown v. State*, 27 Tex. 335; *Sights v. Yarnalls*, 12 Gratt. (Va.) 292.

When License Takes Effect.—It is said in *Brown v. State*, 27 Tex. 335, that a license to retail liquors will take effect at the time when the application produces to the clerk of the county court, the county treasurer's receipt for the taxes imposed by the law in such cases, and not from the time when the county court acted upon the application.

An ordinance of the city of Wheeling provides that a license to keep an ordi-

nary shall expire on the 1st day of May succeeding the date thereof. In April the council granted a license for the succeeding year. Held that the party to whom it was granted had no actual vested right in such license until it issued to him on the 1st of May, the passing of the order before that date being merely for the convenience of the council. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292.

4. *Edwards v. State*, 22 Ark. 253; *Keiser v. State*, 78 Ind. 430; overruling *Vannoy v. State*, 64 Ind. 447, and *State v. Wilcox*, 66 Ind. 557; *Wiles v. State*, 33 Ind. 206; *State v. Hughes*, 24 Mo. 147.

License—Relation Back.—The supreme court of Missouri say in the case of *State v. Hughes*, 24 Mo. 147, that a license to sell spirituous liquors has no relation back to the date of the order granting permission to obtain it and will only protect one who sells after the date of its issue.

The supreme court of Indiana say in the case of *Keiser v. State*, 78 Ind. 430, that a license to sell intoxicating liquor should bear the date of the day when issued and its effect from that date and does not relate back to the order granting the license, although so dated so as to legalize sales made between the date of the order and the issuing of the license.

5. *Commissioners of Alms House of Kingston v. Osterhoudt*, 23 Hun (N. Y.) 66; *State v. Brady*, 14 R. I. 508.

Sale After Expiration of License.—One who sells after the expiration of his license cannot defend on the ground that he was induced by town officers to believe that his license would be renewed, and that it was customary to date licenses back. *State v. Brady*, 14 R. I. 508.

10. Taking Out License.—Anyone who brings himself within the requirements of the law is entitled to a license to sell,¹ and the authorities are bound to grant the same.²

1. *Ailstock v. Page*, 77 Va. 386. See *Polk County Commissioners v. Johnson*, 21 Fla. 578; *Zanone v. Mound City*, 11 Ill. App. 334; *Rosenham v. Com.* (Ky.), 2 S. W. Rep. 230; *Mundy v. Excise Commissioners*, 9 Abb. (N. Y.) N. C. 117; *People ex rel. Gillane v. Haughton*, 3 How. (N. Y.) Pr., N. S. 135; *O'Rourke v. People*, 3 Hun (N. Y.) 225; s. c., 5 T. & C. (N. Y.) 496; *People ex rel. Gillane v. Woodman*, 5 N. Y. State Rep. 318; *People ex rel. Ochs v. Commissioners of Excise of Brooklyn*, 10 N. Y. Wk. Dig. 413; *Leighton v. Maury*, 76 Va. 865; *People v. Morrison*, 22 Alb. L. J. 210; *Munn v. Southall*, 7 L. T. 356.

Refreshment and Wine License.—In *Munn v. Southall*, 7 L. T. 356, a beer house keeper having obtained a refreshment house license, applied for a wine license under the statute; and an objection was made that he was not entitled to such license as not coming within the statute; he provided travellers and others who came in his house with bread, cheese and other victuals as they required them. The court held that he was entitled to a wine license.

License to Sell Ale and Beer.—A license to sell ale and beer to be drunk on the premises may be granted to one not a hotel keeper. *Mundy v. Excise Commrs. of New York*, 9 Abb. (N. Y.) N. C. 117; *O'Rourke v. People*, 3 Hun (N. Y.) 225; s. c., 5 T. & C. (N. Y.) 496; *People ex rel. Ochs v. Commrs. of Excise of Brooklyn*, 10 N. Y. Wk. Dig. 413; *People v. Morrison*, 22 Alb. L. J. 210.

Joint Commissioners—Absconding of One.—Where one of two joint petitioners for a liquor license absconds, this is not necessarily a reason for refusing a license to the other. *Polk County Commrs. v. Johnson*, 21 Fla. 578.

License to Druggist.—A druggist is a merchant and entitled to a license as such under the Kentucky statute. *Rosenham v. Com.* (Ky.), 2 S. W. Rep. 230.

Under Ordinance—Arbitrary Discrimination.—Under a general ordinance of a city for licensing dram shops, the city authorities have no right to make an arbitrary discrimination,

but should issue licenses to all complying with the conditions of the ordinance, and such an one is justified in selling without a license if they refuse or neglect to issue one to him. *Zanone v. Mound City*, 11 Ill. App. 334.

Building Used for Amusement.—In *People v. Andrews*, 54 N. Y. Super. Ct. (22 J. & S.) 183; s. c., 3 N. Y. St. Rep. 547, an applicant for a license for the sale of intoxicating liquors had music played in his saloon upon a piano and violin by performers hired for that purpose every night, Sunday included. The court held that the applicant kept a place of exhibition and performance within the meaning of the New York City Consolidation act, and that under that act a license could not be granted. Compare *People ex rel. Gillane v. Woodman*, 5 N. Y. St. Rep. 318, where the decision in *People ex rel. Gillane v. Haughton*, 3 How. (N. Y.) Pr., N. S. 135, holding that the excise law does not prohibit granting a license for a building which is used part of the time for a place of amusement, is reiterated.

Who not Entitled to—Coffee House.—It is said in *Louisville v. Kean*, 18 B. Mon. (Ky.) 9, that the authorities of the city of Louisville are not bound under the charter to license coffee houses.

Same—Distillers.—The supreme court of Pennsylvania say, in the case of *Vandegrift's Application*, Pa., 1 Cent. Rep. 626, that a license to sell spirituous liquors in quantities less than a gallon cannot, under the Pennsylvania act of 1858, be granted to a distiller.

Same—Grocery Keepers.—It is said in *State v. Sumer*, 5 Blackf. (Ind.) 253, that the statute of Indiana authorizing the clerks of courts in vacation to give "permits" to retail spirituous liquors, etc., does not apply to grocery keepers.

Same—Lodging House Keeper.—A lodging house keeper is not entitled to a license as an inn keeper because accustomed to send out for cooked food for his lodgers. *Kelly v. Excise Commrs. of New York*, 54 How. (N. Y.) Pr. 327.

2. *Daugherty v. Com.*, 14 B. Mon. (Ky.) 239. See *Zanone v. Mound City*, 11 Ill. App. 334.

The qualifications necessary to entitle one to receive a license are governed by each particular law under which the application is made. Thus in England the licensee is required to be a person who is a householder,¹ and in Indiana every licensee must be a male inhabitant of the State,² and a temperate and a moral man of the age of twenty-one.³

Under a law regulating the sale and trafficking in intoxicating liquors, all persons engaged therein must procure the necessary license, such as wholesale dealers,⁴ and all classes of retail dealers,⁵ such as saloon keepers or inn and hotel keepers, where intoxicating liquors are sold;⁶ druggists,⁷ and the holders of "special stamps."⁸

1. *Thompson v. Harvey*, 4 H. & N. 254; s. c., 28 L. J., M. C. 163.

2. *Murphy v. Board of Commrs. of Monroe County*, 73 Ind. 483; *Ex parte Laboyteaux*, 65 Ind. 545.

3. *Miller v. Wade*, 58 Ind. 91.

Residence of Applicant.—Under the Indiana laws it is not necessary that an applicant for license should be a resident of the ward, town, township or county in which the place where the liquor is to be sold is situated. *Murphy v. Board of Commrs. of Monroe County*, 73 Ind. 483; *Ex parte Laboyteaux*, 65 Ind. 545.

"Immorality or Other Unfitness."

—It is said in *Hill v. Perry*, 82 Ind. 28, that one may be an immoral man and not a proper person to be licensed to sell intoxicating liquors, though he himself is not in the habit of becoming intoxicated; and in *Calder v. Sheppard*, 61 Ind. 219, that the fact that a person has been once seen intoxicated, and sometimes take a drink, does not disqualify him for a license under the statute requiring him to be "a fit person to be entrusted with the sale of intoxicating liquors" and "not in the habit of becoming intoxicated" and permitting any voter to remonstrate "on account of immorality or other unfitness."

Same—Frequenting Gambling Houses.

—In the late case of *Groscop v. Rainier*, 111 Ind. 361, it is said that it is sufficient to sustain a verdict in favor of a remonstrance against granting a license under the above named statute, that the applicant was immoral by reason of his frequenting places of gambling, and thus unfit to sell liquor under the law of the State, although frequenting places of gambling is not specified in that act.

4. *United States v. Kallstrom*, 30 Fed. Rep. 184. See *United States v. Vroll-*

igo, 28 Int. Rev. Rec. 313; *United States v. Wittig*, 22 Int. Rev. Rec. 98; s. c., 2 Law Dec. 466.

Wholesale Dealers—Retailers' Protective Union.—Thus where retail liquor dealers organized themselves in a "Protective Union" and signed articles pledging themselves to purchase beer through the union in another State, by which means they saved two dollars a barrel, and no wholesale license having been taken out as prescribed by the U. S. Rev. Stat., § 3242, and the purchases were made by the president of the "union," who was paid nothing for his services and the members were charged only with mere storage and the like, it was held that the retail dealers became wholesale dealers and were liable to the penalty provided by the statute.

Same—Minnesota Doctrine.—It is said by the supreme court of Minnesota, in the case of *State v. Orth*, 38 Minn. 150, that the Minnesota statutes regulating the sale of intoxicating liquors do not apply to, exclusively, wholesale dealers who sell to other dealers so as to make it necessary for them to take out licenses.

5. It is said in *Com. v. Wheeler*, 79 Ky. 284, that under the Kentucky statute, before a person is required to obtain a license to sell whiskey he must be engaged in merchandizing and in the sale of other things than spirituous liquors.

6. *People v. Davis*, 45 Barb. (N. Y.) 404; *Louisville v. Kean*, 18 B. Mon. (Ky.) 9.

7. *Jones v. State*, 68 Ala. 559; *Chew v. State*, 43 Ark. 361; *Brown v. State*, 9 Neb. 189.

8. **Special Stamp Holders.**—Under the U. S. Rev. Stat., § 2243, providing that the holders of special stamps for the sale of liquor shall not be exempt

Laws regulating the sale of liquors do not apply to social clubs where the steward furnishes the members with food and with beer or other liquors at a fixed price to be consumed at the club, the money so received being expended for the expenses of the club.¹

11. Term of Duration.—Usually a license may extend for the period of one year from the time it is granted,² or until the beginning of the next excise year.³

12. What Rights or Privileges Are Included in or Conferred by.—A license to sell liquors for certain purposes therein specified cannot protect the licensee from a criminal prosecution for violating the laws of the State in selling liquors for other purposes than

from any penalty imposed by State laws for carrying on the sale in the State; a holder of such stamps on board a steamer within the State limits is subject to the State license law. *Com. v. Sheckels*, 78 Va. 36.

Physicians and Druggists.—Under a town charter prohibiting the sale of spirituous liquors within the corporate limits of the town, but containing a proviso that the section should not be so construed as to prevent any practicing physician or druggist selling such liquors for medical or sacramental purposes. Held, that physicians and druggists selling for such purposes were not bound to take out a license. *Jones v. State*, 68 Ala. 559.

1. *Seim v. State*, 55 Md. 566; s. c., 39 Am. Rep. 419; *Com. v. Smith*, 102 Mass. 144. See *Com. v. Pomphret*, 137 Mass. 564; s. c., 50 Am. Rep. 340; *Graff v. Evans*, 8 Q. B. Div. 373. Compare *Martin v. State*, 59 Ala. 34; *Rickart v. People*, 79 Ill. 85; *Marmont v. State*, 48 Ind. 21; *State v. Mercer*, 32 Iowa 405; *State v. Lockyear*, 95 N. Car. 633; s. c., 59 Am. Rep. 287.

Sale of Liquor by Clubs.—On an indictment under the Massachusetts statutes for keeping a liquor nuisance, it was proven that the defendant, as agent of a club, bought intoxicating liquors with money advanced by the club; that the liquors purchased were the property of the club; that checks of the denomination of five cents each were delivered to each member to the extent of the amount of money advanced by him; that the defendant was a member of the club and delivered to each member, upon presentment of the checks, from time to time, liquor of the club to the amount of the checks presented; and that the residue of undelivered liquors, amounting by calcula-

tion to twenty per cent., was to belong to the defendant as compensation for his services and for the use of his room. The court held that this did not justify a ruling that the facts proven would, as matter of law, be a sale; that the question whether the facts amounted to an evasion of the law is a question for the jury. *Com. v. Smith*, 102 Mass. 144.

2. *State ex rel. Edwards v. Sumter Co.*, 22 Fla. 1; *Gurley v. State*, 65 Ga. 157; *People v. Gainey*, 8 Hun (N. Y.) 60; *Hendersonville v. Price*, 96 N. Car. 423. Compare *Opinions of Attorneys General*, N. Y., 457, 503, 553.

Life of License.—It is said by the supreme court of Georgia, in *Gurley v. State*, 65 Ga. 157, that an ordinary has no power to grant a license to retail spirits for less than one year, and a license for four months will not protect the retailer from prosecution.

The supreme court of North Carolina say, in *Hendersonville v. Price*, 96 N. Car. 423, that while the board of commissioners cannot issue a license for a longer period than one year, the time may not begin and terminate with the term of office of the board which grants it; for they can grant a license which extends beyond their term of office, providing it does not exceed one year and does not begin to take effect after their term of office has expired.

The supreme court of Florida say, in the case of *State ex rel. Edwards v. Sumter County*, 22 Fla. 1, that a permit under the Florida statute continues for the license year as defined by the statute for which it may have been issued and for the unexpired year for the license portion when issued.

3. The New York statutes, prescribing the time during which a license to sell liquors shall remain in force, has

those named in the license.¹ And a license will not authorize the licensee to sell liquor on Sunday contrary to the statute.²

13. Place of Sale Authorized by.—*a.* WHERE BUSINESS MAY BE CONDUCTED, GENERALLY.—While it is desirable that a license to retail spirituous liquors should designate the place in which the business is to be carried on, yet it is no objection to a license to sell liquor that it does not specify the particular place in the town

been held not to refer to the calendar year but to the excise year, and that a license granted on and after the first Monday in May expires at the same time with those granted on that day. *Disbrow v. Saunders*, 1 Den. (N. Y.) 149.

1. *State v. Adams*, 20 Iowa 486; *Curd v. Com.*, 14 B. Mon. (Ky.) 386; *New Orleans v. Jane*, 34 La. An. 667; *State v. Woodward*, 34 Me. 293; *State v. Cahen*, 35 Md. 236; *Com. v. Jordan*, 35 Mass. (18 Pick.) 228; *Com. v. Markoe*, 34 Mass. (17 Pick.) 465; *State v. Amba*, 20 Mo. 214; *Lambert v. State*, 8 Mo. 492.

It is said in the case of *State v. McGrath*, 73 Mo. 181, that the license of a dram shop keeper authorizes all the sales which the owner and beer shop keeper is authorized to make by virtue of his license, and that a license to a tavern keeper includes the privilege of retailing spirituous liquors. *State v. Chamblyss*, 1 Cheves (S. Car.) 220; s. c., 34 Am. Dec. 593. *Compare Com. v. Kamp*, 14 B. Mon. (Ky.) 385; *Commissioners v. Dennis*, 1 Cheves (S. Car.) 229; *Hirn v. State*, 1 Ohio St. 15.

Upon trial of a complaint for keeping intoxicating liquors with intent to sell the same, contrary to a statute which required a license of a certain class for the sale of such liquors to be drunk on the premises (Mass. Pub. Stat., ch. 100, § 10), the evidence tended to prove that defendant kept such liquor with intent to sell the same to be used as a beverage, and to be drunk on the premises; and the court instructed the jury that a license to keep and sell intoxicating liquors for medicinal, mechanical and chemical purposes "gave the holder no right to keep for sale or to sell intoxicating liquors to be used as a beverage, . . . or . . . to be drunk on the premises." Held, that the instruction was correct, it not appearing that there were any circumstances about the sales in question requiring the liquor sold, if sold for medicinal purposes, to be drunk on the premises. *Com. v. Mandeville*, 142 Mass. 469.

Tavern Keeper's License.—It is said in the case of *Com. v. Kamp*, 14 B. Mon. (Ky.) 385, that a license granted in general terms by virtue of the statute to keep a tavern authorizes a tavern keeper to vend spirituous liquors in his bar room, or tavern, in small quantities, to be drunk in the tavern or elsewhere. And in the case of *Hirn v. State*, 1 Ohio St. 15, it is said that a license to keep a tavern, under the Ohio act of 1831, was, according to the true meaning of the act, a license to retail spirituous liquors. To the same effect see *State v. Chamblyss*, 1 Cheves (S. Car.) 220; s. c., 34 Am. Dec. 593. *Compare Commissioners of Roads v. Dennis*, 1 Cheves (S. Car.) 229.

License of Common Victualer.—It is said by the supreme judicial court of Maine, in *State v. Woodward*, 34 Me. 293, that the license of an inn holder and common victualer does not authorize the person licensed to sell intoxicating liquor to guests. And by the supreme judicial court of Massachusetts, in *Com. v. Markoe*, 34 Mass. (17 Pick.) 465, that under the Massachusetts statute a person licensed to be a common victualer in any other place than Boston was not authorized to sell distilled spirits. *Com. v. Jordan*, 35 Mass. (18 Pick.) 228.

Oyster and Eating House.—It is held, in the case of *State v. Cahen*, 35 Md. 236, that under the Maryland statute providing for the issuing of three classes of license to sell spirituous liquors, an oyster or eating house license must not authorize the sale of spirituous or fermented liquors by the barrel, or quantities greater than a pint.

Merchant's License.—A merchant's license does not authorize him to sell liquors by the quart, or any other quantity, at a store to be drunk there, or adjacent thereto, or which shall be so drunk; and if he does so, he is guilty of keeping a tippling house. *Curd v. Com.*, 14 B. Mon. (Ky.) 386.

2. See *State v. Amba*, 20 Mo. 214; *Lambert v. State*, 8 Mo. 492.

where the licensee may sell; he cannot, however, carry on his business at more than one place in the same town.¹ But a general license to retail spirituous liquors within the county, does not authorize the sale of such liquors within the area covered by a special prohibitory law.² Where a license designates the particular place where the business shall be carried on it will not justify a sale in any other place.³

b. ADJOINING ROOMS OR PREMISES.—Where a license is granted to sell liquor at a particular place, as a rule it will not cover a sale at any other place.⁴ But where two bars are maintained in the same establishment and separated from each other by temporary obstructions, it is thought that one license will protect both bars.⁵

1. *State v. Walker*, 16 Me. 241; *State v. Gerhardt*, 3 Jones (N. Car.) 178.

A license granted by the commissioners of a certain county reciting that the person to whom it was granted was a resident of R, in said county, and licensing him to sell strong and spirituous liquors to be drunk in his house as an inn or tavern, when at the time of the granting of the license he in fact resided in another town and county, and had ever since resided there, does not authorize sales to be made in a mere drinking saloon, in the corner of a warehouse, but only authorizes such sales in an inn, tavern or hotel. *People v. Davis*, 45 Barb. (N. Y.) 494.

2. *Barnes v. State*, 49 Ala. 342.

3. *State v. Prettyman*, 3 Harr. (Del.) 570; *State v. Hughes*, 24 Mo. 147.

Tavern License.—A tavern license restricts the sale of liquors to the place as well as the person licensed. *State v. Prettyman*, 3 Harr. (Del.) 570.

4. The respondent had a license to sell intoxicating liquors at his stand on the corner of A and B streets. He had another stand adjoining this, there being an internal communication between the two, and he sold liquors in both. Held, that his license only applied to the place first named. *State v. Fredericks*, 16 Mo. 382, 14.

A license, granted by the commissioners of excise of Seneca county to D, recited that he was a resident of R, in said county, and licensed him to sell strong and spirituous liquors and wines to be drunk in his house, as an inn or tavern. D, in fact, at the time, resided in the town of T, in the county of Yates, and had ever since resided there. Under this license, D kept a mere recess or drinking saloon in a room in his warehouse, situated in the waters of Seneca

lake, a few feet from the western shore thereof, and a few yards from the county line, within the town of R. Held, that the judge was right in instructing the jury that D's license was void, and afforded him no protection, if he was, at the time it was applied for and granted, a resident of the town of T. *People v. Davis*, 45 Barb. (N. Y.) 494.

A small building on the same lot with a dwelling house, but 45 rods distant from it, with a passageway between, though both are occupied by one person, is not an apartment or dependence of the dwelling house; and a license to sell spirits in his dwelling house will not authorize the selling of them in the small building. *Com. v. Estabrook*, 27 Mass. (10 Pick.) 293.

5. *Hochstadler v. State*, 73 Ala. 24; *Sanders v. Town Council of Elberton*, 50 Ga. 178; *St. Louis v. Gerardi*, 90 Mo. 640; *State v. Moody*, 95 N. Car. 656.

The question whether two rooms in a house, in which it is proposed to sell spirituous liquors, are in truth two distinct places, so that the applicant may be required to take out two licenses, is a question of fact; and the judgment of the town council, upon evidence, holding that they are distinct places, will not be disturbed if the evidence justifies that conclusion, though it may not require it. *Sanders v. Town Council of Elberton*, 50 Ga. 178.

Where defendant, the proprietor of a hotel, procured a license to keep a dram shop at the main entrance to the hotel, and three bars were kept on the ground floor of the hotel, screened off by partitions having direct and immediate connection by doorways, all of which were accessible to the guests without going

14. Licenses Granted to Partners and Third Persons.—A license may be granted to two persons jointly,¹ but a license granted to one person who forms a partnership with an unlicensed person, does not authorize the latter to make sales.² The agent or servant of one licensed to sell liquor, is protected to the same extent as the master by the license;³ but where a pretended appointment of

out of the hotel, and all of which bars were located on the premises occupied for hotel purposes, and where a part of the house, which was one building and one place, the mere fact of the licensee erecting more than one bar at such place, so connected, would not render him liable to the penalty of the ordinance which contemplates that the location of the place where a dram shop is to be kept shall be designated, and that a license to keep a dram shop at any such place does not authorize it to be kept anywhere else. *St. Louis v. Gerardi*, 90 Mo. 640.

Separate Bar for Negroes.—It is held in *Hochstadler v. State*, 73 Ala. 24, that only one license is required of a person engaged in retailing vinous, spirituous and malt liquors, who occupies and carries on his business in two adjoining rooms connected with each other by an open fence or archway cut in the portion of the wall in each of which is a bar; one of the rooms being used for white persons, and one for negroes, and both rooms constituting but one establishment and being under one and the same management.

1. *Shaw v. State*, 56 Ind. 188; *State v. Gerhardt*, 3 Jones (N. C.) L. 178.

2. *Long v. State*, 27 Ala. 32; *Shaw v. State*, 56 Ind. 188; *Com. v. Hall's Case*, 8 Gratt. (Va.) 588.

A license to one man to keep a tavern at his house in a village, does not authorize another who formed a partnership with the first in the sale of spirituous liquors which the first was authorized to sell under his license, to sell liquors at a house on the same lot and within the same inclosure as that of the tavern. *Com. v. Hall's Case*, 8 Gratt. (Va.) 588.

License to a Firm.—A license to sell liquors issued to a firm of which A is a member, confers no authority to sell to another firm of which he is also a member. *Wharton v. King*, 69 Ala. 365.

Same—Retirement of Partner.—A license to sell liquor granted to two persons as partners will, during the period mentioned in the license, protect one of the partners against the penalty

for selling without a license, although the other has retired from the firm. *State v. Gerhardt*, 3 Jones (N. C.) L. 178.

3. *People v. Buffum*, 27 Hun (N. Y.) 216. See *Heath v. State*, 105 Ind. 342; *Keiser v. State*, 58 Ind. 379; *State v. Sterns*, 28 Kan. 154; *Com. v. Branamon*, 8 B. Mon. (Ky.) 374; *Duncan v. Com.*, 2 B. Mon. (Ky.) 281.

One who sells spirituous liquors in a room of an inn, which is under the control of the inn keeper, and by his permission, is protected by the license of the inn. *Duncan v. Com.*, 2 B. Mon. (Ky.) 281.

Where A obtained a license to keep a tavern, and B agreed to pay for the license, and sold liquors in an adjoining room, which he rented from a third person, not being at all under the control of A, it was held that B was not protected by A's license, but was liable for keeping a tippling house. *Com. v. Branamon*, 8 B. Mon. (Ky.) 374.

On the trial of the defendant, charged with selling intoxicating liquor, without license, in a less quantity than a quart at a time, the evidence established that the defendant, who was the owner of the premises where the sale was made, had made such sale pursuant to, and in compliance with, the terms of the written contract, entered into by the defendant, who had no license, and another who had a license, whereby the defendant leased such premises to the licensee for a saloon, upon the condition that the licensee should furnish the stock necessary to carry on the business; that the defendant in the name of licensee should make all purchases and sales of such stock, should pay all debts and expenses incurred in carrying on the business out of the proceeds thereof; and for his services and the rent of the building he should receive all the profits of the business, except a certain sum *per diem*, which was to be paid to the licensee. Held, that, by the terms of such agreement, the licensee and defendant became, as between themselves, not partners, but principal and agent, and that such sale was pro-

one as a liquor seller's agent, is in fact a sale, the license of the pretended principal will afford no protection.¹

15. Validity and Effect of Assignments and Transfer.—A license to sell or traffic in intoxicating liquors, is personal to the holder and cannot be delegated or assigned nor committed to the care of a receiver appointed by the court.²

16. Authority to Sell by Agent.—³ It is true that a license to sell or traffic in intoxicating liquors is not transferable, yet a person who has been rightfully licensed may employ an agent to conduct his business for him,⁴ although he leaves the country for an indefinite time,⁵ or removes into another county.⁶

17. License to Sell Near Schools, etc.—A statute forbidding the granting of a license for the sale of intoxicating liquors in any

tected by such license. *Keiser v. State*, 58 Ind. 379.

1. *Heath v. State*, 105 Ind. 342.

2. *State ex rel. Edwards v. Sumter County*, 22 Fla. 8; *Heath v. State*, 105 Ind. 342; *Runyon v. State*, 52 Ind. 320; *Godfrey v. State*, 5 Blackf. (Ind.) 151; *Lewis v. United States*, 1 Morr. (Iowa) 199; *Com. v. Bryan*, 9 Dana (Ky.) 310; *State v. Lydick*, 11 Neb. 366; *Sample v. Flynn* (N. J. Eq.), 10 Atl. Rep. 177; *Alger v. Weston*, 14 Johns. (N. Y.) 231; *State v. McNeeley*, 1 Winst. (N. C.) L. 234; *In re Templeton* (Pa.), 4 Lancast. L. Rev. 242.

License not Assignable.—Where a person who held a license from a city to retail malt, spirituous and vinous liquors, sold his stock in trade, furniture and fixtures, to the defendant, and assigned his said license to him. The court held that such license so assigned to him was no defence to an indictment for selling liquors "without first having obtained a license therefor." *State v. Lydick*, 11 Neb. 366. See *State ex rel. Edwards v. Sumpter County*, 22 Fla. 8; *Heath v. State*, 105 Ind. 342.

And where an instrument is a mere cover for an absolute transfer of a saloon, although in form an appointment as bar keeper or seller who holds the license, such license will not protect the purchaser. *Heath v. State*, 105 Ind. 342. See *Keiser v. State*, 58 Ind. 379; *Shaw v. State*, 56 Ind. 188; *Krant v. State*, 47 Ind. 519; *Pickens v. State*, 20 Ind. 116.

A license issued contrary to statute confers no authority to vend malt, spirituous or vinous liquors. A person who holds a liquor license issued under the authority of a mayor and council of a city, sold out his saloon and assigned his license to the defend-

ant, who petitioned the mayor and council to transfer the said license to him. The council thereupon ordered the said license to be transferred to the defendant, and the clerk issued an original license, in form, to the defendant, who proceeded to retail spirituous liquors under it, and was indicted therefor. The court held that such license was no defence to the indictment. *State v. Lydick*, 11 Neb. 366.

A license to keep a tavern or an inn confers a personal privilege which is not assignable, and does not pass by a lease of the tavern house. *Com. v. Bryan*, 9 Dana (Ky.) 310; *Alger v. Weston*, 14 Johns. (N. Y.) 231.

A license to keep a grocery is not assignable. *Lewis v. United States*, 1 Morr. (Iowa) 199.

It is said in *Godfrey v. State*, 5 Blackf. (Ind.) 151, a grocer having a license to retail spirituous liquors sold his grocery, agreeing that the buyer should have the benefit of the license. The court held that the license was not assignable and that the buyer had no authority under it to retail spirituous liquors.

3. See also *infra*, this title, OFFENCES; SALE BY AGENT.

4. See *Thompson v. State*, 37 Ala. 151; *State v. Keith*, 37 Ark. 96, 98, 272; *Runyon v. State*, 52 Ind. 320; *State v. McNeeley*, 1 Winst. (N. C.) 234.

5. *State v. McNeeley*, 1 Winst. (N. C.) 234.

6. *Thompson v. State*, 37 Ala. 151.

Carrying on Business by Agent.—Where a license has not been forfeited, a licensee may carry on the business by an agent at the place designated in the license, and the agent will not be responsible for selling without a license. *Runyon v. State*, 52 Ind. 320.

building or place on the same street within a specified distance of a public school or university, applies to the whole building; and no license can be granted or the sale of liquor in any room thereof, although more than the prescribed distance from the school building.¹

18. Granting License.—A license to sell or traffic in spirituous, vinous or malt liquors cannot be issued until the statutory conditions have been complied with.²

a. CONSENT OF COMMISSIONERS.—In those cases where by private act a county court or other licensing body is forbidden to grant a license to retail spirituous liquors within the limits of an incorporated town without a recommendation from the board of commissioners of the town, a license granted without such recommendation having first been procured, is void and will not protect the licensee.³

b. POWER TO GRANT GENERALLY.—The power of the board of excise, or other body charged with the granting of licenses to sell and traffic in spirituous, vinous or malt liquors, is limited to the granting or refusing of licenses. The statutes regulate the rights acquired by such license; the restriction to be observed and the punishment for each violation of its provisions.⁴ When the law

1. *Com. v. Jones*, 142 Mass. 573. See *De Bois v. State*, 34 Ark. 381.

It is said by the supreme court of Arkansas, in the case of *De Bois v. State*, 34 Ark. 381, that the sale of liquor within two miles of Judson University is regulated entirely by the act of February 27th, 1875, entitled "an act to prohibit the sale of alcoholic spirits, vinous liquors within two miles of Judson University, White County." And that the county court had no authority to license one to sell within that distance of the university.

2. *Com. v. Welch*, 144 Mass. 356. See *Russell v. State*, 77 Ala. 89; *Long v. State*, 27 Ala. 32.

Compliance with Statute.—In issuing a license for retailing spirituous liquors under the general statutes, the officer granting such license acts ministerially, and is bound to require a substantial compliance with the precedent statutory conditions; and while the license itself is *prima facie* evidence of such compliance, the fact of noncompliance when affirmatively shown renders the license void; and its validity being thus shown, it affords no protection to the person to whom it was granted, and who has acted under it. *Russell v. State*, 77 Ala. 89.

It is said by the supreme court of Alabama, in the case of *Long v. State*,

27 Ala. 32, that a law authorizing licensees to retail and traffic in intoxicating liquors is not merely a revenue measure. The payment of the prescribed tax is not the only prerequisite to obtaining a license, the other prerequisites show that the legislature deemed the privilege of retailing so dangerous that it was not to be entrusted to any person until he was properly recommended, etc.

3. *Purdy v. Sinton*, 56 Cal. 133; *State v. Moore*, 1 Jones (N. C.) L. 276.

In *Purdy v. Sinton*, 56 Cal. 133, the plaintiff applied to the defendant, the collector of licenses of San Francisco, for a license to retail liquors, and was refused, on the ground that the defendant was not authorized to issue such a license without the written consent of a majority of the board of police commissioners. The court held that such are the requirements of the act from which the defendant derives his sole power to issue licenses; and that, if the act is constitutional, the plaintiff must comply with it before he can demand a license; and if unconstitutional, the defendant has no power to issue licenses at all.

4. *In re Breslin*, 45 Hun (N. Y.) 210; s. c., 10 N. Y. St. Rep. 80. See *Siloam Springs v. Thompson*, 41 Ark. 456; *State v. Justices*, 15 Ga. 408; *Pierce*

has been complied with, it is the right of the petitioner to have a license issued, and any obstacle thrown in his way by the commissioners or body charged with the issuing of licenses on the plea of being guardians of the public, is a mistake as to duty.¹

c. DISCRETION TO GRANT OR REFUSE.²—A law regulating or restraining the traffic in intoxicating liquors and investing a particular tribunal with power to grant a license therefor, upon proper petition or application, signed or recommended by a certain number or proportion of the residents of the immediate vicinity in which the business is to be carried on, vests such body with a judicial discretion.³ In granting or refusing the license, such

v. Com., 10 Bush (Ky.) 6; *Ex parte* Persons, 1 Hill (N. Y.) 655; *State v. Moody*, 95 N. C. 656; *Conway's Appeal* (Pa.), 1 Atl. Rep. 727; *Rauch v. Com.*, 78 Pa. St. 490; *Lutz's Application*, 3 Pa. County Court 127.

The rule that the court will take judicial notice of things which are public in their effects and relations, and ought to be known within their jurisdiction, is applied to the question whether a county treasurer could grant a valid brewers' license after the result of a vote had been judicially ascertained. *Rauch v. Com.*, 78 Pa. St. 490.

Duty of Court to Grant License.—It is said in *State v. Justices*, 15 Ga. 408, that the inferior courts of Georgia cannot withhold a license from any person applying for it, and complying with the requirements of the law by paying for the license and giving bond and security to keep an orderly house.

It is said in *Conway's Petition* (Pa.) 1 Atl. Rep. 727, that a wholesale liquor license can be denied by the court of quarter sessions without assigning any reason. And in the case of *Pierce v. Com.*, 10 Bush (Ky.) 6, that the Kentucky statute, which provides that no license shall be granted unless the judge "or board of trustees shall deem it expedient to grant such privilege," confers a power to grant a license only when deemed by them to be expedient to the community or travelling public."

Same—Failure to Vote.—It is said by the supreme court of Arkansas, in *Siloam Springs v. Thompson*, 41 Ark. 456, that under the Arkansas act of March 19th, 1881, the county court could not grant licenses to sell liquor in any township or city ward in the county unless at the previous general election there was a majority vote "for license" both in the county township or ward

in which it was applied for, and that where there was no vote at all on the question, no license could be granted. See *State v. Moody*, 95 N. C. 656.

Same—Bottler's License.—It is said in *Lutz's Application*, 3 Pa. County Court 127, that the court of quarter sessions has no authority to grant a bottler's license.

Granting License When Concluded.—It is said in *Ex parte Persons*, 1 Hill (N. Y.) 655, that the question whether the commissioners will grant a tavern license is open until a resolution is entered on their minutes as provided by statute.

1. *State ex rel. Edwards v. Sumter County*, 22 Fla. 1. See *State v. Justices*, 15 Ga. 408.

2. See *infra*, JUDICIAL CONTROL OF DISCRETION; REVIEW; APPEAL etc.

3. *Ex parte Levy*, 43 Ark. 42; s. c., 51 Am. Rep. 550; *Ex parte Whittington*, 34 Ark. 394; *Batters v. Dunning*, 49 Conn. 479; *Wiggins v. Varner*, 67 Ga. 583; *People v. Norton*, 7 Barb. (N. Y.) 477; *Ex parte Persons*, 1 Hill (N. Y.) 655; *Muller v. Buncomb Co. Commrs.*, 89 N. C. 171; *Attorney-General v. Justices of Guilford*, 5 Ired. (N. C.) 315; *Leister's Appeal* (Pa.), 11 Atl. Rep. 387; *Morris's Licenses*, 3 Pa. Co. Ct. 307; *Chester's Licenses*, 3 Pa. Co. Ct. 304; *Wayne's Licenses*, 3 Pa. Co. Ct. 301; *Licenses of Frey*, 3 Pa. Co. Ct. 93; *Lycoming Licenses*, 3 Pa. Co. Ct. 90; *Beaver's Licenses*, 3 Pa. Co. Ct. 56; *Conroy's Licenses*, 3 Pa. Co. Ct. 52; *Mercer's License Applications*, 3 Pa. Co. Ct. 43; *Northumberland Licenses*, 2 Pa. Co. Ct. 660; *Kistler's Licenses*, 2 Pa. Co. Ct. 604; *Meredith's Licenses*, 2 Pa. Co. Ct. 82; *Lelling's Licenses*, 2 Pa. Co. Ct. 76; *Severn's Licenses*, 2 Pa. Co. Ct. 75; *Smith's Licenses*, 2 Pa. Co. Ct. 74; *Application*

of Keifer, 2 Pa. Co. Ct. 40; Bourjohn's Application, 2 Pa. Co. Ct. 33; *Re* License Applications, 2 Pa. Co. Ct. 30, 603; Justin's Application, 2 Pa. Co. Ct. 22; King's Application, 2 Pa. Co. Ct. 17; *Ex parte* Lester, 77 Va. 663; Ailstock *v.* Page, 77 Va. 386; Leighton *v.* Maury, 76 Va. 865; *Ex parte* Yeager, 11 Gratt. (Va.) 655.

The Connecticut Act of 1881 provides that the county commissioners of each county shall, upon the recommendation of the selectmen of the town where the business is to be carried on, license suitable persons to sell intoxicating liquors in suitable places in said county. *Batters v. Dunning*, 49 Conn. 479. In which case it was held that under this act the commissioners have a discretion to grant or refuse licenses to persons, regulated by the selectmen, and that having this discretion the exercise of their judgment in the matter is final, and cannot be controlled by *mandamus*.

The Georgia Act providing for an application for a liquor license upon written consent of two thirds of the freeholders of a particular county, is said in *Wiggins v. Varner*, 67 Ga. 583, not to divest the ordinary of the discretion, under the Georgia Code to grant or refuse the license.

The Pennsylvania Doctrine.—It is said in *Leister's Appeal* (Pa.), 11 Atl. Rep. 387, to be a proper exercise of the discretionary power of the court of quarter sessions in the granting of liquor licenses, to refuse such a license in a case where but fourteen people signed a petition for the license, and over two hundred signed a remonstrance against it, and the applicant had been refused a license a year before for the violation of the liquor law; also in a case where the court knew that the applicant had violated the liquor law the preceding year.

The Pennsylvania act of March 22d, 1867, providing that, on application for license to sell intoxicating drinks, it shall be lawful for the court to hear petitions in favor of and remonstrances against the application, "and in all cases to refuse the same whenever, in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers and travellers," vests in the court a sound judicial discretion to be exer-

cised in accordance with the law, and guided by the evidence prescribed by the law-making power; and the necessity for a license is to be determined, in great part, by the sentiment of the locality as expressed in the petitions and remonstrances presented to the court. King's Application, 2 Pa. Co. Ct. 17. See also, as to the nature and exercise of the discretion of the court. Justin's Application, 2 Pa. Co. Ct. 22; *Re* License Applications, 2 Pa. Co. Ct. 30; Bourjohn's Application, 2 Pa. Co. Ct. 33. And *compare*, as to the weight to be given to petitions, remonstrances, etc.

Morris's License, 3 Pa. Co. Ct. 307; Chester Licenses, 3 Pa. Co. Ct. 304; Wayne Licenses, 3 Pa. Co. Ct. 301; License of Frey, 3 Pa. Co. Ct. 93; Lyecoming Licenses, 3 Pa. Co. Ct. 90; Beaver Licenses, 3 Pa. Co. Ct. 56; Conroy's Application, 3 Pa. Co. Ct. 52; Mercer License Application, 3 Pa. Co. Ct. 43; Northumberland License, 2 Pa. Co. Ct. 660; Kistler's Licenses, 2 Pa. Co. Ct. 604; License Application, 2 Pa. Co. Ct. 603; Meredith's License, 2 Pa. Co. Ct. 82; Lelling's License, 2 Pa. Co. Ct. 76; Severn's License, 2 Pa. Co. Ct. 75; Smith's License, 2 Pa. Co. Ct. 74; Application of Keifer, 2 Pa. Co. Ct. 40.

The Virginia Act of 1882, regulating the sale of intoxicating liquors, confers upon the county courts a discretion to grant or refuse license to sell liquors, not conferred by the former act; therefore an applicant who appears to have brought himself within the rule which, under the former law, would have entitled him to a license as of right, and a license is granted by the court, such exercise of discretion cannot be interfered with by the circuit court at the instance of a contestant, and no prohibition will issue to restrain such interference on the part of the circuit court by *supersedas* and writ of error. *Ailstock v. Page*, 77 Va. 386. See *Ex parte* Yeager, 11 Gratt. (Va.) 655.

It is otherwise, however, where the license is refused. The discretion to be exercised by the court is not an arbitrary discretion. *Ex parte* Lester, 77 Va. 663.

"May" and "shall"—Under the North Carolina Code providing that county commissioners "shall grant" license "to all properly qualified applicants," it was held that in the exercise of a sound discretion the commissioners could refuse a license even to an appli-

body does not act solely as judicial officers,¹ and while they have a discretion, it is a judicial and not an arbitrary discretion.²

d. BY WHOM GRANTED.—License to traffic in intoxicating liquors may be granted under the various statutes by judicial officers,³ municipal and ministerial officers,⁴

cant properly qualified. *Muller v. Buncomb Co. Commrs.*, 89 N. C. 171.

The Virginia act of March, 1882, amending the act of March, 1880, and substituting "may" for "shall," has been said not to remit applicants to sell liquor to the court's arbitrary discretion. The words "may grant the license" mean the court must grant it in a proper case. *Ex parte Lester*, 77 Va. 663.

The supreme court of Virginia say, in the case of *Leighton v. Maury*, 76 Va. 865, that the statute of Virginia relating to the granting of licenses providing that the county court "shall grant the license" if the applicant brings himself within the requirements, and that the circuit court "may grant the license," the words "may grant the license" mean that the circuit court shall have the jurisdiction to do so, and must do so, if the applicant brings himself within the requirements, and they confer no arbitrary discretion, but a sound judicial discretion, subject to move as in other cases provided by act 1873. p. 1136, §§ 2-3.

1. *People v. Norton*, 7 Barb. (N. Y.) 477.

It has been said that under the New York excise law, the justices who are charged with the granting of licenses have a discretion, but that their duties are so plainly defined that in case they disregard them they are liable to indictment. *People v. Norton*, 7 Barb. (N. Y.) 477.

2. *Louisville v. Kean*, 18 B. Mon. (Ky.) 9.

The County Court having the discretion to grant or refuse to grant a license to sell intoxicating liquors in a particular locality, having licensed some applicants, may not arbitrarily refuse others in the same locality, who are of good moral character and comply with the statute. *Ex parte Levy*, 43 Ark. 42; s. c., 51 Am. Rep. 550.

The Justices of the County Court, in North Carolina, are not bound to grant a license to retail spirituous liquors to every one who proves himself of good moral character; nor have they, on the other hand, the arbitrary power to re-

fuse, at their will, all applicants for license who have the qualifications required by the statute. *Attorney-General v. Justices of Guilford*, 5 Ired. (N. C.) 315.

They have the right to exercise only a sound legal discretion, referring itself to the wants and conveniences of the people, to the particular location in which the retailing is to be carried on, and to the number of retailers that may be required for the public accommodation. *Attorney-General v. Justices of Guilford*, 5 Ired. (N. Car.) L. 315.

Although a person complies with the provisions of the statute relative to the granting of a license to keep a dram shop, he cannot of right demand the license, the power of granting it being a matter of discretion vested in the county court. *State v. Holt County Court*, 39 Mo. 521.

3. *State v. Brandon*, 28 Ark. 410; *Intoxicating Liquor Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284; *Austin v. State*, 10 Mo. 591; *O'Driscoll v. Viard*, 2 Bay (S. C.) 316; *Candlish v. Simpson*, 1 B. & S. 357.

Druggist's Permit.—The legislature has the power, under the Kansas constitution, to cast upon the person holding the office of judge of the probate court the duty of issuing permits or licenses for the sale of liquor, as provided in ch. 128 of the law of 1881.

4. See *Com. v. Voorhies*, 12 B. Mon. (Ky.) 361; *Leymon v. Peyton*, 64 Miss. 161; *State v. Bayonne*, 42 N. J. L. (13 Vr.) 114; *Com. v. Mueller*, 81* Pa. St. 127.

In *State v. Bayonne*, 42 N. J. L. (13 Vr.) 114, the charter of a city gave the common council power to pass ordinances to license and regulate or prohibit inns or taverns, restaurants and beer saloons, the court held that only the common council and not the mayor could grant a license, and that only beer saloons could be licensed, and that an ordinance authorizing the license of a sale of beer at picnics is void.

License by County Treasurer.—Under the Pennsylvania act of 1875, a county treasurer is prohibited from issuing a

and by excise commissioners.¹

e. GROUNDS OF GRANTING OR REFUSING.—It has been said that where, from the evidence of personal knowledge or inspection, the body empowered with granting licenses is fully satisfied that there has been a sufficient number of licenses already granted in the locality, it is their duty not to grant others,² and an applicant's former wilful violation of the liquor laws, coupled with a

liquor license when the local option law is operative, and a seller cannot justify a sale under such a license. *Com. v. Mueller*, 81* Pa. St. 127.

License by Supervisor — Aiding in Call of Election.—The supreme court of Mississippi say, in the case of *Lemon v. Peyton*, 64 Miss. 161, that a supervisor, who canvasses for or signs a petition for an election under the local option law of Mississippi, is not thereby disqualified from acting on such petition, in his official capacity in pursuance of the terms of the law. The interest which disqualifies is pecuniary, not political.

1. *People v. Murray*, 70 N. Y. 521; *People v. Gates*, 56 N. Y. 387; *Board of Excise of Ontario v. Garlinghouse*, 45 N. Y. 249; *Cronin v. Gundy*, 16 Hun (N. Y.) 520; *Comms. of Excise of Cattaraugus Co. v. Wiley*, 2 Lans. (N. Y.) 427.

Appointment of Excise Commissioners.—Commissioners of excise cannot be constituted by merely oral appointment, or relieve themselves from the duties of the office, save in one of the ways designated by the statute. *People ex rel. Babcock v. Murray*, 70 N. Y. 521.

Under New York act, 1870, "regulating the sale of intoxicating liquors," and prescribing the manner of appointment of commissioners of excise for cities (Laws 1870, ch. 175, § 2), the same methods are to be pursued in subsequent as upon the first appointment under the act, *i. e.*, in all cities, except the cities of New York and Brooklyn, the appointments are to be made by the mayor of the city alone; and in those cities, by the mayor and board of aldermen in the manner directed. *People v. Gates*, 56 N. Y. 387.

Same — Bond — Commissioners of excise failing to have their bond approved, as they are required to do by the statute, do not *ipso facto* vacate their office, but leave it to be declared forfeited on proper proceedings. *Cronin*

v. Gundy, 16 Hun (N. Y.) 520. See *Foot v. Stiles*, 57 N. Y. 399.

Thus in *Cronin v. Stoddard*, 97 N. Y. 271, where, because of the failure of an excise commissioner to procure the approval of the supervisor to the bond presented by him, no one was selected to fill the supposed vacancy, the court held that a license signed by the person so selected and by one of the three commissioners was no defence to an action to recover a penalty for selling liquor without a license.

Transfer of Office. — The commissioners of excise cannot transfer their office or relieve themselves from their duties, except in the way designated by statute. *People v. Murray*, 70 N. Y. 521 reversing 8 Hun (N. Y.) 577.

Majority of Board. — Two of the commissioners of excise may act in the absence of the third, if he had notice of the time and place of meeting. *People ex rel. Kimball v. Haughton*, 41 Hun (N. Y.) 558.

Constitution of Board. — The supervisor may, in his discretion, associate more than two justices with himself as commissioners, and a license signed by a majority present is valid. *Palmer v. Doney*, 2 Johns. Cas. (N. Y.) 346; *Orvis v. Thompson*, 1 Johns. (N. Y.) 500.

Legality of License. — A license is illegal for want of authority to grant, that is, if granted by two commissioners without the supervisor, or by several, one of whom is not a commissioner, is no defence to an action for the penalty. *Palmer v. Doney*, 2 Johns. Cas. (N. Y.) 346. And a license granted by one who has not even apparent authority or color of title to act as an excise commissioner, furnishes no defence to an action for a penalty. A person desiring to enjoy the privileges afforded by the act must see to it that they are granted by one duly authorized or submit to the penalty prescribed. *Cronin v. Stoddard*, 97 N. Y. 271.

2. *Northumberland Licenses*, 2 Pa. County Ct. 660.

number of remonstrances, is thought to be sufficient reason for refusing a license;¹ but it seems that a judge is not justified in refusing a license merely because he does not think it necessary to license a hotel to sell liquors.² The fact that there are covenants in deeds to premises prohibiting the sale of intoxicating liquors on such premises will not prevent the granting of licenses for such sale;³ neither will the fact that a building is being used part of the time as a place of public amusement.⁴ A license will not be refused on account of general disorder in the neighborhood when the applicant was in no way connected therewith or responsible therefor;⁵ and it has been said that a refusal to take out an excise license for the sale of spirits is not a sufficient legal ground for refusing a license for the sale of beer.⁶

f. TIME OF GRANTING; TERM OF COURT.—Under some statutes a license to sell intoxicating liquors can be granted only at designated terms of court;⁷ and by others such license is of no validity if granted before the delivery to the town treasurer of the bond prescribed by the statute.⁸

g. INDICTMENT AGAINST COMMISSIONERS.—The persons charged with the duty of granting licenses, may under some of the statutes be indicted as for a misdemeanor where they knowingly

1. *Leister's Appeal* (Pa.), 11 Atl. Rep. 387; s. c., 20 Wk. Notes Cases, 224.

Withholding License Because of Former Violation.—It is said by the supreme court of Indiana, in *Golden v. Bingham*, 61 Ind. 108, that under the Indiana statute of 1873 the fact that one holding a liquor license had been convicted of a violation thereof was no ground for refusing him a license under 1 Ind. Rev. Stat. 1869.

Same — Repeated Violations.—Although a license should not be withheld for a single previous violation of the laws by the applicant, repeated violations, as by selling on Sunday, are ground for such refusal. *Bourjohn's Application*, 2 Pa. County Ct. 33; *Application of Meitzler*, 2 Pa. County Ct. 37. See also *Rutherford's License*, 2 Pa. County Ct. 78; *Meredith's License*, 2 Pa. County Ct. 82.

2. *Leister's Appeal* (Pa.), 11 Atl. Rep. 387; s. c., 20 Wk. Notes Cases, 224.

Licensing Hotel.—It is not the necessity of the house for the public accommodations, as a hotel or eating house, but the necessity for a license to sell intoxicating drinks, that is to control the action of the court. *Mercer License Applications*, 3 Pa. County Ct. 43; *Beaver Licenses*, 3 Pa. County Ct. 56; *King's Application*, 2 Pa. County

Ct. 17. Compare *Justin's Application*, 2 Pa. County Ct. 22.

An application for license for a restaurant, which the petitioner shows should furnish accommodation for women, will be refused under the Pennsylvania law unless the proper and decent facilities therefor are furnished. *Morris License*, 2 Pa. County Ct. 79; s. c., 3 Pa. County Ct. 307.

3. *State v. Busby*, 44 N. J. L. (15 Vr.) 627.

4. *People ex rel. Gillaine v. Haughton*, 3 How. (N. Y.) Pr., N. S. 135.

5. *Helling's License*, 2 Pa. County Ct. 76.

6. *Queen v. Sylvester*, 2 B. & S. 322.

7. *State v. Kennedy*, 1 Ala. 31.

In the case of *Brown v. Nicholson*, 5 C. B., N. S. 468, a license was granted by the justice of the boroughs of M,—a place having a separate commission of the peace, but no separate court of quarter sessions,—at a licensing meeting held on the 7th of September which had been duly appointed by them as they had been accustomed to do, the court held that the license so granted was valid, notwithstanding that the justice of the county (who had concurrent jurisdiction in M) had previously appointed a licensing meeting for the 8th.

8. *In re Ricker*, 32 Me. 37

and wilfully grant licenses to sell liquor in violation of the law.¹ They are not judicial officers, and are not entitled to the protection of such officers. And the general principle is that when the common law or statute forbids the doing of a thing, the doing of it wilfully is indictable though the motive is not corrupt.² But an indictment which simply charges such officers with having unlawfully granted a dram-shop license, and alleges that they were then the officers charged with such duty; is insufficient; it should aver that the license was granted by them as such officers, and that the act was done wilfully, knowingly, and from an improper motive.³

h. PETITION.—A presentation of a petition according to the statute is an indispensable prerequisite to the license.⁴

(1) *Oath or Affidavit of Petitioner.*—Where an affidavit is required of the petitioner, it is a necessary prerequisite to the issuance of the license, and if it is omitted, and material parts of the statement are omitted, the license will be void.⁵ An applicant

1. See *State v. Kite*, 81 Mo. 97; *People v. Worsley*, 1 N. Y. Supp. 748; *People v. Jones*, 54 Barb. (N. Y.) 311; *People v. Norton*, 7 Barb. (N. Y.) 477.

The commissioners of excise in New York who have power to grant licenses to keep spirituous liquors for sale may be indicted for granting licenses to persons not possessing the qualifications contained in the statute. But they are not liable for a mere error of judgment. *People v. Norton*, 7 Barb. (N. Y.) 477.

Same — Sufficiency of Evidence.—It is said in the case of *People v. Worsley*, 1 N. Y. Supp. 748, on an indictment of excise commissioners for misdemeanor in granting a license to sell liquor to be drunk on the licensee's premises, knowing that he was not able to keep an inn, and had not the necessary accommodations for travellers, in violation of the excise law, where it appears that the licensee had no such accommodation for travellers, and there is evidence from which the jury might find that defendants had entirely failed in their official duty to ascertain the licensee's disability, and want of accommodation before issuing the license, the evidence is sufficient to sustain conviction.

But on an indictment against commissioners of excise, for granting a license, illegal proof of the mere granting of a license, which had before never been granted, does not establish an offence, but the jury must be able to say from the evidence that the defendant knew at the time that it was not a

proper case for a license under the statute, and nevertheless granted it, in wilful disregard of the statute. *People v. Jones*, 54 Barb. (N. Y.) 311.

2. *People v. Norton*, 7 Barb. (N. Y.) 477.

3. *State v. Kite*, 81 Mo. 97.

It is said under the Missouri Rev. Stat., 1879, § 5442, making it a misdemeanor for county courts to grant a liquor license save on the petition of citizens, it is not necessary in an indictment charging defendants with having unlawfully granted a license to allege that it was granted wilfully and knowingly. *State v. Kite*, 81 Mo. 97.

4. *Mere informalities* in a petition for a license present no valid reason for its issuance. *Hearn v. Brogan*, 64 Miss. 334.

The alteration of a petition for a liquor license, which consists of erasing the name of the person to whom the registered voters supposed that the license was to issue, and substituting the name of another person, affords a sufficient ground for refusing a license to the person thus substituted. *Polk County Commissioners v. Johnson*, 21 Fla. 578.

5. *Russell v. State*, 77 Ala. 89. See *State ex rel. Edwards v. Sumpter County*, 22 Fla. 1; *Floyd v. Commissioners of Eatonton*, 14 Ga. 354; *Hall v. State*, 9 Lea (Tenn.) 574.

Affidavit of Applicant.—The statutory affidavit required of a person applying for a license to retail spirituous liquors (Sess. Acts 1882-3, pp. 36-7) must state, among other things,

making oath to a petition for a permit to sell liquors should know of his own knowledge that the petitioners have signed; and should not base his affidavit of the absence of fraud, bribery, or deception, upon the statement of others whom he may have procured to get the names for him.¹

(2) *Statement as to Liquors.*—Where the statute prohibits the sale of liquors in less than a given quantity, without first having obtained a license, a petition for a license to retail intoxicating liquors is not bad for failing to state what quantity the applicant desires to sell.²

(3) *Description of Premises.*—Where the statute requires the applicant for license, to give a description of the premises where the business is to be carried on, a description of the premises so reasonably full and certain as to point out the exact location thereof is sufficient.³

(4) *Statement as to Qualification of Petitioner.*—A petition for a license to sell liquors is not insufficient under the statute because it fails to state that the applicant is a moral person;⁴ but a petition which fails to recommend the petitioner to be of "good repute" as is required by statute is insufficient.⁵

that the applicant will not knowingly sell or give away vinous or spirituous liquors to any person of known intemperate habits, and will not keep his house open on Sunday for the purpose of carrying on the business; and if the affidavit omits these statements, it does not authorize the issue of a license, and the license itself is void. *Russell v. State*, 77 Ala. 89.

The Georgia act of January 22nd, 1852, granted power to certain commissioners to issue licenses for the retail of spirituous liquors, provided the applicant be required to take the oath required by the general law of the State. Held, that this gave them impliedly power to require the clerk of the applicant to take a similar oath. *Floyd v. Commissioners of Eatonton*, 14 Ga. 354; s. c., 58 Am. Dec. 559.

The statutory oath required of a liquor seller not to "mix or adulterate with any substance whatever," is not complied with by an oath not to "mix or adulterate with any poisonous substance whatever." *Hall v. State*, 9 Lea (Tenn.) 574.

1. *State ex rel. Edwards v. Sumter County*, 22 Fla. 1.

2. *Hearn v. Brogan*, 64 Miss. 334. See *State v. Jefferson County Commissioners*, 20 Fla. 425.

It is said in the case of *State v. Jefferson County Commissioners*, 20 Fla. 425, that under the Florida act of

March 3rd, 1883, to regulate the sale of wine, beer, providing that an applicant for a license shall present a petition asking the board of county commissioners to grant the right "to sell such liquors, wines or beer," a petition asking for a license "to sell spirituous or intoxicating liquors, wines and beer," is a good and sufficient form under the application of the act.

3. *Murphy v. Monroe County Commissioners*, 73 Ind. 483. See *Eslinger v. East*, 100 Ind. 434; *State v. Reingardt*, 46 N. J. L. (17 Vr.) 337.

An application for license to sell liquor at "No 1005 Elizabeth avenue, the corner of Spring street, in said city," sufficiently designates the place. *State v. Reingardt*, 46 N. J. L. (17 Vr.) 337.

Evidence.—Upon an application for license to sell liquors, evidence showing the location of the proposed place of business, with reference to the court house, a college and public school, and that it is on a street necessarily much used by school children, is admissible. *Eslinger v. East*, 100 Ind. 434.

4. *Hearn v. Brogan*, 64 Miss. 334.

5. *McGee v. Beall*, 63 Miss. 455; *McCreary v. Rhodes*, 63 Miss. 308; *Loeb v. Duncan*, 63 Miss. 89; *Corbett v. Duncan*, 63 Miss. 84.

"Good Repute."—Under the Mississippi Code requiring an applicant for a license to retail liquor to produce

(5) *Signing*.—Where a statute requires that a license to sell intoxicating liquor can only be granted upon the petition of a majority of the qualified voters or of resident land-holders, such a petition is a prerequisite to the granting of the license to sell intoxicating liquor.¹ The personal fitness of the party to be li-

a petition recommending him as of "good reputation, and a sober and suitable person to receive such license," a petition is insufficient which omits the representation concerning "good reputation." *McCreary v. Rhodes*, 63 Miss. 308; *Loeb v. Duncan*, 63 Miss. 89; *Corbett v. Duncan*, 63 Miss. 84.

Nor is a petition sufficient which avers that a certain firm is of good reputation, no further mention being made of the reputation of the individual members of the firm. *Loeb v. Duncan*, 63 Miss. 89.

Under Mississippi Code of 1880, § 1099, a license granted without it being shown to the board, by the petition or otherwise, that the petitioner is a resident of the county in which he presents his application, is invalid. And such objection, being a jurisdictional one, may be raised for the first time in this court, in a case properly brought here. *McGee v. Beall*, 63 Miss. 455.

Section 2 of the 3 & 4 Vict., ch. 61, which enacts "that every applicant for a license to retail beer shall produce to the officer of excise a certificate from an overseer that he is the real resident of the house in which he shall apply to be licensed," is directory only, and therefore a license may be valid, notwithstanding the certificate omits to state that the applicant is such householder. *Thompson v. Harvey*, 4 Hurl. & Nor. 254.

A man who was living in a state of concubinage with a woman, by whom he had had three illegitimate children, procured a certificate from his neighbors that he was a person of good character, and with it obtained a license to sell beer to be drunk on the premises. Held, that he was not liable to conviction, under § 6 of 3 & 4 Vict., ch. 61, for using a certificate for obtaining such license, knowing it to be false. *Leader v. Yell*, 16 C. B. (N. S.) 584.

1. See *Rogers v. Hahn*, 63 Miss. 578; *Corbett v. Duncan*, 63 Miss. 84; *House v. State*, 41 Miss. 737; *State v. Meyers*, 80 Mo. 601; *State v. Weber*, 20 Neb. 467; *O'Rourke v. People*, 5 T. & C. (N. Y.) 496.

Assent of Taxpayers.—Under the

Missouri statute requiring the assent of two-thirds of the tax payers, etc., to the keeping of a dram shop, it has been held that an act requires the assent of two thirds only of the tax payers of the block or square wherein the dram shop is to be kept, and that, if the city contains two thousand five hundred or more inhabitants, not two thirds of the tax payers of the city. *State v. Meyers*, 80 Mo. 601.

Majority of Legal Voters — Requisites of Record.—It is said in *Rogers v. Hahn*, 63 Miss. 578, that under a law prohibiting the granting of a license, unless the petition therefor contains a majority of the names of all the legal voters within the city, town or district for which the license is sought exclusive of all names appearing on the counter petition, if the records of the proceedings granting such license fail to show affirmatively that the petition therefor contained the requisite majority, the supreme court will, upon appeal, reverse the action of the authorities, in granting the license.

Objections and Counter Petitions.—The same court say, in *Corbett v. Duncan*, 63 Miss. 84, that under the Mississippi Code, where it is sought to prevent the issuance of any license for the period of twelve months, the petition must be signed by a majority of the legal voters within the supervisor's district or incorporated town, but where it is sought to prevent the issuance of such a license as to a particular individual, a single voter may intervene by counter petition for the purpose of raising any valid objection to its issuance.

The presentation to the board of trustees of an incorporated village, or filing in the office of the village clerk of a petition signed by not less than thirty of the resident freeholders of such village, applying for a license to the person or persons therein named to sell malt, spirituous and vinous liquors in said village, is an indispensable condition precedent in Nebraska to the issuance of such license. *State ex rel. Conway v. Weber*, 20 Neb. 467.

The requirement of a petition of freeholders, under New York Laws

censed is an essential consideration in the mind of the voter at the time of signing the petition.¹ Under the various statutes regulating the granting of license for the sale of intoxicating liquors, the petition of the applicant is required to be signed by adult residents,² by the registered voters,³ or by the reputable freeholders of the community in which the business is to be carried on.⁴ The signatures to the petition must be signed by the persons themselves in ink,⁵ it not being sufficient that the names be signed by another or by a cross as a mark.⁶

of 1857, ch. 628, § 6, does not apply to licenses to sell ale and beer, granted to one not an inn keeper. *O'Rourke v. People*, 5 T. & C. (N. Y.) 496; s. c., 3 Hun (N. Y.) 225; *Opin. of Attys. Gen.* 458. But it seems that this act was repealed by the act of 1870. *People v. Smith*, 69 N. Y. 175; reversing *Smith v. People*, 9 Hun (N. Y.) 446.

1. *Polk Co. v. Johnson*, 21 Fla. 578.

Recommendation of Householdors.—An act requiring the applicant for a liquor license to secure a recommendation from a majority of the householders in the precinct is not inoperative because it provides no way of obtaining such a recommendation. *Jones v. Hilliard*, 69 Ala. 300.

It is said by the United States circuit court, in *In re Hoover*, 30 Fed. Rep. 51, that the act of Georgia requiring an applicant for a license to present the written consent of ten of the nearest *bona fide* residents, five of whom shall be freeholders, and not applying to municipal corporations, is not an unconstitutional discrimination against the rural population.

2. The petition to the county court provided for by the Arkansas act of March 2nd, 1885, may be signed by adult females as well as males; and on trial for violation of the act the judgment of the county court that the petitioners were a majority of the adult residents within, etc., cannot be impeached. *Blackwell v. State*, 36 Ark. 178.

3. See *State ex rel. Edwards v. Sumter Co.*, 22 Fla. 1; *Hearn v. Brogan*, 64 Miss. 334; *State v. Reinhardt*, 46 N. J. L. (17 Vr.) 337.

Signing by Applicant.—It is said that an applicant, if a registered voter, has a right to sign his name as one of the petitioners for a permit to sell liquor, and be counted as such in making the majority required by statute. *State ex rel. Edwards v. Sumter Co.*, 22 Fla. 1; *Hearn v. Brogan*, 64 Miss. 334.

Signing a recommendation for license of an inn or a tavern does not disqualify a person from signing a recommendation for beer license. *State v. Reinhardt*, 46 N. J. L. (17 Vr.) 337.

4. Thus it is said by the supreme court of New Jersey in the case of *State, Austin v. Atlantic City*, 48 N. J. L. (19 Vr.) 118, that a deed of five acres of marsh land to four hundred and sixty persons for a single consideration, for the purpose of enabling them to sign recommendations for inn and tavern licenses, is fraudulent, and the grantees are not "reputable" freeholders within the words and intent of the New Jersey statute. The court say in this case that "persons who will lend themselves to such a scheme are not the reputable freeholders whose certificate will be received by any legal tribunal entrusted with the responsible duty of controlling the sale of intoxicating drinks, as satisfactory recommendation of good repute for honesty and temperance of one who seeks a license to keep an inn and tavern. A like attempt was made to impose on the excise board of the city of Elizabeth, and was condemned by this court in *State, ex rel. Smith v. Elizabeth*, 46 N. J. L. (17 Vr.) 312.

5. Signatures in lead pencil are not sufficient. *Smith's Appeal*, 3 Pa. Co. Ct. 314.

6. *Grant's License*, 2 Pa. Co. Ct. 87. *Faulkner's License*, 2 Pa. Co. Ct. 86. Compare *Ex parte Miller*, 49 Ark. 18.

Signing by Making Mark.—In *Ex parte Miller*, 49 Ark. 18, some of the signatures to a petition presented to a county court for the prohibition of the sale of intoxicating liquors within a certain district were by mark, not attested by a witness. The petitioners tendered evidence that these signatures were genuine, and that the persons who wrote the names of the signers by mark were authorized to do so; the court held that under *Mansf. Dig. Ark.*, § 6344, which defines a signature or prescription

to "include a mark when the person cannot write his name being written near it, and witnessed by a person who writes his own name as a witness;" evidence was competent, the statute intending the signature by mark not to be taken as *prima facie* genuine, without other proof of signing, and not that such proof should be exclusive. In *Watson v. Billings*, 38 Ark. 278. it is said by MR. JUSTICE EAKIN, that since the adoption of the code. the mark of one who cannot write is not to be considered a signature or subscription, unless the person writing his name writes his own name as a witness; this only means that such a signature is not to be *prima facie* evidence without other proof of signing.

Signature of Witness.—Witnesses to a petition for a permit to sell liquor are not required to subscribe or attest the signatures in Florida. *State ex rel. Edwards v. Sumpter Co.*, 22 Fla. 1.

Sufficiency and Effect of Signature.—A petition for a license signed by less than the majority of voters of the district was denied. At the ensuing regular meeting an additional number of names, thus making a majority, was affixed to the original petition on file and the whole duly authenticated and published. Held, that though courts would consider such signing of a paper already on file in judicial proceedings irregular, yet in transacting the ordinary business of the community by plain people in a simple manner the strict rules of courts should not be enforced, no fraud being imputed. And if the petitioner shows that a majority have expressed themselves it is of no consequence whether the additional names are signed to the original or to an additional petition of the same import. *State v. Jefferson Co. Comms.*, 20 Fla. 425.

Under Missouri Revised Statutes of 1879, §§ 5438, 5442, as amended by the act of the general assembly of March 24th, 1883 (acts, pp. 87, 88), the petition for a dram shop license, where the dram shop is to be kept in a block or square of a city containing 2,500 inhabitants or more, signed by two thirds of the assessed tax paying citizens of said block or square, is sufficient in respect to such signers, and the law being otherwise complied with by the applicant for the license, it is obligatory on the county court to issue it. *State ex rel. Fitzpatrick v. Meyers*, 80 Mo. 601.

Signatures Procured After Presenta-

tion.—A petition for a license which after presentation receives signatures, there not being before its presentation enough to justify the issue of a license based on it, although irregular, will not be declared incorporative. Such proceedings need not be conducted with the strict accuracy required by courts. *State v. Jefferson County Comms.*, 20 Fla. 425.

Same.—Withdrawal of the name of a signer of a recommendation for a license after it has been presented to the excise board cannot, without the board's consent, divest it of jurisdiction. *State v. Reingardt*, 46 N. J. L. (17 Vr.) 337.

Dram Shop Keeper's License.—Effect.—On the trial of an indictment for selling intoxicating liquor without a dram shop keeper's license, a license as such, covering the time of the alleged sales, is a complete defence, and the State cannot show that the petition of the tax payers, upon which the license was granted, did not contain the requisite number of signers. *State v. Evans*, 83 Mo. 319.

Judicial Ascertainment of Validity and Effect of Signatures.—An applicant for a liquor license circulated different petitions. Held, that in determining whether a sufficient number of voters had signified their assent, the petitions could not be treated as one petition. *Collins v. Barrier*, 64 Miss. 21.

The sole duty of the county court is to satisfy itself by the best modes fairly practical that the petition contains the names of a majority of the inhabitants. *Williams v. Citizens*, 40 Ark. 290.

Under Missouri acts, 1883, p. 86, requiring a petition for a dram shop license to be signed by a majority of the assessed taxpaying citizens, to be presented as a condition precedent to the exercise of the power to grant a license in a city, it is incumbent on the county court, in determining whether the petition is signed by a majority of the assessed tax payers, to include married or single women who reside in the city and own property in their own right, and who are assessed thereon at the last assessment; to count minors resident in the city who have guardians and own property; but not to count citizens residing outside of the city, though owning property therein regularly assessed. *State ex rel. McCampbell v. Howard County Court*, 90 Mo. 593.

Under Missouri statute of 1885, making it unlawful for any county court in the State, or clerk thereof in vaca-

(6) *Notice of Petition or Application*.—Under most if not all the laws regulating the granting of license to traffic in intoxicating liquors, an applicant for a license is required to give notice thereof.¹

i. *REMONSTRANCE*.—One who would resist the granting of a licence to sell intoxicating liquors must follow the statute, he must file a remonstrance and do the other things provided for by the statute, otherwise he cannot be heard;² and where such party fails to file such remonstrance with the proper officers upon consideration of the matter in the court, he cannot be permitted to appear by an attorney and resist the application.³ Any remonstrance against the granting of a petition for a license to sell intoxicating liquors must be filed before the body granting such license, and before whom the petition is pending.⁴ Where it is

tion, to grant any license to keep a dram shop in any town or city containing two thousand five hundred inhabitants, or more, until a majority of the assessed taxpaying citizens shall sign a petition asking for such license. Held, (1) that it is incumbent on the county court, in determining whether such petition has been signed by a majority of the tax payers, to count married or single women who resided in the city or town, and owned property in their own right, and who are assessed thereon at the last assessment; (2) to count minors resident of the city who have guardians, and who own property; and (3) that citizens residing outside of the city, though owning property in the city, and regularly assessed, should not be counted. *State v. Howard County Court*, 90 Mo. 593.

1. *Blackwell v. State*, 36 Ark. 178; *Polk County v. Johnson*, 21 Fla. 578; *Pelton v. Drummond*, 21 Neb. 492. See *State ex rel. Edwards v. Sumter County*, 22 Fla. 1; *Hornaday v. State*, 43 Ind. 306.

In the publication of the petition for a permit to sell liquor, the omission to publish the marks of a few petitioners whose names are published is immaterial, in the absence of improper motive. *State, Edwards v. Sumter County*, 22 Fla. 1.

Whether proper notice by publication has been given by an applicant for license under the statute cannot be enquired into in a prosecution against him for retailing intoxicating liquor without a license. Under that act no one but the applicant need sign his petition for a license. *Hornaday v. State*, 43 Ind. 306.

Publication of Affidavit.—The Florida statute does not require the publication of the affidavit to the petition named therein, but only of "the petition and the names and marks thereto attached." *Polk County v. Johnson*, 21 Fla. 578.

Applications for Licenses, and Proceedings Thereon.—Under a statutory provision that "no action shall be taken" upon an application for a license to sell intoxicating liquors "until at least two weeks' notice of the filing of the same has been given by publication," etc. (*Neb. Comp. Stat. ch. 50, § 2*), the board to which such application is to be made has no authority, before the expiration of the two weeks, even to adjourn the hearing of the application to a day after such expiration. *Pelton v. Drummond*, 21 Neb. 492.

2. *Ex parte Miller*, 98 Ind. 451.

Change of Place of Conducting Business.—In *Lester v. Price*, 83 Va. 648, it is said that under the provisions of the Virginia Code which relate to changing licenses from one place to another, an application to the county court to have a license to keep a bar room at one place, changed, a license to keep a bar room at another place, is such an application that any person who should feel that he would be aggrieved by the granting of such application is entitled to have himself entertained as a defendant and to defend and contest the same.

3. *Ex parte Miller*, 98 Ind. 451.

4. *Miller v. Wade*, 58 Ind. 91.

Withdrawal of Remonstrance.—On appeal to the circuit court from the action by a board of commissioners

provided by statute that the petition for a license to sell intoxicating liquors shall lie over for a definite time before being acted upon, counter petitions may be presented at any time before the granting of the license, even though after the time has expired for which the petition is required to lie over.¹ A remonstrance against granting an application for a liquor license under some statutes, may be made on the ground of the applicant's immorality or of his unfitness otherwise to be entrusted with the sale of liquor.²

j. **PROCEEDINGS ON APPLICATION.**—It is provided in some statutes that on application for a license to sell intoxicating liquors when a remonstrance against the issue of such license is filed, a day shall be appointed for hearing the case, and that a license may not be issued unless this is done, and an opportunity for an investigation afforded.³ Where the remonstrance is passed upon

on a petition for such license, that court has no power on the withdrawal of a remonstrance made before such a board to hold a party to appear and file a remonstrance. *Miller v. Wade*, 58 Ind. 91. See *Ex parte Miller*, 98 Ind. 451.

1. Rogers v. Hahn, 63 Miss. 578.

Right to Remonstrate—When Lost.—When the remonstrance provided for by the statute against the granting of license to sell intoxicating liquors "by any voter of said township," the remonstrance must be filed before the party making it has ceased to be a voter of the township or district. *List v. Padgett*, 96 Ind. 126.

2. Immorality of Applicant.—When the immorality or other unfitness of an applicant are made the grounds of a remonstrance against the application for a license to sell liquors, such immorality or unfitness should be set forth with such reasonable certainty as will advise him of the charges against him. *Grummon v. Holmes*, 76 Ind. 585.

Species of Immorality other than the habit of becoming intoxicated may be made the ground of a remonstrance against the applicant for license to sell intoxicating liquors under the Indiana statute of 1876, were properly set forth in such remonstrance. *Grummon v. Holmes*, 76 Ind. 585. *Overruling Calder v. Sheppard*, 61 Ind. 219.

Remonstrance—Verification.—A remonstrance against granting an application for a license to sell intoxicating liquors must be verified by an affidavit, or it will not be considered. *Palmer's License*, 3 Pa. County Ct. 314.

Remonstrance against granting license to keep inns and taverns may present special facts affecting the jurisdiction of the city council under the charter. *State v. Atlantic City*, 48 N. J. L. (19 Vr.) 118.

It has been said that under a statute which provides that no license to retail spirituous liquors shall be granted to any person within the township if a majority of the freeholders shall remonstrate against it. A general remonstrance against granting such license to any person is within the spirit of the statute, and on receiving it the officers charged with the duty of granting the licenses should refuse them. *Woods v. Pratt*, 5 Blackf. (Ind.) 377.

Hotel Licenses—Unexpired Term—Remonstrance of Ejected Licensee.

—It would seem that under the Pennsylvania act of April 20th, 1858, the court of quarter sessions can grant a hotel license to any applicant for the unexpired term, notwithstanding the remonstrance of the owner of the original licenses who had been ejected from the premises. *Teller's License*, 2 Pa. County Ct. 235.

3. Clark v. State, 24 Neb. 263; *State ex rel. Conway v. Weber*, 20 Neb. 467; *Steinkraus v. Hurlbert*, 20 Neb. 519; *State v. Reynolds*, 18 Neb. 431; *Vanderlip v. Derby*, 19 Neb. 165.

Upon presentation of a remonstrance, it is the duty of the board to appoint a day for hearing the case, sufficiently advanced in the future to give reasonable opportunity to subpoena witnesses and make suitable preparations for trial. *State v. Weber*, 20 Neb. 467.

Where, as by the Nebraska statute,

without objection on the part of the applicant such application is said to have waived any objections to the persons filing the remonstrance.¹ Where the statute requires that every applicant for a liquor license shall be "a fit person to be entrusted with the sale of intoxicating liquors," on application being made to obtain a license to retail liquors, and a remonstrance filed thereto on account of the alleged immorality and unfitness of the applicant, the burden is upon such applicant to prove his innocence.²

it is required that, on remonstrance against the issue of a license, a day for a hearing shall be appointed, the board is bound to grant a hearing and to fix a day in the future. In case of refusal, *mandamus* may issue. *State v. Reynolds*, 18 Neb. 431.

Where a remonstrance is filed with a village board against the issuance of a license to a particular applicant to sell intoxicating liquors, it is the duty of such board to set a time for the hearing of such remonstrance, and to grant the persons so remonstrating a reasonable time to produce their testimony. *Clark v. State*, 24 Neb. 263.

Upon the presentation to the board of trustees of an incorporated village of a petition for a license to sell liquors in said village, and the presentment of a protest or remonstrance against the issuance of the license, alleging that some of the persons signing were not the identical persons named in the body of the petition, and that certain other signers were not lawful residents, and still others were not lawful freeholders of the village; an adjournment from ten o'clock P.M. to nine o'clock A.M. the next day for a hearing of the remonstrance is not a reasonable time, and is a substantial denial of a hearing to the remonstrators. *State v. Weber*, 20 Neb. 467.

When after the presentation or filing of a petition for a license, an objection, protest or remonstrance against the issuance of such license, alleging that two of the thirty-two persons signing said petition are the identical persons named in the body of such petition as the persons to be licensed; that other two signers, naming them, are not lawful residents of said village; and that other two signers, also naming them, are not lawful freeholders of said village, was presented to and brought to the consideration of said board, it was the duty of such board to appoint a day for the hearing of the case. And the day so appointed should have been fixed

sufficiently advanced in the future as to give a reasonable opportunity to subpoena witnesses and make suitable preparations for trial. *State ex rel. Conway v. Weber*, 20 Neb. 467.

It is said in *Steinkraus v. Hurlbert*, 20 Neb. 519, that where a remonstrance against the issuing of a license to a certain applicant is filed with the board, in which it is alleged that the applicant "within five or six months last passed, during which time he has run a saloon in Planeview, has been guilty of gross violation of the law under which he now asks for license," it is the duty of such board to set a day and hear the testimony to prove or disapprove the charge and render a decision thereon. *Vanderlip v. Derby*, 19 Neb. 165.

It is said in *Reed's Appeal*, 114 Pa. St. 452, that under the Pennsylvania act of 1867 an application to the court of quarter sessions for a license to sell intoxicating drinks, the court is to hear petitions in addition to that of the applicant in favor of and remonstrances against the application; and in all cases to refuse the same whenever in the opinion of the court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers and travelers; the petitions and remonstrances being for the sole purpose of determining with regard to the character of the applicant whether such license is or is not a matter of public notoriety.

1. *Groscop v. Rainier*, 111 Ind. 361.

2. *Hill v. Perry*, 82 Ind. 28; *Stockwell v. Brant*, 97 Ind. 474; *Goodwin v. Smith*, 72 Ind. 113; s. c., 37 Am. Rep. 144. See *Session v. Dixon*, 5 B. & S. 758; *Bodwell v. Redge*, 1 Car. & P. 220; *Smith v. Davies*, 7 Car. & P. 307; *Williams v. East India Co.*, 3 East 192; *Ridgway v. Ewbank*, 2 Moo. & R. 217.

Burden of Proof.—Whoever asserts a right dependent for its existence upon a negative, must establish the

k. JUDICIAL CONTROL AND DISCRETION.—(1) *Mandamus.*—Where an act regulating the granting of licenses to sell intoxicating liquors vests a discretion in a designated person or body empowered to grant such license, such person or body cannot be controlled in the honest exercise of such discretion;¹ but if such

truth of that negative, and where a person becomes an applicant for a license to retail intoxicating liquors the burden is on him to prove that he is not in the habit of becoming intoxicated and is a fit person to sell intoxicating liquors; where these qualifications are made a prerequisite by the statute. *Goodwin v. Smith*, 72 Ind. 113; s. c., 37 Am. Rep. 144.

Opinion of Witness.—Where upon a remonstrance to a petition the county board refuses to grant a license to sell intoxicating liquors in a less quantity than a quart, upon a trial of the case it is proper for a witness to testify that in his judgment the applicant was a man fit to be entrusted with the license. *Stockwell v. Brant*, 97 Ind. 474.

Unfitness of applicant may be proved by specific acts, yet the question is not one merely of general character; but the jury may judge whether the specific acts prove unfitness in the applicant. *Stockwell v. Brant*, 97 Ind. 474, in such a case the testimony, as to the conduct of persons who entered the saloon formerly kept by the applicant and going in and out thereof, is competent, although the former place was one where liquor was sold by the quart instead of the pint. *Stockwell v. Brant*, 97 Ind. 474.

Evidence—Surrounding Circumstances.—Where the circuit court certifies that it is not “fully specified that the place is suitable for a bar room and for retailing ardent spirits,” the same being certified by the county court and the testimony being conflicting, and it is contended by the remonstrant that the sale of ardent spirits at the place will injure the large and prosperous business of making charcoal in the vicinity and so be detrimental to the community, to which it is repeated by the applicant for a license that the legislature has adopted a system of measuring liquor, and that this policy ought not to be detained by the personal interests and private business of individuals, however extensive and important that interest and business may be. The court in determining this

question may take into consideration all the circumstances whether of a general or limited nature. *Leighton v. Maury*, 76 Va. 865.

Opening and Closing Argument.—Where an application has been made for a license to retail intoxicating liquors and a remonstrance has been filed on account of the alleged immorality and unfitness of the applicant, the refusal of the court to award such applicant the opening and closing of the argument is error for which the judgment against him will be reversed. *Hill v. Perry*, 82 Ind. 28.

Findings—Verdict.—Where the jury found especially that an applicant for a liquor license, “by frequenting places of gambling, was an immoral man,” the law concludes that such immorality unfits the applicant to be entrusted with the sale of intoxicating liquors. *Groscop v. Rainier*, 111 Ind. 361.

It is said in *Hill v. Perry*, 82 Ind. 28, where an application is made to obtain a license to retail intoxicating liquors to which a remonstrance is filed on account of alleged immorality and other unfitness of the applicant, and upon such issue the jury returned a general verdict for the remonstrators with answers to interrogatories that the applicant is a resident of the State, is of proper age and not in the habit of becoming intoxicated, such facts so found are not inconsistent with the general verdict as that in effect finds that the applicant is an immoral man and unfit to be trusted with a license.

Rehearing.—After applications for and remonstrances against granting licenses have been dispose of at a term of the court, fixed upon as an annual license court, and the court is discharged *sine die*, rehearings will not be granted. *License Applications*, 2 Pa. County Ct. 140.

1. *Ex parte* *Whittington*, 34 Ark. 304; *Batters v. Dunning*, 49 Conn. 479; *Crotty v. People*, 3 Ill. App. 465; *State v. Board of Commissioners*, 45 Ind. 501; *State v. Commissioners of Cass County*, 12 Neb. 54; *People v. Norton*, 7 Barb. (N. Y.) 477; *In re Raudenbusch*, 120 Pa. St. 328; *Sights v. Yar-*

authorities, in the arbitrary exercise of their discretion, refuse without sufficient reason to issue a license to a suitable person, they will be compelled by *mandamus* to issue such license.¹ And if the county commissioners refuse to hear testimony they will be compelled to do so by *mandamus*.²

nall, 12 Gratt. (Va.) 292. See Toole's Appeal, 90 Pa. St. 376.

Mandamus—Pennsylvania Doctrine.

—In *In re Raudenbusch*, 120 Pa. St. 328, in refusing a writ of *mandamus*, the court say the petitioner assumes that he is entitled, as a matter of right, to a license, upon complying with the provisions of the act of 1887, in the absence of any allegation that he is an improper person to be so licensed. This is the fallacy which underlies his cause, as well as the able argument of his learned counsel. He has no such absolute right, nor has any other man in the commonwealth. It is not needed to review the license legislation of this State for the last half century. That was thoroughly done by MR. JUSTICE AGNEW in *Schlaudecker v. Marshall*, 72 Pa. St. 200.

Same—Connecticut Doctrine.—It is said in *Batters v. Dunning*, 49 Conn. 479, that the discretion of the county commissioners to grant or refuse a license conferred by the Connecticut act of 1881, providing that the county commissioners of each county shall, upon the regulation of the selectmen of the town where the business is to be carried on, license suitable persons to sell intoxicating liquor in suitable places in said county, cannot be controlled by *mandamus*.

An application for mandamus against county commissioners to compel the issuance of licenses for the sale of intoxicating liquors, though answered as causes of refusal that the relator "had sold liquors to minors; had sold liquors on Sunday, and had kept a disorderly and gambling house, all within twelve months before the hearing of said causes," the court held (1) that the answer stated the good cause for refusing to grant license; (2) that the county commissioners have a discretion as to whether they will issue licenses or not and their question therein cannot be controlled by *mandamus*. *State v. Cass County Commissioners*, 12 Neb. 54.

Resolution of Village Trustees.—The passage of village trustees of a resolution fixing the amount to be paid for a license to keep a dram shop is not a regular ordinance such as to entitle one

who has tendered the amount and a bond, to a *mandamus* to compel the village to issue a license, the moral offence of the application may be considered. *Crotty v. People*, 3 Ill. App. 465.

1. *Polk County Commissioners v. Johnson*, 21 Fla. 578; *Brock v. State*, 65 Ga. 437; *Zanone v. Mound City*, 103 Ill. 552; *People ex rel. Gillane v. Houghton*, 3 How. (N. Y.) Pr. N. S. 135.

If the authorities disregard plainly defined duties, they are liable to indictment. *People v. Norton*, 7 Barb. (N. Y.) 477.

Arbitrary Exercise of Discretion.

—It is said in the case of *People ex rel. Gillane v. Houghton*, 3 How. (N. Y.) Pr., N. S. 135, that although the duties devolved upon the excise commissioners of New York city are to some extent discretionary and judicial, yet where there has been an abuse of their discretion in refusing a license, the court may compel them by *mandamus* to grant the license. So held where the license was refused by the commissioners on the ground that the applicant kept a place of amusement where the liquors were forbidden to be sold by statute, it being shown, however, that the place was used for that purpose only a part of the time.

Same—Georgia Doctrine.—The supreme court of Georgia say, in the case of *Brock v. State*, 65 Ga. 437, that the commissioners of Gwinnett county—like the ordinary in a county where there are no commissioners—have power to grant or refuse a license to retail liquors. If a license is arbitrarily refused, the remedy is by *mandamus*, and such a refusal does not give the right to retail without a license.

Joint Petitioners—Absconding of One.

—The absconding of one of two joint commissioners after the issuance of an alternative right of *mandamus* to the board of county commissioners which had refused said petitioners a permit to obtain license is not a good reason why the peremptory right should not issue. *Polk County v. Johnson*, 21 Fla. 578.

2. *Steinkraus v. Hurlbert*, 20 Neb. 519.

(2) *Certiorari*.—Where the authorities grant a license to sell intoxicating liquors on a petition on its face insufficient, a *writ of certiorari* may be awarded to review the proceeding on the application of any person who has duly filed a counter-petition,¹ or becomes otherwise connected with the action.² But where at the time of granting the license no objection was raised by any citizen, and there was no counter-petition on file, and qualified voters are not entitled to prosecute a *writ of certiorari* to have the proceedings reviewed, they not being parties to the record.³

(3) *Injunction, Prohibition*.—The act of the authorities empowered to grant licenses for the sale of intoxicating liquors, which is exclusively within their jurisdiction, is a *quasi* judicial one; and if erroneous the remedy is by appeal or *certiorari*, and not by injunction.⁴

(4) *Appeal*.—(a) RIGHT OF APPEAL; JURISDICTION.—In most of the States where the record is without fault, the action of the

1. *Loeb v. Duncan*, 63 Miss. 89. See *Corbett v. Duncan*, 63 Miss. 84; *State v. Atlantic City*, 48 N. J. L. (19 Vr.) 118.

A *writ of certiorari* may be awarded by the circuit court to correct errors of law apparent on the face of the record of the proceedings of municipal authorities in relation to petitions for and against the issuance of a license to retail vinous and spirituous liquors, where no appeal is given in such case by statute. *Corbett v. Duncan*, 63 Miss. 84.

Remonstrants — Refusal to Hear — Remedy.—Where remonstrants against the granting of licenses for the sale of intoxicating liquors, who are acting in good faith, are refused a hearing by a city council, its action, without an examination of the charges made against the legality of the application for license, will be at the peril of revocation by review on *certiorari* in the supreme court. *State v. Atlantic City*, 48 N. J. L. (19 Vr.) 118; *nom. Austin v. Atlantic City* (N. J. L.), 2 Cent. 709.

2. A qualified voter of a city, who appears before the municipal authorities some time after the filing of a petition for license, but before final action thereon, and objects to the issuance of such license, thereby becomes connected with the proceedings sufficiently to enable him to prosecute a *writ of certiorari* to have the same reviewed. *McCreary v. Rhodes*, 63 Miss. 308.

3. *Lexington v. Sargent*, 64 Miss. 621; *McCreary v. O'Flinn*, 63 Miss. 204.

Pursuant to the provision of the Mississippi code forbidding the grant-

ing of any license to retail liquor for twelve months after the presentation to the city or town council of a petition signed by a majority of the residents (§ 1103), a town council passed an ordinance that no such licenses would be granted in that town for the ensuing twelve months. Plaintiff applied for a license, and before action was taken on his application, sought by *certiorari* to annul the ordinance. Held, that plaintiff not being a party to the proceedings sought to be reviewed, and there being no decision on his application that was subject to review, he was not entitled to *certiorari*. *Lexington v. Sargent*, 64 Miss. 621.

4. *Northern Pac. R. Co. v. Whalen*, 3 Wash. Tr. 452. See *Gayle v. Owen County Court*, 83 Ky. 61; *Romberger v. Water Valley*, 63 Miss. 218; *Leigh v. Westervelt*, 2 Duer (N. Y.) 618; *Hein v. Smith*, 13 W. Va. 358.

No court has jurisdiction to restrain commissioners of excise from granting, in their discretion, licenses under the statute authorizing the sale of spirituous liquors. *Leigh v. Westervelt*, 2 Duer (N. Y.) 618.

Where a board had not entertained jurisdiction of a petition, or done any act to indicate an intention to do so, held that a prohibition granted to restrain the board from considering it is improper. *Romberger v. Water Valley*, 63 Miss. 218.

Under the West Virginia act of 1877, ch. 107, § 11, providing that county courts shall not authorize a liquor license, "unless they are satisfied and so enter on the record, that the

authorities in granting or refusing a license to traffic in intoxicating liquors will not be reviewed on appeal;¹ but in other States an appeal has been provided by statute.²

applicant is not of intemperate habits," and section 18 requiring a bond, etc., of at least \$3,500, the action of the county court in granting or refusing the certificate is not reviewable, and the issuance of a *supersedeas* thereon by a judge of the circuit court is *coram non judice* and of no effect; and the supreme court of appeals will grant the injured person a writ of prohibition to restrain the appellant and judge from proceeding to enforce the judgment. *Hein v. Smith*, 13 W. Va. 358.

In the matter of a license to keep a hotel or to retail spirituous liquors, the judge of the county court has a large discretionary power; and while this discretion is judicial, the chancellor will not control its exercise, or prohibit the inferior court from acting when the case is within this jurisdiction. *Gayle v. Owen County Court*, 83 Ky. 61.

1. *State v. Pischel*, 16 Neb. 608; *Reed's Appeal*, 114 Pa. St. 452; *Leister's Appeal* (Pa.), 11 Atl. Rep. 387; *Ailstock v. Page*, 77 Va. 386; *French v. Noel*, 22 Gratt. (Va.) 454; *Yeager ex parte*, 11 Gratt. (Va.) 655.

The action of the court of quarter sessions in granting or refusing licenses, under act March 22nd, 1867, being a matter in the discretion of the court, and no appeal being provided by the statute, will not be reviewed. *Reed's Appeal*, 114 Pa. St. 452.

The discretionary action of the county court, under the statute granting or refusing to the keeper of an eating house a certificate for a license to retail ardent spirits, held to be final and conclusive, and a reversal on appeal to be *coram non judice* and void. *French v. Noel*, 22 Gratt. (Va.) 454.

Writ of Error and Supersedeas.—Where an application to the county court for a license to sell by retail required at a certain place was opposed, and by the evidence the court was satisfied that the applicant brought his case within the requirements of the law, and granted the license, and upon exception being taken by the person who made the opposition, the court certified the evidence, and the party opposing obtained from the circuit judge a writ of error and *supersedeas*, it was held that the circuit court had no jurisdiction to award the writ of

error and *supersedeas*. *Ailstock v. Page*, 77 Va. 386.

Same—Nebraska Doctrine.—Where application was made to the county court for license to sell by retail liquor at a certain place, which application was opposed, and by the evidence the court was satisfied that the applicant had brought his case within the legal requirements and granted the license, and upon exception being taken by the one who made the opposition, the court certified the evidence and the opposing party obtained from the circuit judge a writ of error and *supersedeas*, it was held, on petition of the applicant for the license for a writ of prohibition to the circuit court, that the writ must be awarded, and that the judgment of the county court would remain as if no writ of error and *supersedeas* had been awarded. *State v. Pischel*, 16 Neb. 608.

2. See *State v. Board of Commrs.*, 45 Ind. 501; *Ex parte Dunn*, 14 Ind. 122; *Ex parte Lester*, 77 Va. 663; *Ailstock v. Page*, 77 Va. 386; *Leigton v. Maury*, 76 Va. 865.

A party entitled to a license to retail liquors may appeal from a refusal to grant it. *Ex parte Dunn*, 14 Ind. 122.

An appeal lies to the circuit court, under the general statute relating to county commissioners, from a decision of such commissioners in refusing to grant a permit to sell intoxicating liquors, there being no provision in the liquor law of February 27th, 1873, forbidding such appeal, or making the decision of the commissioners final. *State v. Board of Commrs.*, 45 Ind. 501.

Same—Virginia Doctrine.—The object of the Virginia statute, acts 1879-80, p. 148, was to depart from the former laws on the subject of licenses to sell ardent spirits, as construed by this court in *Yeager's Case*, 11 Gratt. (Va.) 655, where it was held that the county courts had unlimited discretion on the subject, and that their decisions were not liable to review by any appellate tribunal. The present statute is mandatory, and the right of appeal to the circuit court absolute. The appeal is a transfer of the case to the circuit court, where it is heard *de novo*. *Leigton v. Maury*, 76 Va. 865.

(b) *Who May Appeal*.—A party entitled to a license to retail liquors may appeal from a refusal to grant it.¹ The signers of counter-petitions against the issue of a license to retail liquors, have the right to appeal from the decision granting such license.² Any citizen is entitled to make himself a party to the proceedings to procure a license and oppose a granting of the same, and may appear and defend in the appellate court and should be served with process upon appeal, writ of error and *supersedeas*.³

(c) *Nature and Effect of Appeal; Supersedeas*.—It seems that pending an appeal from the decisions of the authorities granting a license to sell, the applicant may sell if he tender a proper bond and license fee, although the auditor unlawfully refuses to issue the license;⁴ and that a license issued after a reasonable time has elapsed to take an appeal from an order overruling a remonstrance to the granting thereof, but before such appeal is actually taken, is valid, notwithstanding a notice of intention to appeal.⁵

(a) *Parties; Service of Notice*.—In a proceeding to review the action of the authorities granting or refusing a license, the county or public corporation whose acts are to be reviewed must be a defendant,⁶ and citizens who make themselves parties to the pro-

To applicant denied liquor license by the act of March 6th, 1882, there is given an appeal of right to the circuit court. Under Code 1873, ch. 178, § 2, he may, upon bill of exceptions taken at the trial, apply to the circuit court for a writ of error and *supersedeas*. Of his two remedies he may resort to either. And if the circuit court also erroneously refuse the license, its decision is reviewable by this court upon appeal, or writ of error and *supersedeas*, as in other cases. *Ex parte Lester*, 77 Va. 663.

Discretion—"Shall" and "May."—The purpose and effect of the change by the legislature by its act of March 6th, 1882, of the word "shall" to the word "may," was to conform the act of March 3rd, 1880, so amended, to the law in this respect, when the case of *French v. Noel*, 22 Gratt. (Va.) 454, was decided, and so to leave it discretionary with county courts to grant or refuse such licenses. This, however, is a sound legal discretion, subject to the appeal specifically allowed by the statute to the applicant. *Ailstock v. Page*, 77 Va. 386.

Time of Appealing.—On the third day of October, 1881, the city council of F overruled a remonstrance against granting a license to L to sell intoxicating liquors. The parties presenting the remonstrance gave notice of an intention to appeal, but no transcript was

filed nor was the case docketed in the district court until December 5th of that year. License was issued October 7th. Held, that as the law fixed no time in which to appeal, and as no undertaking was given, the appeal must be taken as soon as with reasonable diligence the transcript could be prepared and filed. And where an appeal was not perfected until sixty days from the date of the order appealed from, the appellate court acquired no jurisdiction. *Lydick v. Korner*, 13 Neb. 10.

1. *State v. Board of Commrs.*, 45 Ind. 501; *Ex parte Dunn*, 14 Ind. 122.

2. *Collins v. Barrier*, 64 Miss. 21.

3. *Leigton v. Maury*, 76 Va. 865.

Board of commissioners may voluntarily appear and defend in the circuit court on appeal, and contest the application for a license, and such board, though ordinarily not a proper party on such an appeal, will not be heard to move for its dismissal on that ground in the supreme court. *Murphy v. Monroe Co. Commrs.*, 73 Ind. 483.

4. *Padgett v. State*, 93 Ind. 396. See *Chalmers v. Funk*, 77 Va. 717.

5. *Lydick v. Korner*, 13 Neb. 10.

6. *Wood v. Riddle*, 14 Oreg. 254.

Where remonstrants against the granting of a license to sell spirituous liquors bring a writ of review, the county or other public corporation granting the license must be made a party. *Wood v. Riddle*, 14 Oreg. 254.

ceedings as contestants and oppose the granting of the license, should be served with process upon appeal, writ of error and *super-sedeas*.¹

The service of a notice of appeal on one member of the board of commissioners of excise of the county or other body empowered to grant licenses is not a proper service, because any number of the members less than the whole do not constitute the body, and the service of papers on such a body must be on every member thereof to confer jurisdiction on the appellate court to hear the appeal.²

(e) *Issues; What Will be Considered.*—On an appeal from an order granting or refusing a license nothing can be tried except what appears to have been in issue before the board of commissioners or other body,³ and the court will not review the facts of the case.⁴

(f) *Remand.*—Where a licensing board refuses to hear testimony in support of a remonstrance against a license, the court upon appeal will remand the cause that such testimony may be taken and a decision rendered thereon.⁵

19. License Fees and Taxes.—*a. IN GENERAL.*—The exaction of license fees under an act passed for the purpose of regulating and licensing the sale of malt, spirituous and vinous liquors is not taxation, either in the ordinary or constitutional significance of that term.⁶ And the imposition of a State tax on the sale of liquor

Upon an application for a license under § 3, of the act to regulate the sale of intoxicating liquor (1 Indiana R. S. 1876, p. 869), the board of commissioners is not a proper party to appeal to the circuit court; but where the board voluntarily appeared in that court and contested that application, it will not be heard to move for a dismissal of the appeal in the supreme court on that ground. *Murphy v. Monroe Co. Comms.*, 73 Ind. 483.

1. *Leighton v. Maury*, 76 Va. 865.

2. **A board of excise commissioners**, like overseers of the poor, commissioners of highways, and the like, is not an official body like a corporation, but a *quasi* corporation only. *Metcalf v. Garlinghouse*, 40 How. (N. Y.) Pr. 50.

3. See *Groscop v. Rainier*, 111 Ind. 361; *Osborn v. Sutton*, 108 Ind. 443; *Forsythe v. Kreuter*, 100 Ind. 27; *Green v. Elliott*, 86 Ind. 53.

Remonstrance—Amendments—Practice.—On an appeal from a refusal by the county board to grant a license to sell intoxicating liquor in a less quantity than a quart, the circuit court may permit, at the costs of the remonstrator, an amendment making the remonstrance more specific and adding new

specifications under the original objections, where no new parties are introduced.

Stockwell v. Brant, 97 Ind. 474.

Where a remonstrance against an application for a license to retail intoxicating liquors has been struck out by the court, and on leave of court an amended remonstrance is filed over the objection of petitioner, no question upon the ruling permitting the filing of such amended remonstrance can be raised in the supreme court unless the rejected remonstrance is properly incorporated in a bill of exceptions. *Goodwin v. Smith*, 72 Ind. 113; s. c., 37 Am. Rep. 144.

4. *Leister's Appeal* (Pa.), 11 Atl. Rep. 387.

5. *Steinkraus v. Hurlbert*, 20 Neb. 511.

6. *San Louis Obispo Co. v. Hendricks*, 71 Cal. 242; *Pleuler v. State*, 11 Neb. 547.

Tax to Raise Revenue.—It is said in *Aulamier v. Governor*, 1 Tex. 653, that a tax imposed upon retailers of spirituous liquors "to raise a revenue," etc., is a license tax, and its collection as such is provided for by statute "to provide for the assessment and collection of taxes."

does not preclude the State from authorizing an additional imposition of a municipal tax.¹

b. FIXING AMOUNT; RATING, ETC.—Under the provisions of some of the statutes regulating the sale of intoxicating liquors a license cannot issue until the amount of the fee has been fixed;² and where the power to impose a license fee is given by law to a municipal council, its discretion in fixing the amount is not reviewable by the courts.³ It has been said that the power to

It is said in *Place v. State*, 8 Blackf. (Ind.) 319, that an act respecting certain specific taxes authorizing the county treasurer in vacation, etc., to determine the sum to be charged for a year for a license to retail spirituous liquors, to receive the amount and give a receipt therefor, applies only to the application of brokers.

Occupation Tax.—The commissioners' courts of the several counties of this State have power to levy and collect a tax for the counties, equal to one half of the State tax upon taxable occupations. No particular form is presented by law for an order of the commissioners' court levying an occupation tax on retail liquor dealers, nor is there any statute prescribing the requisites of such an order. *Wade v. State*, 22 Tex. App. 629.

Same—Local Option.—The general law imposing an occupation tax on retail liquor dealers is not in force in localities where the local option law has been adopted. *Robertson v. State*, 5 Tex. App. 155.

The Missouri act of March 24th, 1883 (Sess. acts 1883, p. 86, § 13), exacting a license fee for the privilege of maintaining a dram shop, etc., is applicable to the city of St. Louis. *State v. Hudson*, 78 Mo. 302.

Construction of Statutes.—The fact that a party sells liquor without license subjects him to the legal penalty therefor; and under Mississippi Rev. Code, arts. 3, 4, 5, ch. 20, the board of police may assess him for a license; but under act of December 5th, 1865, such board has no right to assess him for the State tax imposed on licensed retailers of spirits. *O'Harra v. Cox*, 42 Miss. 496.

1. *Wolf v. Lansing*, 53 Mich. 367. See *Matter of Lawrence*, 69 Cal. 608.

Double Taxation—State and Municipal.—A person doing business as a liquor dealer in a city within a county, who has paid a valid license tax imposed by the municipal authorities

of the city, is not thereby exempted from paying a tax of the same kind duly levied by the county authorities. *Matter of Lawrence*, 69 Cal. 608.

2. *State v. Hudson*, 78 Mo. 302. See *State v. Keaough*, 68 Wis. 135.

Fixing Liquor License Fees—Missouri Doctrine.—Under Missouri act of March 24th, 1883, regulating dram shops and exacting a license fee for a privilege of selling liquors therein, it is the duty of the municipal assembly of the city of St. Louis and all the county courts of the several counties to fix the amount of license fee to be charged under the act, within the limits prescribed, and until such action is taken by the municipal assembly or the county court, no collector has a right to issue a license to any person as a dram-shop keeper. *State v. Hudson*, 78 Mo. 302.

Same—Wisconsin Doctrine.—The Wisconsin statute regulating the sale of intoxicating liquors provides that the sum to be paid for a license to sell such liquors in towns containing within their boundaries no city or village incorporated or unincorporated with a population of 500 or more, should be \$100; and that the population of any city or village "shall be ascertained by the last preceding enumeration of the State or general government." (L. 1885, ch. 296.) An answer, in proceedings to compel by *mandamus* a town treasurer to accept \$100 for a license, alleged that there was an unincorporated village in the town containing more than 500 inhabitants, and offered to make proof of that fact by parol evidence. Held, that the statute was exclusive, and under it parol evidence was not admissible to prove the population of such city or village, which was settled by the last enumeration by the State or national government. *State v. Keaough*, 68 Wis. 135.

3. *Wolf v. City of Lansing*, 53 Mich. 367.

license implies the power to fix the amount of the license fee, subject only to the restriction that it shall not be so large as to show the evident intention to forbid altogether the acts to be licensed.¹

c. WHO ARE LIABLE TO PAY TAXES AND FOR WHAT PURPOSES.

—Retail dealers,² manufacturers.³

1. *Portland v. Schmidt*, 13 Oreg. 17.
Fixing the Amount of the License Fee—Alabama Doctrine.—Under the provisions of the Alabama Revenue Law of 1876, imposing a license tax on retailers of spirituous, vinous and malt liquors, the price of the license in the city of Mobile, outside of certain designated limits, was reduced to \$75; the other provisions contained in the paragraph declaring this limit, as transcribed in the code, to apply to the entire subdivision of the section, are not confined to the portion of the city of Mobile in which a license is imposed. *Foster v. Burt*, 76 Ala. 229. Under this construction of the statute, it has been held that when a license for retailing liquors has been taken out after the first day of January, the full price for the whole year must be paid, although the license for any other business or occupation, if taken out after the first day of July, is only one-half the price for the whole year. *Foster v. Burt*, 76 Ala. 229.

Same—California Doctrine.—A license fee of \$50 a month, required by a city ordinance to be paid by persons carrying on the business of a saloon, where liquors are sold or given away in quantities less than a gallon, is not, as matter of law, oppressive, unreasonable, or prohibitory of trade. *Matter of Guerrero*, 69 Cal. 88.

Same—Illinois Rule.—Under a constitutional requirement that taxes on "liquor dealers," *inter alia*, shall be uniform as to the class on which the taxes operate, one sum may be charged for a license to sell liquors generally, and a less sum for a license to sell malt liquors. *Timm v. Harrison*, 109 Ill. 593.

Same—In a license to a wholesale dealer there may be charged a sum both for the purpose of restricting sales or the persons selling, and compensating the municipality for additional police expenses that may result from the traffic. There can be no question of adequacy or excessiveness of amount charged. *Dennehy v. Chicago*, 120 Ill. 627.

The act chartering the city of Louisville, passed in March, 1851, conferred upon the general council the power to

license taverns in the city, with or without the privilege of selling spirituous liquors by retail; and also to license coffee houses, and other houses and establishments, wherein such liquors might be sold by retail. Under the general law of the State, no establishment, or house of any description, has a right to retail spirituous liquors to be drunk on their premises, except licensed taverns. Held, that the power conferred upon the city authorities by the charter must be exercised in conformity with the general law, and only gave to them the right to impose an additional tax for the privilege besides that which was required to be paid to the State. *Louisville v. Kean*, 18 B. Mon. (Ky.) 9.

Same—A brewer of beer is not one "engaged in distilling and rectifying alcoholic or malt liquors," within Louisiana acts 1881, No. 4, § 9, requiring from such a license of \$75; he is only liable to the license tax of \$10, under § 3. *State v. Weckerling*, 38 La. An. 36.

As to rate of license in Louisiana see *Jefferson Police Jury v. Marrero*, 38 La. An. 896.

Where an order granting a license to issue in May, passed the city council of Wheeling in April, the city council could alter its grant, at any time before the time prescribed for the issuing of the license, by substituting a legal for an illegal tax, where the tax first imposed was illegal, or by fixing a tax where none had been imposed before. And the inn keeper could demand his license only on payment of the tax so fixed. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292.

2. It is said in *Chastain v. Calhoun*, 29 Ga. 333, that under the Georgia act authorizing the city council of Calhoun to tax liquor shops, and repealing previous conflicting laws, does not authorize a tax on a dealer who had bought a license from the State.

Under How. Stat., § 1281, the payment of a manufacturer's tax does not authorize a sale at retail. *People v. Greiser* (Mich.), 11 West. Rep. 489, 35 N. W. Rep. 87.

3. *Taylor v. Vincent*, 12 Lea (Tenn.)

and wholesale dealers¹ are liable under the statute to pay a liquor license; but druggists² and social clubs³ cannot be required to pay a license tax.

282; s. c., 47 Am. Rep. 338; Webb v. State, 11 Lea (Tenn.) 662.

Home Grown Materials—Liquors from—License Tax.—A manufacturer of liquors made of the produce of Tennessee, who sells the same in unbroken packages at his place of business, is not liable for the taxes on dealers. Taylor v. Vincent, 12 Lea (Tenn.) 282; s. c., 47 Am. Rep. 338.

But it is said in Webb v. State, 11 Lea (Tenn.) 662, that manufacturers of whiskey and brandy, out of products of the farms and orchards of the State of Tennessee, who sell by wholesale, are liable for the privilege tax imposed upon wholesale liquor dealers.

1. **Wholesale dealers who are not manufacturers** are not within the terms of the Ohio statute, taxing the traffic in intoxicating liquors, and are within the terms of the act of the general assembly providing against the evils resulting from the traffic of intoxicating liquors and are liable to the taxes therein imposed. Senior v. Ratterman, 44 Ohio St. 661.

City Dealers—County License Tax.—A liquor dealer in a city within the county is not exempt from the payment of a county license tax by reason of the fact that he has paid a license tax of the same kind in pursuance of an ordinance enacted by the municipal authorities of the city. *In re Lawrence*, 69 Cal. 609.

Officers' Fees for License—Who Must Pay.—The Kansas statute fails to say who shall pay the probate judge's fees for issuing to druggists the certificate of the filing, by the physician of the county, of the affidavit required to obey the law regulating the sale and use of intoxicating liquors. The court held, therefore, that the physician is not liable for the fees. Miller v. Minney, 31 Kan. 522.

2. **Druggists—Liability for Tax.**—Under the Tennessee statute a druggist who sells liquors is liable for a liquor seller's occupation tax although he has paid a merchant's tax. The Druggist Cases, 85 Tenn. 449.

The revenue act of 1883, providing that the "provisions of the act shall apply to all druggists," did not subject a druggist to the payment of the tax imposed upon retail liquor dealers unless

he sold liquor contrary to the provisions of the act of 1870, for other than communion purposes, or for medical purposes upon a physician's prescription. State v. Wharton, 85 Tenn. 449.

3. **A club or association of persons**, not incorporated, combining together to promote social or literary objects, which delivers beer to its members, receiving checks in exchange for glasses of beer, having sold the checks originally to members of the club, is a dealer, under the statute, and liable to be taxed, under the United States revenue law of 1875, ch. 36, § 18. United States v. Wittig, 2 Low. C. C., 466.

A social club organized under the act of 1875, ch. 142, § 1, subsections 3 and 5, maintained a library, gave musical entertainments, afforded meals for its members, and kept a small stock of liquors, which were for the use of its members, members paying for each drink as it was taken, but no profit was made for the club upon the liquors, the stock of which was in part kept up by the monthly dues of members. Held, the club was not liable to pay a privilege tax as a retail liquor dealer. Tennessee Club of Memphis v. Dwyer, 11 Lea (Tenn.) 452; s. c., 47 Am. Rep. 298.

House of Public Entertainment.—No tax can be demanded on granting a license to keep a house of public entertainment, unless it be in a city or incorporated town or village. State v. Cloud, 6 Ala. 628.

Necessity of Payment.—The necessity of payment under a statute which provides that before a license shall issue to retail liquors the applicant must first pay the required tax, the payment is necessary and no discretion is left to the officers. McWilliams v. Phillips, 51 Miss. 196.

It is said in State v. Mancke, 18 S. C. 81, that a grant of license by a city council, without the payment of the county license required by the statute is void.

The charter of the city of Wheeling authorizes it to levy a tax on licenses to inn keepers, the payment of the tax may be made a condition precedent to the issuing of the license. Sights v. Yarnalls, 12 Gratt. (Va.) 292.

When a city council have authority

d. CUSTODY AND DISPOSITION OF LICENSE MONEYS.—The custody and disposition of license moneys will in each instance depend upon the provision of the statute under which such moneys are collected.¹

e. LIEN FOR TAXES.—An act regulating the sale of intoxicating liquors providing that the fee therefor shall be a lien upon the

to add a city tax to a State tax on ordinaries, and a license is granted "under existing rates of taxation," the payment of the city as well as of the State tax may be required as a condition, without a compliance with which the license cannot issue. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292.

Where in such case a license had been ordered, though upon payment of a tax, unequal, oppressive and illegal, the payment was notwithstanding a condition precedent, and must be made before any right to the license will vest. Nor can the grant be regarded as absolute, the condition being inseparable from it. The inn keeper must accept the whole or reject the whole. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292.

Sufficiency and Effect of Payment.—The payment of a liquor tax for the coming year, does not exempt the dealer from the operation of a subsequent law, passed during the year, forbidding the sale of liquor on specified days. *Reithmiller v. People*, 44 Mich. 280.

License Fee—Payment.—The relator paid the necessary fee for a license to sell intoxicating liquors in the city of Crete, and a formal one was issued. Through the omission of the corporate authorities to take certain steps required by the general license law, the license was void. Subsequently the required steps were taken, whereupon the relator applied for a license on the credit of his former payment, and for the unexpired term for which he paid, so far as it would go. Held, that he was entitled to it. *State v. Cornwell*, 12 Neb. 470.

A retailer of spirituous liquors who has paid all his licenses, does not become on that account exempt from the operation of the effect of a police regulation, thereafter ordered by the police jury. *State v. Isabel*, 40 La. An. 340.

Same—Payment by Note.—The note of a liquor dealer, payable on time, cannot be received in satisfaction of the liquor tax imposed by statute, and if taken in payment therefor is void as in violation of public policy. *Doran v. Phillips*, 47 Mich. 228. Thus

where a county treasurer took notes in payment of license to retail liquors, it was held that the notes were void; that the county treasurer had no authority to receive them and that he was liable to the county for the amount of the licenses. *McWilliams v. Phillips*, 51 Miss. 196.

Same—Payment of a Less Sum.—The payment of a less sum for a liquor license than that required by law does not authorize it to be issued, and if issued contrary to law is a nullity. *Spake v. People*, 89 Ill. 617.

Thus where, in violation of their own ordinance prescribing that a certain fee shall be paid before a liquor license shall issue, the mayor and town council permit one who has only paid a portion of the required fee to do business, they cannot subject to the payment of the balance of the fee the stock in trade of the delinquent in the hands of an innocent purchaser. *Wicker v. Siesel* (Ga.), 6 S. E. Rep. 817.

A city license, dated in July, to retail liquors to December 31st, gave no license to sell in the January preceding, although the tax had then been in part paid, and it was customary to pay in two installments. *State v. Mancke*, 18 S. C. 81.

A's license to sell spirituous liquors expired December 31st, 1880. The city license fee was \$100 for a year, and when on January 13th, 1881, A paid \$50 of the amount due for the current year, a statute had that day become operative, prohibiting the issuance of a license to one who should not have paid the county fee as well as the city fee. In July, 1881, A obtained a license which recited that it was good until December 31st, following. Held, that A was properly convicted of selling on January 15th, 1881, without a license. *State v. Mancke*, 18 S. C. 81.

1. The power of the State to license and collect license charges is a delegated police power, and the legislature may so amend its charter as thereby to divert part of such license charges into the treasury of the county. *Winnona v. Whipple*, 24 Minn. 61.

property creates a valid lien upon real estate when the tenant holds under a lease, written or oral, made after the passage of the statute;¹ and the postponing of all liens, mortgages, conveyances and incumbrances to the lien for liquor taxes, while valid, does not apply to liens created before the act was passed.²

Under an amended State charter providing that "the State council shall have the exclusive right to license persons vending intoxicating liquors, and persons so licensed shall not be required to obtain a license from the board of county commissioners," and further providing that "three fourths of the money received from the licenses so granted shall be paid to the treasury of the city, and one fourth to the treasurer of the county." It is the duty of the State treasurer to pay over one fourth of the sum so collected by him to the county treasury, notwithstanding a provision in the State charter that all funds in the city treasury shall be under the control of the State council and be drawn out upon the order of the mayor and recorder. *Winona v. Whipple*, 24 Minn. 61.

Under Kentucky general statute, ch. 92, as amended in 1886, the county clerk, and not the county judge, is the proper person to collect and to receive commissions on fees for licenses to retail spirituous liquors shall be granted by the county court. *Severance v. Kelly*, 86 Ky. 522.

Mandamus will lie to compel a county treasurer to pay over to the proper local officers the amount of liquor taxes to which they are entitled by law. *East Saginaw v. Saginaw County Treasurer*, 44 Mich. 273.

County treasurers are not required to pay excise moneys received under the act of 1857 to the overseers of the poor of towns which support their own poor, though such moneys were first paid to the commissioners for licenses by residents of such towns. They must pay to the county superintendents of poor, who are authorized to draw on them therefor. (1 R. S., 617, § 16, subd. g.) *People v. Harris*, 16 How. (N. Y.) Pr. 256.

The fact that the constitution of Mississippi recognizes the policy of general laws for granting licenses to sell liquors by devoting revenues derived from such sources to the support of common schools cannot be held to prevent change of the conditions recognized, and does not establish any policy

in respect to such licenses. *Lemon v. Peyton*, 64 Miss. 161.

City authorities, in Nebraska, are not empowered to dispose of money paid into the treasury as a fee for obtaining a license until the license for which it is paid has been issued. *State v. Mayor etc. of Lincoln*, 6 Neb. 12.

Where a city requires an applicant for license to pay to the city treasurer \$1,000, one half of which sum to be paid to the school district in which the city is situated, and the other half to be retained by the city as an occupation tax on saloon keepers, since the entire sum of \$1,000 is required to be paid as a condition of obtaining a license, it is license money and not a tax, and under the provisions of § 5, art. 8, of the constitution, belonging to the school district. *State v. Wilcox*, 17 Neb. 219.

Inebriates' Home.—The treasurer of the Inebriates' Home of King's county is entitled to twelve per cent. of the excise money collected by the Brooklyn board of police and excise (L. 1873, ch. 687, § 3; L. 1872, ch. 687, § 1; 55 N. Y. 180); and *mandamus* issues to compel payment. *People ex rel. Buckley v. Board of Police and Excise of Brooklyn*, 63 N. Y. 623.

1. *Anderson v. Brewster*, 44 Ohio St. 576.

2. *Finn v. Haynes*, 37 Mich. 63.

Action to Restrain Collection.—It has been said that under a statute providing that courts of chancery shall have jurisdiction of suits to restrain the collection of taxes levied or attempted to be collected without authority of law, such court has jurisdiction of a suit by a saloon keeper to restrain the collection of the license tax on his business for the privilege of retailing, imposed by the statute. *Portwood v. Baskett*, 64 Miss. 213.

An act of the legislature of Texas, entitled "An act regulating taxation," approved June 3rd, 1873, provides in its third section that "there shall be levied on and collected from every firm or association of persons . . . pursuing the occupation of selling spirituous, vinous, malt, and other intoxicating liquors in quantities less than one

f. RECOVERY OF ILLEGAL OR EXCESSIVE LICENSES.—One who voluntarily pays for a license to sell intoxicating liquors more than is required by municipal charter or by statute cannot

quart, \$200; in quantities of a quart and less than ten gallons, \$100; provided that this section shall not be so construed as to include any wines or beer manufactured in this State." A, who was pursuing in that State "the occupation of selling spirituous, vinous, malt, and other intoxicating liquors in quantities less than one quart," filed his petition setting forth that the wines and beer which he was selling were the manufacture, not of that State but of other States and of foreign nations, and praying that the county treasurer be enjoined from collecting the tax imposed by said act of 1873, on the ground of its repugnance to the constitution of the United States. Held, that as he was also engaged in selling other liquors the injunction was properly refused. *Tiernan v. Rinker*, 102 U. S. 123.

Actions and Proceedings to Recover Unpaid Taxes.—The board of supervisors of a county has authority to appoint an agent to collect the license taxes imposed by an ordinance upon the business of selling liquors at retail, to fix the compensation to be paid him therefor, and to empower him to direct actions against persons failing to procure licenses. *Amador County v. Kennedy*, 70 Cal. 458; *Re Lawrence*, 69 Cal. 608.

A suit for the recovery of sums due for license tax, in Texas, should be brought in the name of the State. Whether it can be brought in the name of the governor, *quære*. *Aulainer v. Governor*, 1 Tex. 653.

In a suit by the State against a druggist to collect a tax imposed by law upon retail liquor dealers, the sale of liquors without a license being a misdemeanor, the defendant cannot refuse to testify as to the sales made by him on the ground that he would criminate himself, when the prosecution for the misdemeanor involved in such sale is barred by the statute of limitations. *State v. Wharton*, 85 Tenn. 449.

The indictment alleged both the amount of the occupation tax due the State and the amount of the tax due the county of H. The prosecution failed, on the trial, to prove that the county of H had levied an occupation tax upon liquor dealers. The trial

court instructed the jury that the prosecution could be maintained only for the amount of taxes due the State, and the verdict of the jury was in accordance with the instruction. The defence contended that in order to sustain a conviction it was incumbent on the State to prove both allegations, and asked a special charge to that effect, which was refused. *Held*, that the charge as given by the court was correct, and the special charge was properly refused. *Mansfield v. State*, 17 Tex. App. 468.

Refunding Moneys Collected.—Where a license is cancelled the court should direct repayment *pro tanto* of the amount paid for the same for the unexpired term. *Lydick v. Korner*, 15 Neb. 500.

Where a party receives a license to keep a dram shop, and pays it, the city cannot, by repudiating the act of the officer who issued the license, maintain an action against the said party without returning the money paid for the license. *Martel v. East St. Louis*, 94 Ill. 67.

Where, on taking out a license for the sale of liquor, the dealer paid therefor, which he was not bound to do until the expiration of the time for taking an appeal, and upon appeal the license was refused; held, that the county was not bound to refund any part of the money. *Monroe County Commrs. v. Kreuger*, 88 Ind. 231.

Where a remonstrance against a liquor license was overruled by the city council, the amount paid, and license issued, no appeal having been taken in a reasonable time, and subsequently the license was cancelled by the district court; held, that the treasurer was not liable to refund the money. *Lydick v. Korner*, 15 Neb. 500.

Cancellation of License—Liability of Treasurer.—Where a remonstrance against issuing a license to sell liquor was overruled by a city council, the amount required for the license paid to the city treasurer, and no appeal having been taken within a reasonable time, and license issued; *held*, that the subsequent cancellation of the license by the district court, the money having been paid into the treasury did not render the treasurer liable for the repay-

recover back the overplus;¹ but where the amount is paid under protest it may be recovered back in an action brought for that purpose.²

20. Revocation.—*a.* WHAT ACTS OR VIOLATIONS WILL WORK.—The authorities granting a license to sell intoxicating liquors have power to revoke the same for cause;³ therefore a licensee is bound at his peril to keep within the term of his license.⁴ A re-

ment of the money. *Lydick v. Korner*, 15 Neb. 500.

1. *Commrs. of Thomson v. Norris*, 62 Ga. 538 limiting *Callaway v. Milledgeville*, 48 Ga. 309; *Town of Sullivan v. McCammon*, 51 Ind. 264; *Town of Ligonier v. Ackerman*, 46 Ind. 552; s. c., 15 Am. Rep. 323; *Emery v. Lowell*, 127 Mass. 138; *Trainor v. Multnomah Co.*, 2 Oreg. 214; *Custin v. City of Viroqua*, 67 Wis. 314. See *Woodburn v. Stout*, 28 Ind. 77; *Jacobs v. Morange*, 47 N. Y. 57; *Doll v. Earle*, 65 Barb. (N. Y.) 298; aff'g 59 N. Y., 638; *Gilson v. Bingham*, 43 Vt. 410; s. c., 5 Am. Rep. 289; *Knox v. Lee*, 79 U. S. 457; *Bank of United States v. Daniel*, 37 U. S. 32.

Where an excessive license fee has been demanded under a misapprehension of the law and has been voluntarily paid, the mere fact that the business necessities of the plaintiff compelled him to pay the excessive license does not alter the voluntary character of the payment so as to authorize him to recover back the excess. *Custin v. City of Viroqua*, 67 Wis. 314.

Where a town in good faith adopted an ordinance requiring a license to be obtained for the retail of intoxicating liquors, in pursuance of the amendatory act of the legislature, of March 11th, 1867 (*Acts 1867*, p. 220), a person who applied for license, and received and paid for the same cannot recover back the money thus paid, although the act of the legislature, and the ordinances of the town thereunder, are invalid. *Town of Ligonier v. Ackerman*, 46 Ind. 552.

A village board, in good faith, but under a misapprehension of the law, demanded from plaintiff an excessive sum for an excise license, which he paid without any force or coercion on the part of the village. Held, that he could not recover back the excess. *Custin v. Viroqua*, 67 Wis. 314.

A complaint against a town to recover money paid by the plaintiff to the defendant for a license to sell intoxicating liquors, in compliance with

an invalid ordinance of the town, adopted in pursuance of an invalid act for the legislature, must show that the money was not voluntarily paid. *Town of Sullivan v. McCammon*, 51 Ind. 264.

But where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4s. from a publican resident within the borough for renewing his annual license, and though for fifty-seven years a similar fee had been uniformly received by the mayor for the time being, from every publican within the borough applying to renew his license; held, that such fee was illegal, and might be recovered as money had and received, and the payment could not be considered as voluntary, so as to preclude the party from recovering. *Morgan v. Palmer*, 4 D. & R. 283; s. c., 2 B. & C 729.

2. *Catoir v. Watterson*, 38 Ohio St. 319. See *Emery v. Lowell*, 127 Mass. 138; *Stephan v. Daniels*, 27 Ohio St. 527; *Baker v. Cincinnati*, 11 Ohio St. 534.

A person engaged in the traffic in intoxicating liquors who, under protest, paid into the county treasury the sum required of a dealer in liquors by the terms of the act of April 5th, 1882, "more effectually to provide against the evils resulting from the traffic in intoxicating liquors" (79 Ohio L. 66), may maintain an action to recover back the sum so paid. *Catoir v. Watterson*, 38 Ohio St. 319.

3. *Davis v. Com.*, 75 Va. 944. Compare *Kostler v. Board of Excise of New York*, N. Y. Daily Reg., March 19th, 1886.

4. *Com. v. Julius*, 143 Mass. 132. See *Com. v. Ferenden*, 148 Mass. 28; *Com. v. Uhrig*, 138 Mass. 492; *Roberge v. Burnham*, 124 Mass. 277; *Com. v. Finnegan*, 124 Mass. 324; *Com. v. Emmons*, 98 Mass. 6.

Where the license requires the closing of entrances elsewhere than on the public street it is forfeited by keeping opened a rear door to a driveway. *Com. v. Ferenden*, 148 Mass. 28.

removal from the district,¹ and a conviction of an offence against the law will work a forfeiture of the license;² but it seems that under a statute providing for a revocation of a license, after "a conviction or judgment" has been obtained against a licensee for a penalty given by the act or upon his bond, this provision applies only when there has been a recovery in a civil pro-

1. A person who obtained a permit to sell intoxicating liquors, under the act to regulate intoxicating liquors (Acts 1873, p. 151), and who afterwards voluntarily removed from the State, by the act of removal forfeits and abandons his rights under the permit, and cannot thereafter continue the business by means of an agent. The permit is forfeited by the holder because he has ceased to possess the required qualification of residence. And having been abandoned and forfeited by the principal, to whom it was granted, it is no protection to one who claims to act as his agent in selling intoxicating liquors. *Krant v. State*, 47 Ind. 519.

Under the statutes of Alabama, the removal of a licensed retailer of spirituous liquors to another county does not abrogate his license, or render his clerk or agent liable to an indictment for selling without license for continuing his premises after such removal. 37 Ala. 151. See *Long v. State*, 27 Ala. 36; *Thompson v. State*, 1 Ala. (S. C.) 58.

2. *Ballentine v. State*, 48 Ark. 45; *Hildreth v. Crawford*, 65 Iowa 339; *Ottumwa v. Schaub*, 52 Iowa 515; *Martin v. State*, 23 Neb. 371; *People v. Meyers*, 95 N. Y. 223; s. c., 2 N. Y. Crim. Rep. 128; *Fincke v. Police Commissioners*, 66 How. (N. Y.) Pr. 318; *People v. Tighe*, 5 Hun (N. Y.) 25; *People v. Wright*, 3 Hun (N. Y.) 306; s. c., 5 T. & C. (N. Y.) 518.

For the violation of an ordinance under which a liquor license was granted, the city may cause the license to be forfeited. *Ottumwa v. Schaub*, 52 Iowa 515.

Under that statute relating to cities of the first class, it is the duty of the mayor and council to revoke a license granted for the sale of liquors, upon conviction of the licensee of a violation of any law pertaining thereto, and where the fact of such conviction was certified by a police judge to the mayor and council, they are bound to revoke such license, and may do so by resolution, instead of by ordinance, without giving notice of the proposed action to

the licensee. *Martin v. State*, 23 Neb. 371.

It is competent for the legislature to pass an amendatory law providing that a conviction for a violation of any provision of the act amended by any person or at any place licensed as therein provided shall forfeit the license and authorize the board of commissioners upon being notified of a violation of any such provision to cancel or revoke the license. *People v. Meyers*, 95 N. Y. 223.

Under the provision of the Excise act of 1873 (§ 4, ch. 549, Laws of 1873), which provides that a conviction for a violation of any provision of said act, or of the acts thereby amended, by any person or at any place licensed as therein provided, shall forfeit the license, and authorizes the board of excise, upon being satisfied of a violation of any such provision, to cancel and revoke the license, a conviction of a bartender of a licensed person for an offence under the act, committed at the place licensed, operates *ipso facto* to annul the license. The act casts upon the licensee the necessity, in order to protect himself in the enjoyment of his license, of seeing to it that no violation shall be committed upon the licensed premises; and he may not claim that the offence was committed without his knowledge or consent. *People v. Meyers*, 95 N. Y. 223.

Whether a license by the board of commissioners of excise in the city of New York, to a tavern keeper, is *ipso facto* revoked by the conviction of an employee of the licensee in the court of special sessions for unlawfully selling liquor on Sunday, in violation of L. 1873, ch. 549, § 4, query distinguishing *People v. Tighe*, 5 Hun (N. Y.) 25. *Fincke v. Police Commissioners*, 66 How. (N. Y.) Pr. 318.

Where a dram shop keeper is convicted by a jury of violating his license, whether he is keeping for himself alone or in copartnership with another, the license should be declared forfeited, whether it was issued in his name or another's. The forfeiture of a

ceeding, and does not include the case of a conviction upon indictment.¹

b. LEGISLATIVE POWER TO REVOKE A LICENSE.—Licenses granted for the sale of intoxicating liquors upon fees paid therefor form a part of the internal police system of the State, and are granted in the exercise of the police power of the State and may at any time be revoked by the legislative authority.²

c. LICENSE NOT A CONTRACT RIGHT.—A license to sell liquors is not a contract which may not be taken away by a legislative act or by a town ordinance.³

dram shop keeper's license for permitting gaming in his dram shop is a consequence of his conviction. The jury have nothing to do with it and are not instructed about it. *Ballentine v. State*, 48 Ark. 45.

Permitting Gaming on Premises.—On the trial of an indictment for permitting gaming in defendant's dram shop or grocery, the testimony tending to show that the defendant was the real party in interest, although the license to carry on the business was issued to another, the court held that a judgment declaring the license forfeited was proper, no matter in whose name it was written. *Ballentine v. State*, 48 Ark. 45; *Brockway v. State*, 36 Ark. 629.

1. *People v. Meyers*, 95 N. Y. 223; s. c., 2 N. Y. Crim. Rep. 128; citing *People v. Tighe*, 5 Hun (N. Y.) 25.

2. *La Croix v. County Commrs.*, 50 Conn. 321; s. c., 47 Am. Rep. 648; *State v. Woodward*, 89 Ind. 110; s. c., 46 Am. Rep. 160; *Kellum v. State*, 66 Ind. 588; *Columbus v. Cutcomp*, 61 Iowa 672; *Fell v. State*, 42 Md. 71; s. c., 20 Am. Rep. 83; *Calder v. Kurby*, 71 Mass. (5 Gray) 397; *Moore v. State*, 48 Miss. 147; s. c., 12 Am. Rep. 367; *Mississippi Soc. etc. v. Musgrove*, 44 Miss. 820; s. c., 7 Am. Rep. 723; *State v. Holmes*, 38 N. H. 225; *People v. Board of Commrs. of Police and Excise*, 59 N. Y. 92; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *People v. Wright*, 3 Hun (N. Y.) 306; s. c., 5 T. & C. (N. Y.) 518; *Sights v. Yarnalls*, 12 Gratt. (Va.) 292; *Richland Co. v. Richland Center*, 59 Wis. 591; s. c., 29 Alb. L. J. 412; *Stone v. Mississippi*, 101 U. S. 814; *Beer Company v. Massachusetts*, 97 U. S. 25.

The county commissioners can take cognizance of an application for a revocation of a license, on the ground of a violation of law by the licensee while a criminal prosecution is pending

against the licensee for the same violation of law. *La Croix v. Co. Commrs.*, 50 Conn. 321; s. c., 47 Am. Rep. 648.

Notwithstanding the Virginia act of March 30th, 1877, the judge of the hustling court of Richmond has authority to revoke a license given for keeping a bar for the sale of wine, etc. *Hogan v. Guigon*, 29 Gratt. (Va.) 705.

The provision of the Pennsylvania act of May 13th, 1887 (Pamph. L. 108), known as the Brooks liquor law, relative to the revocation of the license of a liquor dealer, when proof has been made to the court of the violation of any liquor law of the commonwealth being imperative, the quarter session court is not invested with discretionary power. *Bosch's License*, 5 Lan. L. Rev. 290.

Revocation of License.—The legislature may revoke a license granted for the sale of intoxicating liquors, and revocable in terms. *La Croix v. Co. Commrs.*, 50 Conn. 321; s. c., 47 Am. Rep. 648.

Licenses granted under the New York act of 1857, may be revoked by legislation. *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657.

The ordinance of the city of Wheeling provides that the council may at any time annul a license issued by its order. *A fortiori*, where an order only, for a license has passed the council, but no license issued, the order may be rescinded. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292.

3. **License to Sell Liquors Not a Contract.**—A license issued under the general statute to a dealer in liquors, is in no sense a contract between the State and the licensee, and it is not protected by the contract clauses of the federal constitution and of the constitution of this State. It is a mere permit and can be revoked by the legislature at pleasure. *Powell v. State*, 69 Ala. 10.

A license to sell liquors is not a con-

d. JURISDICTION AND DISCRETION TO REVOKE.—A liquor license not being a contract may be revoked by the authorities empowered to grant licenses, if good and sufficient cause be shown.¹

e. PROCEEDINGS AND PROOF, ETC.—A board of excise commissioners, or other body revoking a license granted by them, are not restricted to the formal proceedings, and full evidence requisite to a judicial act affecting life, liberty, or property.² And while such tribunals are not warranted in judicating a forfeiture of the license without legal proof,³ yet the statute does not require the same strictness by want of proof in such a proceeding as is required in an action of special proceeding in court.⁴ Such proceed-

tract vesting in the licensee rights which the State may not take away. Accordingly, where a license was granted to sell ale, wine and beer, under an existing ordinance of an incorporated town, it was competent for the town to abrogate the license, before its term had expired, by another ordinance prohibiting the sale of ale, wine and beer, and the license was no defence to a prosecution for a violation of the new ordinance. *Columbus city v. Cutcomp*, 61 Iowa 672.

1. See *La Croix v. County Commrs.*, 50 Conn. 321; s. c., 47 Am. Rep. 648; *Hogan v. Guigon*, 29 Gratt. (Va.) 705; *Bosch's Case*, 5 Lan. L. Rev. 290.

Number of Offences Necessary.—It is said in the case of *Hildreth v. Crawford*, 65 Iowa 339, that under the Iowa statute "to regulate the practice of pharmacy," a license may be revoked for a single unlawful sale of intoxicating liquors.

In proceedings before excise commissioners, under the New York statute (L. 1873, ch. 549), to annul a license for the sale of intoxicating liquors, the determination of two of these commissioners is effectual, where it appears that the third had notice of the time and place to which the hearing was adjourned, by having participated in the making of the order for adjournment. *People v. Haughton*, 41 Hun (N. Y.) 558; s. c., 4 N. Y. St. Rep. 78.

2. *People ex rel. Weller v. Wright*, 3 Hun (N. Y.) 306; s. c., 5 T. & C. (N. Y.) 518; *People v. Jones*, 54 Barb. 311, 315; *People v. Norton*, 7 Barb. (N. Y.) 477; *Ex parte Persons*, 1 Hill (N. Y.) 655; *People ex rel. Kimball v. Haughton*, 41 Hun (N. Y.) 558; s. c., 25 N. Y. Week. Dig. 15.

The statute does not require the same strictness by way of proof to support

an order revoking a license made by the excise commissioners of the city in a proceeding before them for that purpose, as is required in an action or special proceeding in court. Such a proceeding before the commissioners is destined to be summary, and all that has been required is that the commissioners should become satisfied of the existence of the facts necessary to warrant a revocation of the license by such reliable information as they may be able to obtain, establishing it to a reasonable certainty. *People ex rel. Kimball v. Haughton*, 41 Hun (N. Y.) 558; s. c., 25 N. Y. Week. Dig. 15.

Where upon the hearing of the board of excise to revoke a license, the witnesses on the part of the complainants were examined upon oath against the objection of the relator, who did not ask that any person be examined in his behalf either with or without oath, it was held, that even if a board had not power to administer oaths, as such, as the information was before them and satisfied them that the relator had violated the law, it was their duty to revoke the license. *People v. Delhi Commrs. of Excise*, 3 Hun (N. Y.) 306.

3. **Forfeiture of License.**—The justices are not warranted in adjudicating a forfeiture of the license without legal proof of a former conviction; a mere reference to the records of the petty sessions where former convictions were entered, will not suffice. *Cross v. Watts*, 13 C. B., N. S. 239.

4. *People ex rel. Kimball v. Haughton*, 41 Hun (N. Y.) 558; s. c., 25 N. Y. Week. Dig. 15.

Proceedings Summary.—The proceeding is defined to be summary, and to depend upon such reliable information as may be obtainable to a reason-

ing must be founded upon a complaint¹ made to the licensing board.² Such complaint need not be in writing.³

A proceeding to revoke a license granted for the sale of intoxicating liquors may be heard and determined by the court without a jury;⁴ but to give such court jurisdiction of the case, the license complained of must be notified.⁵ But a defendant whose license has been revoked cannot defend against a complaint for unlaw-

able certainty establishing the existence of the necessary facts. *People ex rel. Kimball v. Haughton*, 41 Hun (N. Y.) 558; s. c., 25 N. Y. Week. Dig. 15.

1. **A Violation of the Law** under which the license has been granted cannot be enquired into by presentment and indictment, and in Maryland it is said that the circuit court and criminal court of Baltimore shall take cognizance thereof on application or remonstrance, and may withdraw the license of persons complained of, and shall exercise a sound discretion relative thereto. *Downs v. State*, 19 Md. 571.

2. *State v. Lamos*, 26 Me. 258.

Knowledge of Board.—It is not sufficient to authorize the board to issue a warrant that the matter complained of has come to their personal knowledge. *State v. Lamos*, 26 Me. 258.

3. *Com. v. Hamer*, 128 Mass. 76.

Form of Complaint.—It is said in *State v. Lamos*, 26 Me. 258, that although the complaint need not be in writing to authorize the issuing of the warrant, yet before notice to the party accused can be given, the complaint should be reduced to writing, and the matter complained of specifically alleged, that he may know what he is required to answer.

Contents of Complaint.—Under the Indiana statute in a proceeding to forfeit a liquor license, for keeping a disorderly house, an information must aver and prove the existence of the license. *Brubaker v. State*, 89 Ind. 577.

4. *State v. Schmitdz*, 65 Iowa 556.

Discretion of Commissioners.—While commissioners of excise have a degree of discretion as to the order and time of the trial of cases coming under their jurisdiction, they have no right to refuse to try a class of cases presented because they question the propriety of enforcing the law therein; and if the evidence produced satisfies them that the charges are true, the license should be revoked, even though the complainant's character and motives may not be above reproach, and even if the wit-

nesses obtain their knowledge by entering the saloons through the back doors and purchasing the liquor with the intention of preferring complaints. *People v. Becker*, 3 N. Y. St. Rep. 202.

Statutory Construction.—An act which inflicts upon a licensed retailer by small measure, who shall be convicted of selling spirituous liquors to persons designated, the forfeiture of his license, etc., applies to those who are retailers at the time of the offence committed, and not at the time of the trial; and the fact of their being such retailers is not to be ascertained on affidavits or otherwise by the court, but must be averred in the indictment and confessed, or found by the verdict of a jury. *State v. Plunket*, 1 Ired. (N. C.), L. 115.

5. *Plummer v. Com.*, 1 Bush (Ky.) 26; *Young v. Blaisdell*, 138 Mass. 344; *Com. v. Hamer*, 128 Mass. 76; *People ex rel. Kimball v. Haughton*, 41 Hun (N. Y.) 558; s. c., 25 N. Y. Week. Dig. 15; *Gaertner v. Fond du Lac*, 34 Wis. 497. See *Com. v. Wall*, 145 Mass. 216.

An Order of Court suspending the license without requiring the licensee to appear and show cause why it should not be sustained as required by statute, is void. *Plummer v. Com.*, 1 Bush (Ky.) 26.

Notice to Licensee—Presumption.—It is said in *Young v. Blaisdell*, 138 Mass. 344, that the law may provide for the revocation of a liquor license on an application of the owner of real estate adjoining the premises where the license is to be exercised, and if a hearing is provided for, it is implied that the licensee is to be notified, and the law cannot be objected to for want of a provision for notice.

The same court say, in *Com. v. Hamer*, 128 Mass. 76, that under the Massachusetts statute authorizing the mayor and aldermen of a city, by whom a license to sell intoxicating liquors has been issued, to declare a license forfeited upon satisfactory proof to them upon a violation of its conditions, after

fully keeping liquors, upon the ground that he had no opportunity to be heard upon the revocation.¹

f. REVIEW; APPEAL.—Appeal lies from error in the hearing and determining of a proceeding to revoke a permit granted by the proper body for the sale of intoxicating liquors.²

21. Bonds; Action on.—*a. NECESSITY OF; WHO MUST GIVE.* The giving of the bonds required by the excise law is an essential condition precedent to the issuing of a license to sell intoxicating liquors; and all licenses granted without such bonds being given are no protection to the licensees.³

a notice to the licensee and reasonable opportunity for him to be heard by them, a licensee can be convicted of keeping intoxicating liquors for sale in violation of law upon the production of the record showing that before the day named in the complaint the board declared his license forfeited, after a hearing on a verbal complaint made to the board, the licensee being present with counsel, and after a finding that he had violated the provisions of his license.

Opportunity to be Heard—Illness of Defendant.—The defendant in a prosecution for illegally keeping liquors contended that the revocation of his license by the board of aldermen was invalid, because he was not given an opportunity to be heard upon the question of revocation, he being unable to attend the hearing before the board of aldermen by reason of the illness, and the board refusing to grant a continuance for that reason. The court held that the acts of the board of aldermen could not be reviewed in a proceeding in which it was not a party. *Com. v. Wall*, 145 Mass. 216.

Notice—Service and Waiver of Objection.—The objection to the power of the excise commissioners of the city of New York to revoke a license founded upon the ground that the summons to appear before the commissioner was not served upon the licensee himself, but upon the person who in his absence was found in the possession and control of his establishment, was obviated by the appearance of the licensee by attorney upon the return of the summons moving for and obtaining an adjournment of the proceeding without taking objection for want of reasonable service. *People ex rel. Kimball v. Houghton*, 41 Hun (N. Y.) 558; s.c., 25 N. Y. Week. Dig. 15.

1. *Com. v. Wall*, 145 Mass. 216.

Costs of Proceedings.—Upon proceeding to revoke a license there can be no

judgment for costs, and the petitioner and respondent each must bear their own costs. *Young v. Blaisdell*, 138 Mass. 344; *Chesney's License*, 2 Pa. Co. Ct. 474.

2. *State v. Schmitdz*, 65 Iowa 556.

Certiorari is Not the Proper Remedy.—*State v. Schmitdz*, 65 Iowa 556.

However, supreme court of Wisconsin, in the case of *Gaertner v. Fond du Lac*, 34 Wis. 497, say that if the act in revoking a liquor license upon charges, without giving the licensee notice and an opportunity to be heard, be without authority (as it seems such act would be) if the proper remedy of the party aggrieved would be by *certiorari* and not by injunction.

Appeal.—However, it is said by the supreme judicial court of Massachusetts, in *Young v. Blaisdell*, 138 Mass. 344, that under the Massachusetts statute no appeal lies from the judgment of a district court revoking a license granted for the sale of intoxicating liquors upon the application of an owner of real estate adjoining the premises in which the license is to be exercised.

Bond on Appeal.—In a proceeding under the Iowa Code to revoke a permit granted by the board of supervisors for the sale of intoxicating liquors, the court is not required to fix the amount in which the defendant must give bond for an appeal to the supreme court as is provided when it is desired to supersede the judgment in a criminal action pending in appeal. *State v. Schmitdz*, 65 Iowa 556.

3. *State v. Fisher*, 33 Wis. 159.

No Bond Required of Druggists.—Since the passage of Iowa acts, general assembly, 1886, ch. 83, relating to sales of intoxicating liquors by pharmacists for medical purposes, a pharmacist is not required to give bond to obtain a permit so to sell, and such permit is not limited to one year. *State v. Courtney*, 73 Iowa 619.

b. ACCEPTANCE AND APPROVAL; HOW COMPELLED.—Authority to retail spirituous liquors is not operative without the approval of the bond required, and may be set aside at any time before such approval.¹ Where the proper bond has been furnished and is sufficient, its acceptance cannot be compelled by *mandamus*, where there is nothing showing that the discretionary power vested in the commissioners or other board empowered to grant license has been exercised unreasonably or in bad faith;² but where a liquor bond is rejected simply because the affidavit required by statute omits to state that the surety is not engaged in the sale of liquors, its acceptance will be compelled by *mandamus*.³

c. FORM AND VALIDITY.—The bond required by statute to be

A druggist empowered by municipal ordinance to sell liquor for medical purposes is not within the purview of the Illinois dram shop act, § 5, requiring a bond from those licensed to sell. *Moore v. People*, 109 Ill. 499, limiting *Wright v. People*, 101 Ill. 126.

But under the Missouri statute, while druggists and physicians are permitted to mix, adulterate spirituous and other liquors, for medical and mechanical purposes, yet they are required to make an affidavit, and give the bond required by the law, of all persons who deal in such liquors. *State v. Ferguson*, 72 Mo. 297.

New Bond — Discretion of County Treasurer.—The county treasurer cannot be invested with power to determine in what contingency he will require a liquor dealer to give a new bond or stop his business until it is done. *People ex rel. Robinson v. Miner* (Mich.), 37 N. W. Rep. 21.

1. *Crutz v. State*, 4 Ind. 385; *Garrison v. Steel*, 46 Mich. 99.

It is said in the case of *Garrison v. Steel*, 46 Mich. 99, that a liquor dealer's bond in Bay City, in which the penalty by mistake has been left blank, cannot be enforced until approved by the common council; and a report of a committee will not be sufficient unless adopted by the council.

2. See *McHenry v. Chippewa*, (Mich.), 31 N. W. Rep. 602; *Wolfson v. Rubicon*, 63 Mich. 49; *Post v. Sparta*, 58 Mich. 212. Compare *Kuhn v. Detroit* (Mich.), 38 N. W. Rep. 470.

In an application for *mandamus* to compel the township board to approve a druggist's liquor bond, where nothing is disclosed in the return showing that its discretionary power was not exercised reasonably and in good faith, the

writ must be denied. *McHenry v. Chippewa*, (Mich.) 31 N. W. Rep. 602.

On an application for a *mandamus* to compel a township board to approve a liquor bond, where the sureties justified on oath as to their sufficiency, and there was a conflict of testimony as to the value of the property owned by one of them, and there was nothing in the testimony to make it inadmissible and the witnesses were legally qualified to express an opinion, the determination of the board in rejecting one of the proffered sureties will not be disturbed. *Wolfson v. Rubicon*, 63 Mich. 49.

On a petition for a *mandamus* to compel a township board to approve a liquor bond, the supreme court is not called upon to decide from the record whether the surety was worth more than the law requires over and above his indebtedness and liabilities on other similar bonds; and where it does not appear that the board had acted arbitrarily or capriciously, the right must be refused. *Post v. Sparta*, 58 Mich. 212.

The answer of the respondents in proceedings to compel by *mandamus* the approval of a liquor bond fully met all the allegations in the relator's petition, and raised a direct issue as to the surety's sufficiency, and denied that he was worth the penalty of the bond over his liabilities, and the whole record failed to show that the respondents acted arbitrarily and capriciously, or with a design to evade the law. *Held*, that a *mandamus* would be denied. *Post v. Sparta*, 58 Mich. 212. See also *McHenry v. Chippewa*, 31 (Mich.) N. W. Rep. 602.

3. *Kuhn v. Detroit*, (Mich.) 38 N. W. Rep. 470.

given by retail liquor dealers should be made payable to the State, but is not void if it runs to a village instead.¹ And where in a liquor dealer's bond the penalty has, by mistake, been left in blank, it will be held valid at the lowest statutory penalty, when the sureties have justified at that sum, in accordance with the statute requiring the justification to conform to the penalty.² But where the bond taken by a board of officers imposes upon the obligee restraints additional to those imposed by statute, is void.³

d. WHAT CONSTITUTES A BREACH.—A bond given by a licensee to retail spirituous, malt or intoxicating liquors is broken by a violation of the laws relating to intoxicating liquors,⁴ by

1. *Thomas v. Hinkley*, 19 Neb. 324 following *Huffman v. Koppelkom*, 8 Neb. 344; distinguishing *Sexson v. Kelley*, 3 Neb. 104. See *Redpath v. Nottingham*, 5 Blackf. (Ind.) 267; *Ring v. Gibbs*, 26 Wend. (N. Y.) 502; *Van Deusen v. Hayward*, 17 Wend. (N. Y.) 67; *Tripp v. Norton*, 10 R. I. 105.

Tavern Keeper's Bond.—The bond required by statute to be given by tavern keepers, etc., may be made payable to the county treasurer, without either naming him or containing the words "and his successors in office." *Redpath v. Nottingham*, 5 Blackf. (Ind.) 267.

Refusal to Give Bond—Objection to Statute.—The relator having refused to give a bond, as required by Texas act of March 29th, 1887, regulating the sale of intoxicating liquors, was arrested, and applied for a writ of *habeas corpus*, alleging the conditions of the bond were unconstitutional. Held, that as the relator had never executed the bond, he had no right to be heard upon the validity of its conditions. *Ex parte Bell*, 24 Tex. App. 428.

Bond to Village.—In *Tripp v. Norton*, 10 R. I. 125, a licensee's bond to "the city treasurer of the city of Providence" was held not to be invalid by omission to insert his name.

2. *Garrison v. Steele*, 46 Mich. 98.

3. *Crosby v. Snow*, 16 Me. 121; *Com. v. Kelly*, 75 Mass. (9 Gray) 259; *Providence v. Bligh*, 10 R. I. 208.

License Bond—Excessive Restraints.—A license bond conditioned that the principal "shall not violate any of the provisions of the laws" of Rhode Island,—construed to comply with R. I. Rev. Stat., ch. 670, requiring a bond conditioned that he "will not violate any of the provisions of this act." *Providence v. Bligh*, 10 R. I. 208.

A bond, given by a party convicted under a statute, which requires him to give bond not to violate any law "concerning the sale of intoxicating liquors," is void, if conditioned that he shall not violate any law "concerning the manufacture or sale of intoxicating liquors." *Com. v. Kelly*, 75 Mass. (9 Gray) 259.

Bond of Innholder.—A bond taken by a board of officers, imposing upon the obligor, as innholder, restraints in the sale of liquors, additional to those imposed by statute, is void. *Crosby v. Snow*, 36 Me. 121.

4. See *Welch v. McKane*, 55 Conn. 25; *Quintard v. Corcoran*, 50 Conn. 34; *State ex rel. Pearson v. McEntee*, 68 Iowa 381; *People v. Harrison*, 28 How. (N. Y.) Pr. 247.

Keeping Open on Sunday.—It is held by the supreme court of Connecticut, in *Quintard v. Corcoran*, 50 Conn. 34, that it is a breach of the licensee's bond conditioned to "duly observe all laws relating to intoxicating liquors" to keep open on Sunday a place where such liquors are exposed for sale, and this although the act of keeping open on Sunday is not a violation of the liquor law, but of the statute in regard to Sunday.

Conviction of a Violation of the Law.—Under the Connecticut act of 1883, providing that, where the bond required by the act upon granting a license to sell liquors is given and such license issued, if the "person so licensed shall be convicted of a violation of the provisions of" a certain part of the act, "and no appeal is pending, said bond shall thereupon become forfeited" (L. 1883, ch. 137, § 5), a conviction of the principal, of such a violation, constitutes a breach of the bond; the statute, so construed, does not violate the constitutional guaranty of due process of law, as the parties enter into the obli-

abuse of privilege;¹ by keeping a gaming table;² or by a failure to make the return to the auditor of the county required by statute.³

e. DAMAGES FOR BREACH.—It seems that upon a bond given by one licensed to sell intoxicating liquors in a certain town, to the treasurer of such town with sureties as required by law, conditioned that the licensee shall duly observe all laws relating to intoxicating liquors in which case the bond is to be void, the measure of damages for a breach is the face of the bond.⁴

f. HOW AVOIDED; DISCHARGE OF SURETIES.—The obligation of a liquor seller's bond is not affected by the fact that he has been fined the amount of the penalty, and has served out a term of imprisonment for nonpayment of the fine, and his sureties will not thereby be discharged from liability in an action to recover the fines.⁵

gation in view of the provisions of the statute. *Welch v. McKane*, 55 Conn. 25.

Under said act the record of such a conviction of a violation is proof of the breach of the bond in a civil action upon it. *Welch v. McKane*, 55 Conn. 25.

1. Abuse of Privilege—Damage to Plaintiff.—It is not necessary to effect the breach of a bond given by one licensed to sell intoxicating liquors, the condition of which is that if the licensee shall duly observe all laws relating to intoxicating liquors it shall be void, that the act constituting a breach shall be merely an abuse of a privilege granted by the license, or that the plaintiff shall have sustained any damage by reason of such breach. *Quintard v. Corcoran*, 50 Conn. 34.

2. Keeping Gaming Table.—An inn keeper's bond under New York laws, 1857, that he will not keep a gambling table of any description, is broken by keeping a billiard table which his guests and others use under a rule that the losing party of each game should pay him for the use of the table. *People v. Harrison*, 28 How. (N. Y.) Pr. 247.

3. State *ex rel.* Pearson v. McEntee, 68 Iowa 381.

4. Quintard v. Corcoran, 50 Conn. 34.

Liabilities of Sureties on Bond.—The sureties upon the bond of a licensed vendor of intoxicating liquors are liable not only for the damages resulting directly from the act of their principals, but for all damages to which such acts contribute. And where, dur-

ing the existence of a license based upon such bond, the principal sells liquor to one who is disqualified to earn a support for his family by reason of his intoxication, the liability of the surety attaches and continues throughout the period of such disqualification, whether the same terminates during the license year or continues for the entire term. *Wardell v. McConnell*, 23 Neb. 152.

5. Brown v. Com., 114 Pa. St. 335; *Stehle v. Com. (Pa.)*, 7 Atl. Rep. 169; s. c., 4 Lan. L. Rev. 22; *Com. v. Shannon*, 2 Pa. County Ct. 142; *Com. v. Findler*, 37 Leg. Int. 225.

In the case of *Stehle v. Com. (Pa.)*, 7 Atl. Rep. 169, a bond given by defendant on being licensed to keep an eating house, was conditioned that he would pay all damages, fines, etc., that might be recovered against him. Defendant, being sentenced to pay certain fines, "or in default" to undergo imprisonment for selling liquor on Sunday, underwent the imprisonment, but never paid the fines. Held, that his sureties were not discharged from liability in an action to recover the fines. *Com. v. Shannon*, 2 Pa. County Ct. 142.

In the case of *Brown v. Com.*, 114 Pa. St. 335, A applied for a tavern license and filed a \$2,000 judgment bond conditioned that he would pay the costs, fines, and penalties, which might be imposed on him in an indictment for violating any law of the commonwealth, relative to selling intoxicating drinks; later, and after he had been granted a license, he pleaded guilty to selling liquor on Sunday, whereupon he was

V. OFFENCES AND PROCEEDINGS.—A person holding a permit to sell intoxicating liquors for lawful purposes is bound, before making a sale, to exercise reasonable care to ascertain whether the purchaser intends in good faith to use the liquor for a purpose for which it may lawfully be sold.¹

1. Sale Without License.—Under a statute regulating traffic in intoxicating liquors and prohibiting sales without a license, a sale made without first having procured a license is a misde-

sentenced to pay \$200 fine and costs, or, in default, to undergo ninety days' imprisonment. He went to jail and at the expiration of his term of imprisonment was discharged as an insolvent. He paid the costs of the prosecution but did not pay the fine; judgment was confessed on his bond for \$2,000, and liquidated in the sum of \$200, the amount of the fine, as the real debt. The court said: "It is a mistake to suppose that the defendant and his sureties were released from the obligation of their bond by the imprisonment of the defendant in default of the payment of his fine. That was part of the penalty which he suffered in consequence of his non-compliance with the sentence of the court; and, while it released him from the grasp of the quarter sessions, it in no way affected the obligation of his bond."

1. *Taylor v. Pickett*, 52 Iowa 467; *State v. Blair*, 72 Iowa 591. See *Ashurst v. State*, 79 Ala. 276; *Com. v. Boynton*, 84 Mass. (2 Allen) 160; *State v. Perkins*, 26 N. H. (6 Fost.) 9; *Miller v. State*, 5 Ohio St. 275; *McMillan v. State*, 18 Tex. App. 375.

Exercising Due Diligence.—It is the duty of one authorized to sell intoxicating liquors for legal purposes, to exercise due diligence and act in good faith in making such sales, and where this is done he is not responsible for the illegal use made by a purchaser. *Taylor v. Pickett*, 52 Iowa 467. But where a person is licensed under a statute to sell liquors for certain purposes specified in the statute, "and for any other purpose," he is liable to be punished if he does sell for any other use or purpose. *State v. Perkins*, 26 N. H. (6 Fost.) 9.

Liquor Obtained by False Pretences.—Where the liquor is obtained by false pretences, and an imposition on the seller, he having no intention to violate the law, he is not guilty under the statute. *Miller v. State*, 5 Ohio St. 275.

A prohibited sale of liquors is, *per se*, a violation and not an evasion of

the law, and is punishable as a violation. *McMillan v. State*, 18 Tex. App. 375.

Knowledge of Intoxicating Quality.—The supreme judicial court of Massachusetts say, in the case of *Com. v. Boynton*, 84 Mass. (2 Allen) 160, that a person may be convicted of being a common seller of intoxicating liquor, although he did not know or suppose the liquor sold by him to be intoxicating.

It is said by the supreme court of Pennsylvania, in *Hatfield v. Com.*, 120 Pa. St. 395, that on trial of an indictment under a statute prohibiting the sale of vinous or spirituous liquors whether the liquor sold is intoxicating or not, is immaterial.

Manufacturing Corporation — Transfer of Business.—The charter of a manufacturing corporation made it an offence to sell liquor "within four miles of the factories of said corporation." The property of the corporation was sold under a decree in chancery, and the purchasers carried on the same business under a new corporate name. The court held that the offence of selling continued the same as before. *Ashurst v. State*, 79 Ala. 276.

Sale by Person Not a Merchant.—In *Com. v. Wheeler*, 79 Ky. 284, it is said that in the Kentucky statute no penalty has been denounced against a person not a merchant for selling vinous and spirituous liquors when they are not drunk on the premises where sold or adjacent thereto.

Domestic Wines or Cider — Sale in Bar Rooms.—The Georgia act permitting the manufacture and sale of domestic wines or cider, or the sale of wines for sacramental purposes, but providing that "such wine or cider shall not be sold in bar rooms by retail," a "bar room" means a place for the sale of intoxicating liquors by retail for consumption at the place and time of sale. *Beiser v. State*, 79 Ga. 376.

Dram Shop Keeper.—A dram shop

meanor and indictable.¹ It is not necessary to constitute the offence of selling liquor without a license that the liquor sold should be intoxicating, it is sufficient if it be sold under the prohibited circumstances.²

2. What Acts and Agreements Constitute a Sale.—The statutory offence of selling spirituous liquors without a license is not committed by the bargain for a sale. To constitute the offence there must be a completed sale which passes the property;³ the actual delivery of the liquor must be proved.⁴

keeper is a person licensed by law to sell intoxicating liquors in any quantity not exceeding a given amount. *State v. Heckler*, 81 Mo. 417.

1. *State v. Kobe*, 26 Minn. 148; *People v. Brown*, 16 Wend. (N. Y.) 561; *People v. Stevens*, 13 Wend. (N. Y.) 341; *State v. Turner*, 18 S. Car. 103. See *Hill v. People*, 20 N. Y. 363; *Schwab v. People*, 4 Hun (N. Y.) 520; *Blatchley v. Moser*, 15 Wend. (N. Y.) 215; *Richards v. Banks*, 58 L. T. 634. The defendant is liable for selling without a license notwithstanding the fact that he has already been sued for the penalty. *Blatchley v. Moser*, 15 Wend. (N. Y.) 215; *People v. Stevens*, 13 Wend. (N. Y.) 341.

Misdemeanor.—Vending spirituous liquors or wines in quantities less than the amount prescribed by the statute, without a license, is a misdemeanor, although described by the statute simply as an offence. *Hill v. People*, 20 N. Y. 363.

It is said in the case of *People v. Brown*, 16 Wend. (N. Y.) 561, that the selling of spirituous liquors without a license is punishable as a misdemeanor under the New York statute upon that subject, although the statute contains no prohibition other than the imposition of a penalty and a provision that all offences against the provisions of the act shall be deemed misdemeanors.

It is said in *Chevalier v. Com.*, 8 B. Mon. (Ky.) 379, that under the Kentucky act of 1830, regulating the sale of liquors in Louisville without a license, a party is not liable for selling liquors unless the same were to be drunk in his house.

License to Sell "Sweet and Made Wines."—Where the holder of a license to sell foreign wine sold a bottle of wine labeled "Best Pale Sherry, British," the court held that he was guilty of selling foreign wine without a license. *Richards v. Banks*, 58 L. T. 634.

2. *Schwab v. People*, 4 Hun (N. Y.)

520. See *Hatfield v. Com.*, 120 Pa. St. 395.

3. *Banchor v. Warren*, 33 N. H. 183.

4. Recovering Trespass—Not a Sale.—But all transfers of the title intoxicating liquors are not sales. Thus it is said in *Hamilton v. Goding*, 55 Me. 419, that "a recovery in trespass of the value of intoxicating liquors held in this State, and intended for illegal sale in this or another State, transfers the title to the defendant by the mere operation of law, and does not constitute a sale 'by any person or persons' within the prohibition of the statute." *Riley v. State*, 43 Miss. 397. But it is not necessary either to aver or prove that the liquor was paid for, because a sale on credit is as much a violation of the law as one for cash. *Riley v. State*, 43 Miss. 197.

Procurement for Another.—Mere proof of procurement and delivery of a bottle of whiskey by one person to another at the latter's request is not an unlawful sale. *State v. Thomas*, 13 W. Va. 848.

In the case of *State v. Taylor*, 89 N. Car. 577, a witness testified that he applied to defendant for liquor, but the defendant said he could not get it unless he had a bottle. Witness then procured a bottle and gave it to the defendant, together with a small sum of money. The defendant went off and in a short time returned with the bottle of whiskey, and said that he charged the witness a small sum for getting it, which was paid. It was held error in the trial court to charge the jury that if they believed the evidence, the defendant was guilty, without further telling them to consider the *bona fides* of the transaction,—the purchase by the defendant's agent of the witness.

However, if a storekeeper does not keep liquors for sale in his store, but makes himself an agent and carrier merely to procure it for division and distribution among his customers, this

The statutory presumption arising from mere delivery of intoxicating liquor, that there was an unlawful sale, is limited to cases under the act.¹

Any act or transaction which clearly indicates an intention on the one part to dispose of and on the other part receive intoxicating liquors for a consideration, constitutes a sale within the meaning of a statute regulating the traffic in such liquors. Thus an acceptance of intoxicating liquors in exchange for grain,² or for work,³ or in discharge of an indebtedness,⁴ is a sale within the meaning of the statute. Any shift or device by means of which it is sought to evade the liquor law, if a customer procures liquor in quantities prohibited, for which the vendor receives a compensation, the transaction constitutes a sale.⁵

3. Joint and Several Sales.—The retailing of spirituous liquors to two distinct persons at the same time and place constitutes two distinct offences, and not a single offence;⁶ and if two join in

is a violation of the statute prohibiting the sale of intoxicating liquors. *State v. Buck*, 37 Vt. 657.

What Constitutes—Intent.—To constitute the offence of carrying on the business of a retail liquor dealer without having paid the special tax, the facts proved must indicate that the defendant procured the liquor with the intention to retail it, or having on hand, had formed the intent to retail it and had carried out the intent by one or more acts. *U. S. v. Bonham*, 31 Fed. Rep. 808.

Same—Arkansas Doctrine.—It is said in the case of *Ramsey v. State*, 11 Ark. (6 Eng.) 35, that to constitute the offence prohibited by the law of Arkansas (§ 2, ch. 159, Digest) it is not sufficient that the defendant sold ardent spirits in quantities less than one quart without license, he must have kept a grocery for that purpose without a license, and sold spirits without license.

1. *Jones v. McLeod*, 103 Mass. 58.

Drinking or intending to drink the entire glass delivered is not essential to constitute a sale. *Dillman v. People*, 4 N. Y. Week. Dig. 251.

2. *Com. v. Clark*, 14 Gray (Mass.) 367.

3. Exchange for Services.—Where a person has taken liquor in payment for work, in the absence of any prior agreement to do the work for liquor, the transaction constitutes a sale and not a barter of the liquor. *Bescher v. State*, 32 Ind. 480.

4. In the case of *State v. Poteet*, 86 N. Car. 612, where one received sundry drinks of spirituous liquors in payment

of a certain sum the seller to have credit for each drink, and so *toties quoties* until the debt was satisfied, the court held this to be a violation of the statute against retailing without a license.

5. See *Murphy v. State*, 1 Ind. 366; *Murphy v. State*, 1 Smith (Ind.) 261; *Com. v. Geary*, 146 Mass. 139; *Com. v. Thayer*, 49 Mass. (8 Metc.) 525; *Johnson v. State*, 63 Miss. 228; *State v. McMinn*, 83 N. Car. 668; *State v. Kirkham*, 1 Ired. (N. Car.) L. 384; *State v. Bell*, 2 Jones (N. Car.) L. 337; *Williams v. State*, 23 Tex. App. 499; *Richardson v. Com.*, 76 Va. 1007. See *infra*, DEVICES, EVASIONS, etc.

6. *Com. v. Hogan*, 97 Mass. 120; *Com. v. Very*, 78 Mass. (12 Gray) 124; *State v. Barron*, 37 Vt. 57; *Com. v. Dove*, 2 Va. Cas. 26.

Each sale of intoxicating liquor without a license constitutes a distinct and separate offence against the State. Different and distinct offences may be committed by selling to the same persons at different times. *State v. Small*, 31 Mo. 197.

Playing at Game—Loser to Treat.—Where one plays a game with three persons who severally lose under an agreement that each loser shall treat, is liable as a common seller in three distinct sales if he furnished the treats, although no settlement or payment is made until the playing is concluded. *Com. v. Hogan*, 97 Mass. 120.

Simple Call.—In prosecutions for the violation of the liquor law, where the liquor is furnished in answer to a simple call, at the same time, and by a sin-

the sale of a glass of liquor they incur jointly the penalty imposed by the statute, and not several penalties.¹

4. Number of Sales or Violations Necessary to Constitute Offence.—Regarding the number of sales of intoxicating liquors made in violation of laws regulating the sale of the same, which are necessary to constitute an offence, there is a conflict of opinion. No doubt the question depends upon the terms of statutes which should be examined. In some States the statutes prescribe penalties for the offence of being a "common seller," some of the cases holding that one sale is sufficient,² others that more than one sale is required.³ But a conviction for the violation of the liquor law will be sustained by proof of two,⁴ three,⁵

gle act, it can constitute but one act of furnishing, and the party incurs but one penalty, notwithstanding it may be drunk by more than one person. *State v. Barron*, 37 Vt. 57.

Joint Purchase.—Where a dealer to whom a customer applied for whiskey, being out of it, purchased a gallon from another dealer, partly with the money of such customer and partly with his own, divided with the customer,—held, a joint purchase, and not a sale in quantity less than one gallon. *Johnson v. State*, 63 Miss. 228.

If two persons go together to a shop and each asks for a half pint of liquor, which is delivered to each one in his separate bottle, it is a separate sale of liquor to each, although one at the request of the other pays for both. *Com. v. Very*, 78 Mass. (12 Gray) 124.

Placing Money on Dumb Waiter.—Where two persons applying for liquor placed money upon what appeared to be a table,—in fact a dumb waiter,—were excluded from the room, and on their return found two glasses of liquor,—these facts prove a joint sale. *Henry v. State*, 113 Ind. 304, 593.

1. *Tracy v. Perry*, 5 N. H. 504.

2. *Lawson v. State*, 55 Ala. 118; *McPherson v. State*, 54 Ala. 221; *Dansey v. State* (Fla.), 2 So. Rep. 692; *Frese v. State* (Fla.), 2 So. Rep. 1; *Woody v. State*, 32 Ga. 595; *Lebkovitz v. State*, 113 Ind. 26; *State v. Reyelts*, 74 Iowa 499; *Com. v. Kerrissey*, 141 Mass. 110; *Com. v. Coolidge*, 138 Mass. 193; *Com. v. Hoar*, 121 Mass. 375; *Com. v. Cleary*, 105 Mass. 384; *Com. v. Thurlow*, 41 Mass. (24 Pick.) 374; *People v. Kropp*, 52 Mich. 582; *People v. Cox* (Mich.), 38 N. W. Rep. 235; *Kansas City v. Muhlback*, 68 Mo. 638; *State v. Glasgow, Dudley* (S. Car.) 40; *State v. Mooty*, 3 Hill (S. Car.)

187; *State v. Cassety*, 1 Rich. (S. Car.) 90; *State v. Paddock*, 24 Vt. 312; *State v. Bugbee*, 22 Vt. 32; *State v. Chandler*, 15 Vt. 425. Compare *Overall v. Beegan*, 37 Mich. 506.

A single act of retailing is a violation of the law prohibiting the selling of spirituous liquors without license. *Lawson v. State*, 55 Ala. 118; *State v. Glasgow, Dudley* (S. Car.) 40; *State v. Mooty*, 3 Hill (S. Car.) 187; *State v. Cassety*, 1 Rich. (S. Car.) 90; *State v. Paddock*, 24 Vt. 312; *State v. Bugbee*, 22 Vt. 32.

3. *Lawson v. State*, 55 Ala. 118; *Bryant v. State*, 46 Ala. 302; *Blackwell v. State*, 45 Ark. 90; *Overman v. State*, 88 Ind. 6; *Morrison v. Com.*, 7 Dana (Ky.) 218; *Com. v. Patterson*, 138 Mass. 498; *Gulick v. State*, 50 N. J. L. (21 Vr.) 468; *Miller v. State*, 3 Ohio St. 475; *Merritt v. State*, 19 Tex. App. 435; *Halfin v. State*, 18 Tex. App. 410; *Mansfield v. State*, 17 Tex. App. 468.

4. *Com. v. Rooney*, 142 Mass. 474; *Com. v. Tabor*, 138 Mass. 496.

5. *Com. v. Whalen*, 82 Mass. (16 Gray) 25; *Com. v. Barker*, 80 Mass. (14 Gray) 412; *Com. v. Porter*, 70 Mass. (4 Gray) 426; *Com. v. Tubbs*, 55 Mass. (1 Cush.) 2; *State v. Williams*, 6 R. I. 207.

Common Seller of Wine.—In order to constitute a common seller of wine, etc., under the Massachusetts Rev. Stats., ch. 47, § 1, it must be proved that the defendant made three or more distinct sales of spirituous liquor; and it is not sufficient to prove merely that he had a place on his premises fitted up in the usual manner, with a bar for the sale of liquors to be used on the premises; that the place so fitted up was provided with the liquors, or some of them, mentioned in the said

four¹ or more² sales of intoxicating liquors.³

5. Devices, Evasions, etc.—Where it is unlawful to sell or give away liquor, no trick, device, subterfuge or pretence can be allowed to evade the operation or defeat the policy of the liquor law, if liquor be thereby procured.⁴

section; that this place was provided with a person in the employment of the defendant to wait upon customers; that the defendant, by himself or his agent, did in fact sell liquor, of some of the kinds mentioned, to be used upon his premises, to one person or more; and that the defendant, by himself or his agent, was there ready and willing to sell to persons who might come there to buy and drink; though these facts are proper to be submitted to the jury, as evidence of three distinct sales, upon which they may find the defendant guilty as a common seller. *Com. v. Tubbs*, 55 Mass. (1 Cush.) 2.

1. *State v. Day*, 37 Me. 244.

2. *Lemons v. State*, 50 Ala. 130; *Com. v. Perley*, 56 Mass. (2 Cush.) 559; *Com. v. Odlin*, 40 Mass. (23 Pick.) 275.

One travelling with liquors on his person and selling them may be indicted as a common seller. *State v. Grames*, 68 Me. 418.

A mere sale without pursuing the occupation of selling is not an offence against a statute requiring payment of an occupation tax. *Merritt v. State*, 19 Tex. App. 435. The offence denounced by the Texas Pen. Code consists not in the mere sale of spirituous liquor, but in the pursuing of the occupation of selling spirituous liquors without having first paid the tax levied on such occupation. *Williams v. State*, 23 Tex. App. 499.

Who is a Dealer Within the Internal Revenue Laws.—Selling an occasional drink of spirits, out of a bottle, not in a bar room, where no intention of defrauding the national revenue is apparent, is not "carrying on the business of a retail liquor dealer" without having paid the special tax, in contemplation of U. S. Rev. St., § 3242. *United States v. Jackson*, 1 Hugh. C. C. 531.

3. Occupation of Selling.—The engaging in or pursuing the occupation of selling intoxicating liquors, such business being taxable under the laws of the State, without having first paid the tax due thereon, is a penal offence. *Merritt v. State*, 19 Tex. App. 435.

To sustain a conviction under a prosecution for selling spirituous liquors in quantities less than one quart without license, it must appear that the accused was engaged in the occupation of selling spirituous liquors in quantities less than that prescribed by the statute, without first having obtained a license therefor. *Wells v. State*, 18 Tex. App. 417.

4. *Boggus v. State*, 78 Ala. 26; *Looney v. State*, 43 Ark. 389; *Rabe v. State*, 39 Ark. 204; *Murphy v. State*, 1 Ind. 366; *Murphy v. State*, 1 Smith (Ind.) 261; *Archer v. State*, 45 Md. 33; *Com. v. Geary*, 146 Mass. 139; *Com. v. Thayer*, 49 Mass. (8 Metc.) 525; *Johnson v. State*, 63 Miss. 228; *State v. McMinn*, 83 N. Car. 668; *State v. Kirkham*, 1 Ired. (N. Car.) L. 384; *State v. Bell*, 2 Jones (N. Car.) L. 337; *Williams v. State*, 23 Tex. App. 499; s. c., 5 S. W. Rep. 136. See *Rickart v. People*, 79 Ill. 85; *Marmont v. State*, 48 Ind. 21; *State v. Mercer*, 32 Iowa 405; *Walter v. Com.*, 88 Pa. St. 137; s. c., 32 Am. Rep. 429; *Holoman v. State*, 2 Tex. App. 610; s. c., 28 Am. Rep. 439.

Selling Brandy Peaches Without License.—No license is required to sell fruits preserved in brandy; but if one put a few peaches or cherries in a bottle of liquor to evade the law, and sell them, he is guilty. *Rabe v. State*, 39 Ark. 204.

Selling Whiskey as Turpentine.—A device by which one pretends to sell and the other to buy turpentine, whiskey being in fact intentionally sold, is not effective as an evasion of the law. *Looney v. State*, 43 Ark. 389.

What Must be Proved to Authorize Conviction.—In order to sustain a conviction for the offence denounced in the act to prevent the violation or evasion of prohibition laws, or of laws requiring license for the sale of liquors, approved February 19th, 1883, three things must appear: 1st, a house, room, enclosure, or other place, where spirituous, vinous or malt liquors are furnished or obtained in violation or evasion of law, or where some device is used to dispose of, furnish, or obtain

such liquors, in violation or evasion of law; 2nd, such house, room, enclosure, place or device to be so constructed, and in such manner, as to keep the person concealed who furnishes or disposes of the liquor; and 3rd, a sale, disposition or furnishing of such liquor, in violation or evasion of law, by a person who is at the time concealed. *Bog-gus v. State*, 78 Ala. 26.

Devices to Evade Statute—Sale by Bulk—Delivery in Small Quantities.—If a person pays for only part of the liquor in a bottle which is passed to him, and he retains possession of the entire contents, simply using a glass to taste the quality of the liquor, and takes it all away, there is a complete sale. *Com. v. Geary*, 146 Mass. 139.

On an indictment for selling spirituous liquors in quantities less than one quart, it appeared that a customer was in the habit of going to the defendant and contracting for the purchase of a quart of liquor, but that he took away only one pint at a time. Held, that only a pint was sold at each time a pint was delivered. *Murphy v. State*, 1 Smith (Ind.) 261.

An agreement for the sale of a quart of liquor, the price of a quart being paid, and one pint taken away by the purchaser, the other pint remaining in the cask with other liquor, is a sale of less than a quart, under the statute of Indiana prohibiting such sales. *Murphy v. State*, 1 Ind. 366.

In North Carolina, on an indictment for retailing spirits by the small measure without a license, it appeared that the agreement was, to deliver to the purchaser from time to time, spirits, in parts of a quart, as he should call for them, the purchaser to take, in the whole, a quart in quantity, and the seller not to exact payment until that quantity was received. Held, that this was a violation of the act prohibiting sale of spirits by the small measure without a license. *State v. Kirkham*, 1 Ired. (N. Car.) L. 384.

A sold to B a quart of spirituous liquor, and it was agreed that A should retain it in a separate vessel, and that B should have access to it when he pleased, under which agreement the buyer drank the whole at various times. On the trial of an indictment against A, for selling spirits by retail (which indictment had no averment of an intent to evade the statute), the court held that the defendant was not guilty of violating the statute. *State*

v. Bell, 2 Jones (N. Car.) L. 337.

Same—Contribution Among Purchasers.—A, wanting a pint of whiskey, tried to buy it of B, who, not having any, and wanting some for himself, took from A the price of a pint, added thereto enough to make the price of a gallon, bought a gallon of C with the money, and let A have a pint of it. Held, not a sale of less than a gallon by B to A. *Johnson v. State*, 63 Miss. 228.

Same—Sale of Merchandise.—In *Com. v. Thayer*, 49 Mass. (8 Metc.) 525, A, who has no license to sell spirituous liquors, took money of B for some other article, which B received from him, and B thereupon took A's spirituous liquor without any word concerning it; and this was held to constitute a sale of liquor, and that A was guilty of the violation of the statute, if any part of the money given by B and received by A was in payment for the liquor.

In *Archer v. State*, 45 Md. 33, the defendant, having no license to sell liquors, sold cigarettes, worth from a quarter to a half a cent each, for ten cents apiece, and then invited the purchaser to drink liquors with him. The court said: "There can be no question that if the price asked for the cigarettes was intended to cover the price of the whiskey, which was afterwards nominally given to the purchasers, the transaction was a sale of the whiskey, as well as of the cigarettes. Such an attempt to evade the law is a very shallow one, and testimony tending to show that this was the real character of the transaction was admissible to establish the offence for which the traverser was indicted." *Walter v. Com.*, 88 Pa. St. 137; s. c., 32 Am. Rep. 429.

In *Williams v. State*, 23 Tex. App. 499, defendant was indicted for engaging in pursuing and following the occupation of selling spirituous liquors in quantities less than one quart, without first obtaining a license therefor. It appeared that he had some whiskey on hand, but always refused to sell it because he had no license to do so; that on several occasions he let parties help themselves to whiskey in bottles, and he gave some to others. Held, that the evidence failed to show that whiskey selling was an occupation pursued by him.

Same—Hole in a Table.—An indictment for unlicensed retailing of spirituous liquors, the evidence of the

6. Selling on Prohibited Days.—There are certain days upon which the sale of intoxicating liquors is prohibited, such as election days,¹

prosecuting witness was that the defendant had a room wherein was a table with a hole in the top and a vessel on it containing such liquor; that at sundry times witness went into the room, poured out a drink of the spirits, less than a quart, and having drunk it, dropped some money, at the rate of a nickel for a drink, into the hole, defendant being present, and nothing being said to him or by witness. Held, no error in refusing to charge that there was no evidence of a sale or contract for the sale of the liquor, and in charging instead that, if the jury should believe from the testimony that the liquor drunk by witness was the property of defendant, and that he received the money put into the hole by the witness as payment thereof and that this was a device to evade the statute against retailing, defendant was guilty. *State v. McMinn*, 83 N. Car. 668.

1. *State v. Cady*, 47 Conn. 44; *State v. Kidd*, 74 Ind. 554; *Cearfoss v. State*, 42 Md. 403; *State v. Sinnott*, 15 Neb. 472; *People v. Murphy*, 5 Park. Cr. Cas. (N. Y.) 130; *Wooster v. State*, 6 Baxt. (Tenn.) 533; *State v. Powell*, 3 Lea (Tenn.) 164; *Smith v. State*, 18 Tex. App. 454; *Lawrence v. State*, 7 Tex. App. 192; *Haines v. State*, 7 Tex. App. 30.

Selling on Election Day.—In order to constitute the offence of selling or giving away intoxicating liquors on election day, in violation of the statute, the liquor must be sold or given away, in the voting precinct, village, town, or city in which the accused is a voter. *Smith v. State*, 18 Tex. App. 454.

It is said in *State v. Cady*, 47 Conn. 44, that the Connecticut statute forbidding the keeping open on the day of any electors' meeting, of any place where it is reputed that intoxicating liquors are sold, requires such a place to be closed on the days of the electors' meeting, even though the occupant has a license to sell liquors.

In *State v. Powell*, 3 Lea (Tenn.), 164, the defendant was indicted under the Tennessee Code, for keeping open his liquor shop on election day; an indictment charging that defendants "did unlawfully keep open their liquor shop, which is situated within one half mile

of the election ground," on the 21st day of November, "said 21st day of November being an election day," etc. The court held, on appeal, that it was not a matter of law whether half a mile from the voting place was too far to incur the penalties of the statute, and that the presumption was that the election was duly held.

The supreme court of Nebraska say in *State v. Sinnott*, 15 Neb. 472, that persons selling liquor on election days in violation of the statute are punishable by indictment.

The words "during the entire day of any election" mean from midnight to midnight. *Haines v. State*, 7 Tex. App. 30; *Lawrence v. State*, 7 Tex. App. 192.

Where, after the polls were closed, a licensed retailer opened his saloon and invited bystanders in to drink, held, that he was guilty of keeping "open" a liquor establishment on election day; the fact that he kept other commodities for sale in the same house, and paid a tax as merchant, was immaterial. *Haines v. State*, 7 Tex. App. 30.

The giving of spirituous liquors in one's own house on the day of election to a friend in the course of hospitality is a violation of the Maryland act of 1865, ch. 191, prohibiting the sale or giving of spirituous or fermented liquors in the several counties of the State on the day of elections. *Cearfoss v. State*, 42 Md. 403.

Any person keeping an inn, tavern or hotel, having a license to sell spirituous liquors and wines to be drunk in his house, who sells or gives away any intoxicating liquors or wines on any day and time when an election or town meeting is held within a quarter of a mile of the place of such election or town meeting, is guilty of a misdemeanor under the New York Laws of April 16th, 1857 (Laws of 1857, ch. 648, § 21). *People v. Murphy*, 5 Park. Cr. Cas. (N. Y.) 130.

Municipal Election—Water Works.—An election by a city, under Indiana act of March 25th, 1879, § 1, authorizing cities to construct water works, held, to be a "municipal election," within the meaning of the act of March 5th, 1877, § 1, prohibiting the sale of intoxicating liquors on days

holidays¹ and Sundays.²

when municipal elections are held. *State v. Kidd*, 74 Ind. 554.

The term "liquor shop," as used in the Tennessee act of 1870, prohibiting "keeping open a liquor shop" on an election day, applies to a dwelling house where liquor is sold. *Wooster v. State*, 6 Baxt. (Tenn.) 533.

School Election.—The provisions of a general election law against giving away or selling intoxicating liquor on election day, does not apply to an election for a school director at an annual school meeting, provided for by the school laws of the State. *Stout v. State*, 43 Ark. 413.

1. *Ruge v. State*, 62 Ind. 388; *People v. Minter*, 59 Mich. 557; *Reithmiller v. People*, 44 Mich. 280.

"Keeping Open"—Open for any Purpose.—It is said by the supreme court of Michigan, in *People v. Minter*, 59 Mich. 557, that a charge which authorizes a conviction of one accused of keeping his saloon open on a holiday, if it should appear that it was open "for any purpose," is erroneous. See *People v. Waldvogel*, 49 Mich. 337. Compare *Patten v. Centralia*, 47 Ill. 370.

Christmas is a legal holiday within the meaning of a statute which directs all saloons to be closed on legal holidays, Sundays and election days. *Reithmiller v. People*, 44 Mich. 280.

2. See *State v. McMahon*, 53 Conn. 407; *State v. Ryan*, 50 Conn. 411; *State v. Barr*, 39 Conn. 40; *Hall v. State*, 4 Harr. (Del.) 132; *Sanders v. State*, 74 Ga. 82; *Hussey v. State*, 69 Ga. 54; *Harvey v. State*, 65 Ga. 568; *Hall v. State*, 3 Ga. 18; *Siebold v. People*, 86 Ill. 33; *Kroer v. People*, 78 Ill. 294; *Patten v. Centralia*, 47 Ill. 370; *Koop v. People*, 47 Ill. 327; *Bloomington v. Strehle*, 47 Ill. 72; *Weidman v. People*, 7 Ill. App. 38; *Shepler v. State*, 114 Ind. 194; *Tilford v. State*, 109 Ind. 359; *Dant v. State*, 106 Ind. 79; *Barton v. State*, 99 Ind. 89; *Morris v. State*, 47 Ind. 503; *Schlict v. State*, 31 Ind. 246; *Parker v. State*, 27 Ind. 393; *State v. Drischel*, 26 Ind. 154, 180; *Hingle v. State*, 24 Ind. 35; *Hingle v. State*, 22 Ind. 462; *Wood v. State*, 21 Ind. 276; *State v. Thomasson*, 19 Ind. 99; *Rosenbaum v. State*, 4 Ind. 599; *Seim v. State*, 55 Md. 566; s. c., 39 Am. Rep. 419; *State v. Fearson*, 2 Md. 310; *Com. v. Moore*, 145 Mass. 244; *Com. v. Hagan*,

140 Mass. 289; *Com. v. McCurdy*, 109 Mass. 364; *Com. v. Hyneman*, 101 Mass. 30; *People v. Cox*, (Mich.) 38 N. W. Rep. 235; *People v. Cummerford*, 58 Mich. 328; *People v. Higgins*, 56 Mich. 159; *People v. Blake*, 52 Mich. 566; *People v. Roby*, 52 Mich. 577; s. c., 50 Am. Rep. 270; *People v. Waldvogel*, 49 Mich. 337; *Elkin v. State*, 63 Miss. 129; *State v. Burnett*, 77 Mo. 570; *State v. Huffschtmidt*, 47 Mo. 73; *State v. Sinnott*, 15 Neb. 472; *Houtsch v. Jersey City*, 29 N. J. L. (5 Dutch.) 316; *People v. Krank*, 110 N. Y. 488; s. c., 46 Hun (N. Y.) 632; *Schwab v. Mayforth*, 1 N. Y. City Court, 177; *1st* *re Breslin*, 7 N. Y. St. Rep. 764; *Wood v. City of Brooklyn*, 14 Barb. (N. Y.) 425; *Pulling v. People*, 8 Barb. (N. Y.) 384; *People v. Murphy*, 5 Park. Cr. Cas. (N. Y.) 130; *People v. Page*, 3 Park. Cr. Cas. (N. Y.) 600; *Van Zant v. People*, 2 Park. Cr. Cas. (N. Y.) 168; *State v. Wool*, 86 N. Car. 708; *Lincolnton v. McCarter*, Busb. (N. Car.) L. 429; *Com. v. Naylor*, 34 Pa. St. 86; *Omit v. Com.*, 21 Pa. St. 426; *State v. Sharrer*, 2 Coldw. (Tenn.) 323; *State v. Eskridge*, 1 Swan. (Tenn.) 413; *Keller v. State*, 23 Tex. App. 259; *Craddock v. State*, 18 Tex. App. 567; *Angerhoffer v. State*, 15 Tex. App. 613; *Thon v. Com.*, 31 Gratt. (Va.) 887; *State v. Wacker*, 71 Wis. 672; *Jensen v. State*, 60 Wis. 577.

"Other Person."—Under a statute which makes it an offence for "any tavern keeper or other person" to sell liquors on Sunday, the words "other person" mean a person engaged in the business of selling liquor. *Jensen v. State*, 60 Wis. 577.

To convict for selling liquor under a city ordinance enacting that "no person shall keep open, or permit to be kept open, any saloon or place licensed under this ordinance, nor give away, barter, exchange, or sell any liquors of any description on Sunday," it is necessary to prove the defendant was a licensed saloon keeper. *Bloomington v. Strehle*, 47 Ill. 72.

A town ordinance imposed a penalty on any licensed retailer, who should, on Sunday, "open his shop, where he retails, for the purpose of selling," etc., of the sum of \$25 for each offence of selling, etc. Held, that no penalty was incurred, except for selling. *Lincolnton v. McCarter*, Busb. (N. Car.) L. 429.

Selling Beer on Sunday is not Sabbath-breaking within the meaning of the act of 1866, ch. 66. *Seim v. State*, 55 Md. 566; s. c., 39 Am. Rep. 419.

Same—Sale by Israelites.—It is no defence to a complaint under Massachusetts stat. 1868, ch. 141, § 10, for selling intoxicating liquors on the Lord's day, without a license, that the defendant was a Jew, and conscientiously believed that the seventh day ought to be observed as the Sabbath. Otherwise in a prosecution for violating the secular labor law, ch. 84, *Com. v. Hyneman*, 101 Mass. 30.

Indictable Offence.—The supreme court of Missouri say, in the case of *State v. Huffschmidt*, 47 Mo. 73, that selling liquor on Sunday is not an indictable offence under the Missouri statute, but in other States the sale of liquors in any quantity on Sunday is an indictable offence under the State statute and city ordinances. See *State v. Sinnott*, 15 Neb. 472; *State v. Eskridge*, 1 Swan. (Tenn.) 413.

The supreme court of Illinois say, in *Siebold v. People*, 86 Ill. 33, that one may be indicted for keeping open a tippling house on Sunday, in a corporate city, if the municipal authorities have been authorized to act and do not have exclusive jurisdiction in the premises.

Under a statute declaring it a misdemeanor for any tavern or hotel keeper, having a personal license to sell liquors, to sell or give away intoxicating wines or liquors on Sunday, is not applicable other than to those indicted, and it is not an indictable offence under the statute to sell or give away intoxicating liquors or wines on Sunday, when the act is done by a person not licensed to sell liquors, or who is not the keeper of an inn, tavern or hotel. *People v. Krank*, 110 N. Y. 488.

Liability to Prosecution for Selling Without a License.—A conviction is proper under an indictment for selling without a license, although the proof shows that the sale was on Sunday. The fact that the law makes special provisions for the punishment of a sale on Sunday, whether the accused has a license or not, does not alter the general provisions of the law prohibiting sales without license so as to render it inapplicable to sales made on Sunday. *People v. Krank*, 110 N. Y. 488.

Liability for Maintaining Nuisance.—A building kept and used for the purpose of selling intoxicating liquors on Sunday is a nuisance within the

meaning of Massachusetts Gen. Stat., ch. 87, §§ 6, 7, and an indictment under that statute for keeping a tenement for the illegal sale of intoxicating liquor is supported by evidence of sales on Sunday, although the liquor is such that its sale on other days would not be illegal. *Com. v. McCurdy*, 109 Mass. 364.

The Wisconsin Revised Statute (§ 1563) declares all places in which intoxicating liquors are sold in violation of law to be public nuisances. Held, that a sale of liquor on Sunday by a licensed saloon keeper is not, in the absence of evidence showing that a city ordinance had been passed forbidding the sale of liquor on that day, such a violation of the law as to render the place in which it was sold a nuisance. *State v. Wacker*, 71 Wis. 672.

Sale by Licensed Person—Indiana Doctrine.—It is said that although a license granted under the Indiana liquor law of 1859 does not authorize the selling on Sunday, yet none of the penalties imposed embrace the case of a sale on Sunday made by a licensed person. *Parker v. State*, 27 Ind. 393; *State v. Drischel*, 26 Ind. 154, 180; *Hingle v. State*, 24 Ind. 35. See *Rosenbaum v. State*, 4 Ind. 599.

Inn and Hotel Keepers.—*Com. v. Naylor*, 34 Pa. St. 86, holds that the sale of liquors on Sunday by a licensed inn keeper, is not an indictable offence under the Pennsylvania statutes of 1834, 1849, and that the only penalty incurred by such an act is one imposed by the law of 1874 forbidding worldly employment on the Lord's day. And it was said in *Hall v. State*, 4 Harr. (Del.) 132, that the sale of liquor by an inn holder on Sunday is not a profanation of the Lord's day; he being obliged by his occupation to keep a public house of entertainment at all times, but this was altered by statute in 1847.

The prevailing doctrine at present is that any inn, hotel or tavern keeper having a license to sell spirituous liquors or wine to be drunk in his house, who sells or gives away intoxicating liquors or wines on Sunday, is guilty of a misdemeanor and may be prosecuted therefor by indictment. See *Com. v. Hagan*, 140 Mass. 289; *People v. Murphy*, 5 Park. Cr. Cas. (N.Y.) 130; *Jensen v. State*, 60 Wis. 577.

A person, licensed as an inn holder, and to sell intoxicating liquors to be drunk on the premises, may be convicted of keeping and maintaining a tenement

used for the illegal sale and illegal keeping of intoxicating liquors, if he sells and delivers such liquors to persons on the Lord's day, although, before supplying such persons with liquors, he requires them to eat a cold lunch placed on a table at which the liquors are served. *Com. v. Hagan*, 140 Mass. 289.

The Wisconsin statute provides that "if any tavern keeper or other person shall sell" intoxicating liquors on Sunday, he shall be guilty of a misdemeanor, etc. Held, that a "tavern keeper," within the meaning of the act, is a person whose business, in part at least, is to sell such liquors, and the words "or other person" must refer to a similar class of persons, and include, therefore, only those engaged in the business of selling liquors. *Jensen v. State*, 60 Wis. 577.

Same—Housekeeper.—Under the statute which provides that "no housekeeper shall sell any strong liquor on Sunday, or suffer any drunkenness, gaming, or unlawful recreations in his or her house," it was held that a tavern keeper is a housekeeper in the contemplation of this act; and the term gaming, as there used, is synonymous with betting on games. *State v. Fearson*, 2 Md. 310.

Same—Sale to Guests.—Under the statutes of New York regulating the sale of spirituous liquors, hotel keepers and inn keepers have a right to sell spirituous liquors to their guests on Sunday, to be used with their meals. *In re Breslin*, 45 Hun (N. Y.) 210.

Under a statute prohibiting the keeping open on Sunday of any place in which it is reputed that intoxicating liquors are kept for sale, if the reputation applies to the whole house, it may yet be kept open on Sundays for the admission of boarders and travellers. *State v. Ryan*, 50 Conn. 411.

A statute which provides that a licensed inn holder may supply intoxicating liquor to guests who have resorted to his house for food and lodging, clearly excludes those who resort there for the purpose of procuring and drinking intoxicating liquor on Sundays. *Com. v. Hagan*, 140 Mass. 289.

Persons who resort to an inn on the Lord's day for the purpose of procuring and drinking liquor are not guests, within the meaning of Massachusetts Pub. Stat., ch. 100, § 9, cl. 2. *Com. v. Moore*, 145 Mass. 244.

But it has been held that it is not a misdemeanor under the statute, for an

inn keeper to sell drink to be taken on the premises on Sunday to persons not lodgers or travellers. *Van Zant v. People*, 2 Park. Cr. Cas. (N. Y.) 168.

Same—What Constitutes a Sale.—The supreme court of New Jersey, held in the case of *Houtsch v. Jersey City*, 29 N. J. L. (5 Dutch.) 316, that having liquors exposed at the bar without having some affirmative act offering to make sale of them, is not an offence against an ordinance providing that no licensed tavern keeper shall expose intoxicating liquors for sale on Sunday.

Sale by Druggists for Medical Purposes.—It is said in *Elkin v. State*, 63 Miss. 129, that a statute prohibiting keeping open on Sunday is applicable to a druggist who sells liquors in the same store unless that part where drugs are kept does not afford access to the place where liquors are sold.

Under a statute forbidding the sale of intoxicating liquor on Sunday, "unless the person to whom the same is sold shall have first procured a written prescription therefor from some regular practicing physician in the county where the same is sold." A druggist who sells such liquors on Sunday without a physician's prescription will be liable to fine and prosecution, although the liquor is used for medical purposes, and this fact is known to the druggist at the time of the sale. *Barton v. State*, 99 Ind. 89; *State v. Wool*, 86 N. Car. 708. See *Shepler v. State*, 114 Ind. 194; *Tilford v. State*, 109 Ind. 359.

The fact that the druggist making the sale is himself a physician is no defence to the indictment. *Tilford v. State*, 109 Ind. 359.

Giving Away Liquors on Sunday.—The supreme court of Indiana say in the case of *Dant v. State*, 106 Ind. 79, that where the indictment charged a sale on Sunday and the evidence did not show any payment or contract to pay for the liquor, which the witness drank, the evidence will not be set aside for variance, because a gift is as much a violation of the statute as a sale.

But where a statute does not prohibit the giving away of intoxicating liquor on Sunday, but only denounces its sale, a conviction cannot be sustained unless a sale is proved. *State v. Burnett*, 77 Mo. 570; *Keller v. State*, 23 Tex. App. 259.

And where a statute provides *inter alia* that it shall be a misdemeanor for an inn, tavern or hotel keeper, or a person licensed to sell liquor, to sell or

give away any intoxicating liquor on Sunday, such statute is said not to include in this clause a person not an inn holder. *People v. Page*, 3 Park. Cr. Cas. (N. Y.), 600.

Keeping Place Open—What Constitutes.—Keeping a place open for the use of family and boarders is not a violation of the statute prohibiting keeping open on Sunday. *State v. McMahon*, 53 Conn. 407; *Com v. Lattinville*, 120 Mass. 385. And the mere opening of a house on Sunday and permitting people to resort there, no tipping being intended or permitted, will not constitute the offence of keeping open a tipping house on Sunday. *Weidman v. People*, 7 Ill. App. 38.

But it has been held in Michigan to be a violation of the statute of that State against keeping saloons open on Sunday, that the saloon was open for the purpose of being cleaned, although no liquor was sold. *People v. Waldvogel*, 49 Mich. 337; *People v. Minter*, 59 Mich. 557. Compare *Patten v. Centralia*, 47 Ill. 370.

Same—Tipping Houses.—A boarding house keeper will be held liable for keeping open a tipping house on Sunday, though he sell but a single glass of beer, provided his saloon is then accessible to the public. *Koop v. People*, 47 Ill. 327.

But merely opening the door does not constitute the offence, unless it be kept open as on secular days. *Patten v. Centralia*, 47 Ill. 370.

A conviction of keeping open a tipping house on Sunday held, sustained by proof that the house was a tipping house, that it was kept open on Sunday, and that defendant was its owner, although defendant may not have been visible to those resorting to the house for the purpose of tipping. *Sanders v. State*, 74 Ga. 82.

It is not necessary to constitute the offence of keeping a tipping house open the Sabbath day, under the Illinois statute, that the house be kept open as on week days. It will be within the offence named if it is so kept that access may be had thereto on the Sabbath, and facilities afforded for the obtaining of intoxicating drinks, and it is not material whether the access is by the front door or back door, or whether the door is kept open or is only opened on application for admittance. *Kroer v. People*, 78 Ill. 294.

Same—Saloons.—A saloon is not "closed" so long as customers can get

through a door and get liquor, or so long as they are there, nor is it material that the bar keeper is not there if the customers can help themselves. *People v. Cummerford*, 58 Mich. 328.

Where a saloon keeper is prosecuted for violating the law which requires all saloons to be closed on Sunday, the respondent's intention in allowing his saloon to be opened is immaterial; and the same is true even where the opening was the act of his bar tender and without his knowledge or express authority. *People v. Blake*, 52 Mich. 566; *People v. Roby*, 52 Mich. 577; s. c., 50 Am. Rep. 270.

Same—Part of Premises—Adjoining Rooms.—Where the law requires tipping houses to be closed on the Sabbath day, if the whole house is used for tipping purposes it must all be closed; if any or part is so used, that must be closed. Where a part of a tipping house was used for a bed room, and between that part and the saloon there was an open way unclosed by a door, or otherwise, keeping open a door permitting ingress and egress to and from the part used as a bed room on the Sabbath day, would amount to a violation of the statute. *Harvey v. State*, 65 Ga. 568.

Where a saloon keeper connects his living rooms with his saloon and occasionally serves liquor in them, they become part of the saloon and to open them on Sunday to others than his family is to violate the law against opening saloons on Sunday. *People v. Cox* (Mich.), 38 N. W. Rep. 235.

A saloon keeper had a bar in a front room, and two rooms in the rear used for drinking and card playing. Held, that the rear rooms were part of the saloon, and, if kept open on Sunday, the saloon was kept open. *People v. Higging*, 56 Mich. 159.

A saloon keeper occupied three rooms for that business, and lived over them. The rooms opened into one another from front to rear, and the rear room had an outer door. The bar was in the front room; the other two were used for card playing and drinking. Between the front and back rooms there was a hole in the wall. Held, that the saloon included the three rooms; and if any outsider had access to the rear rooms on Sunday, no matter for what purpose, the statute requiring the saloon to be kept closed on that day was violated. *People v. Higgins*, 56 Mich. 159.

7. Selling to Prohibited Persons—*a*. MINORS.—In most, if not all, of the States, statutes have been enacted prohibiting sales of intoxicating liquors to minors without the consent of their parents

Under the statute (Gen. Stats. Connecticut, p. 522, § 60) which forbids the keeping open on Sunday of any place in which it is reputed that intoxicating liquors are kept for sale, an entire hotel may come within the statute as having such a reputation, although liquor may not have been sold in every room in it. *State v. Ryan*, 50 Conn. 411.

Where a bar room is connected by inside halls with living rooms, through which the proprietor permits others than his family to pass into and from the bar room, he cannot open said rooms to the public on Sunday. *People v. Cox* (Mich.), 38 N. W. Rep. 235.

But where such other rooms are distinct from the bar and its supplies, he has the right to keep them open for living purposes on Sunday. *People v. Cox* (Mich.), 38 N. W. Rep. 235.

Michigan acts 1887, No. 313, § 7, providing that each violation thereof shall be a separate offence, does not apply to an offence of not keeping closed on Sunday, into which the selling of liquor does not necessarily enter. *People v. Cox* (Mich.), 38 N. W. Rep. 235.

One is guilty of keeping an open tipping house on Sunday if liquor be then retailed and drunk in his restaurant in the rear of his office, the buyer entering by simply pushing open the street door of the office; and this though the bar be concealed by a canvas on which is a sign, "Bar closed." *Hussey v. State*, 69 Ga. 54.

In Connecticut, on trial of a complainant for a violation of the statute against keeping open on Sunday, "a shop, store, saloon or other building in which it is reputed that spirituous and intoxicating liquors, ale, and lager beer, are exposed for sale," it appeared that the accused kept open an enclosed park, containing four acres of ground, within which was an unenclosed and uncovered platform for dancing, from which lager beer was sold. Held, that the statute was not intended to reach all sales of intoxicating liquors on Sunday, or all cases where such liquors are exposed for sale on that day, but was designed to reach cases where such liquors are kept in buildings for purposes of sale, until such buildings acquire the reputation specified in the

statute, and that neither the park nor the platform was a "house," "saloon," or "building," within the meaning of the statute. *State v. Barr*, 39 Conn. 41.

Kind and Quality of Liquor.—A statute prohibiting the sale of "spirituous liquors" on Sunday includes wine and ale. *State v. Sharrer*, 2 Coldw. (Tenn.) 323.

To sustain a prosecution under the Indiana act of 1865, it is said that it was not necessary to show that the quantity of liquor sold was less than a quart at a time. The statute prohibiting the sale by licensed retailers of any quantity of intoxicating liquor on Sunday. *Schlicht v. State*, 31 Ind. 246.

Particular Hours.—Where a general act makes it a penal offence to sell liquor on Sunday, and defendant holds a municipal license to sell liquor, and a municipal ordinance makes it an offence to sell between specified hours on Sunday, a conviction may be had for selling on Sunday at another hour than those during which the ordinance prohibits the sales. *Angerhoffer v. State*, 15 Tex. App. 613.

A sale of liquor at quarter of one on Monday morning is no violation of the statute that forbids the sale on Sunday, nor is it within a statute which forbids sales of liquors between one and five o'clock in the morning. *Schwab v. Mayforth*, 1 N. Y. City Ct. 177; citing *Pulling v. People*, 8 Barb. (N. Y.) 384; *Campbell v. International Ins. Co.*, 4 Bosw. (N. Y.) 310.

A statute prohibiting the sale of intoxicating drinks anywhere in the commonwealth, from twelve o'clock Saturday night to sunrise of the next Monday morning, and a city ordinance against keeping open a bar room on Sunday, are aimed at different offences, and have different penalties; and the latter is not within the proviso of the former. *Thon v. Com.*, 31 Gratt. (Va.) 887.

A general law required the closing of bar rooms on Sunday. A municipal charter authorized the city to close them on Sunday, and to prescribe hours for closing them. An ordinance of the city prohibited barter and traffic between 9 A.M. and 4 P.M. Held, that it was not an offence to sell liquor in the city at an hour between 9 and 4. *Cradock v. State*, 18 Tex. App. 567.

or guardian.¹ Under these statutes each sale of intoxicating liquors to a minor is a separate offence, and there may be as many convictions as there are sales made.² In some of the States, a violation of this law is made a misdemeanor, while in others there is only a penalty attached, and the offence, therefore, is not indictable.³

1. See *Page v. State*, 84 Ala. 446; *Hill v. State*, 62 Ala. 168; *Bain v. State*, 61 Ala. 75; *Adler v. State*, 55 Ala. 16; *Weed v. State*, 55 Ala. 13; *Marshall v. State*, 49 Ala. 21; *Merkle v. State*, 1 Ala. (Sel. Cas.) 45; s. c., 37 Ala. 139; *Maschwitz v. State*, 49 Ark. 170; *State v. Blahut*, 48 Ark. 34; *Gillan v. State*, 47 Ark. 555; *Foster v. State*, 45 Ark. 361; *Ward v. State*, 45 Ark. 351; *Rounders v. State*, 37 Ark. 399; *Edgar v. State*, 37 Ark. 219, 399; s. c., 45 Ark. 356; *Crampton v. State*, 37 Ark. 108; *Nale v. State*, 36 Ark. 150; *Redmond v. State*, 36 Ark. 58; s. c., 38 Am. Rep. 24; *Cloud v. State*, 36 Ark. 151; *State v. McMahon*, 53 Conn. 407; s. c., 55 Am. Rep. 140; *Dukes v. State*, 79 Ga. 795; *Loeb v. State*, 75 Ga. 258; *Reich v. State*, 63 Ga. 616; *Newman v. State*, 63 Ga. 533; *Johnson v. People*, 83 Ill. 431; *Albrecht v. People*, 78 Ill. 510; *Byars v. City of Mt. Vernon*, 77 Ill. 467; *Farmer v. People*, 77 Ill. 322; *McCutcheon v. People*, 69 Ill. 601; *Flynn v. Galesburg*, 12 Ill. App. 200; *Behler v. State*, 112 Ind. 140; *Mulreed v. State*, 107 Ind. 62; *Kreamer v. State*, 106 Ind. 192; *Bird v. State*, 104 Ind. 384; *Hunter v. State*, 101 Ind. 241; *Swigart v. State*, 99 Ind. 111; *Holmes v. State*, 88 Ind. 145; *Payne v. State*, 74 Ind. 203; *Johnson v. State*, 74 Ind. 197; *Robinius v. State*, 67 Ind. 94; *Moore v. State*, 65 Ind. 382; *Robinius v. State*, 63 Ind. 235; *Ihinger v. State*, 53 Ind. 251; *Ball v. State*, 50 Ind. 595; *Werneke v. State*, 50 Ind. 22; *Ward v. State*, 48 Ind. 289; *Goetz v. State*, 41 Ind. 162; *Ihrig v. State*, 40 Ind. 423; *State v. Clottu*, 33 Ind. 409; *Fitzenrider v. State*, 30 Ind. 238; *Simons v. State*, 25 Ind. 331; *Rineman v. State*, 24 Ind. 80; *Farbach v. State*, 24 Ind. 77; *State v. Kalb*, 14 Ind. 404; *State v. Hamilton*, 75 Ind. 238; *State v. Thompson*, 73 Iowa 282; *State v. Douglass*, 73 Iowa 279; *State v. Coenan*, 48 Iowa 567; *Jamison v. Burton*, 43 Iowa 282; *Com. v. Davis*, 12 Bush (Ky.) 240; *Baer v. Com.*, 10 Bush (Ky.) 8; *Ulrich v. Com.*, 6 Bush (Ky.) 400; *Parkinson v. State*, 14 Md. 184; s. c., 74 Am. Dec. 522; *Com. v. O'Leary*, 148 Mass. 95; *Com. v. Barnes*, 138 Mass. 511; *Com. v.*

Tabor, 138 Mass. 496; *Com. v. Uhrig*, 138 Mass. 492; *St. Goddard v. Burnham*, 124 Mass. 578; *Com. v. Lattinville*, 120 Mass. 385; *McNeil v. Collinson*, 130 Mass. 167; *Faulks v. People*, 39 Mich. 200; s. c., 33 Am. Rep. 374; *State v. McGinnis*, 30 Minn. 48; *State v. Richter*, 23 Minn. 81; *Ritcher v. State*, 63 Miss. 304; *Fahey v. State*, 62 Miss. 402; *Cox v. State (Miss.)*, 3 So. Rep. 373; *State v. Amor*, 77 Mo. 568; *State v. Slaughter*, 17 Mo. App. 142; *State v. McBrayer*, 98 N. Car. 619; *State v. Lawrence*, 97 N. Car. 492; *Perry v. Edwards*, 44 N. Y. 223; *Ross v. People*, 17 Hun (N. Y.) 591; *Farrell v. State*, 32 Ohio St. 456; s. c., 30 Am. Rep. 614; *Grepel v. State*, 32 Ohio St. 167; *State v. Munson*, 25 Ohio St. 381; *Hatfield v. Com.*, 120 Pa. St. 395; s. c., 14 Atl. Rep. 151; *Com. v. Jessup*, 63 Pa. St. 34; *Williams v. State*, 23 Tex. App. 70; *Lantzner v. State*, 19 Tex. App. 320; *Hunter v. State*, 18 Tex. App. 444; s. c., 51 Am. Rep. 319; *Pressler v. State*, 13 Tex. App. 95; *State v. Gilmore*, 9 W. Va. 641; *State v. Cain*, 9 W. Va. 559; *State v. Hartfiel*, 24 Wis. 60.

Sale to Minors.—On an indictment for selling liquor to two minors, it appeared in evidence that the defendant sold but to one; the court held that as the offence was complete when he sold to one, he was properly convicted. *Dukes v. State*, 79 Ga. 795.

Under the Mississippi code subjecting to penalty "any person who may own or have any interest in . . . liquor sold contrary to this act," it was held that the owner was subjected to the penalty imposed for sale to a minor under the statute. *Fahey v. State*, 62 Miss. 402.

Minority of Purchaser—Defendant's Intention.—In the case of *Marshall v. State*, 49 Ala. 21, on the trial of an indictment for selling liquor to a minor, a charge to the jury that the fact of the minority of the person to whom the liquor was sold is conclusive as to the defendant's intention was held to be erroneous.

2. *State v. Blahut*, 48 Ark. 34; *McNeil v. Collinson*, 130 Mass. 167.

3. *State v. Slaughter*, 17 Mo. App.

(1) *Ownership of Liquors; Knowledge and Consent to Sale.*—It is thought that the ownership of the liquors given to a minor is immaterial;¹ but where, under an indictment for the sale of intoxicating liquors to a minor, the proof does not show the sale to have been made with the knowledge or consent of the defendant, he should be acquitted.²

(2) *Knowledge or Belief as to Minority of Purchaser.*—The offence of selling liquor to a minor cannot, as a matter of law, be complete unless the seller had reason to believe the person to be a minor; and, though *prima facie*, his knowledge may be presumed to accord with the fact, yet he may show that the person was unknown to him, and looked like or represented himself to be an adult, or that the person's family or the community treated him as an adult.³ It is held, by a respectable number of cases,

142. See *State v. Thompson*, 73 Iowa 282; *State v. Douglass*, 73 Iowa 279; *Baer v. Com.*, 10 Bush (Ky.) 8; *State v. Amor*, 77 Mo. 568.

Under a statute providing that no one shall sell intoxicating liquors except for medicinal purposes, and then only when he has a permit from the county board of supervisors; but these sections contain no penalty for a violation of their provisions. Section 1539 forbids the sale of liquors by any person to minors, intoxicated persons or those who are in the habit of becoming intoxicated, and imposes a penalty for such sales to such persons, but does not make them misdemeanors. Section 1540 provides that if a person who does not hold a permit from the board of supervisors sells liquor to any person, he shall be deemed guilty of a misdemeanor. Plaintiff, who held a permit from the board of supervisors for the sale of liquors for unlawful purposes, was tried criminally for sales made by him to minors and intoxicated persons. Held, that a person holding such a permit, while liable to a civil action for the penalties imposed in section 1539, cannot be prosecuted criminally for such sales. *State v. Thompson*, 73 Iowa 282; *State v. Douglass*, 73 Iowa 279.

1. Under the Alabama code, the ownership of the liquors is immaterial, because it is the voluntary delivery into the possession of a minor, with or without anything being given in consideration, which the statute denounces and punishes. *Hill v. State*, 62 Ala. 168.

2. This is equally true whether the sale be made upon credit or for cash. *Ihrig v. State*, 40 Ind. 423.

On the contrary it has been held, in *Loeb v. State*, 75 Ga. 258, that where liquor is sold to a minor on the premises of defendant, he is guilty of the offence whether he was present or not, or knew or consented to the sale or not.

3. *State v. Kalb*, 14 Ind. 404. See *Hunter v. State*, 101 Ind. 241; *Robinson v. State*, 63 Ind. 235; *Ihrig v. State*, 53 Ind. 251; *Stephenson v. State*, 28 Ind. 272; *Jamison v. Burton*, 43 Iowa 282; *Faulks v. People*, 39 Mich. 200; s. c., 33 Am. Dec. 374; *Perry v. Edwards*, 44 N. Y. 223; *Williams v. State*, 23 Tex. App. 70; *Hunter v. State*, 18 Tex. App. 444; s. c., 51 Am. Rep. 319; *Pressler v. State*, 13 Tex. App. 93; *State v. Gilmore*, 9 W. Va. 641; *State v. Cain*, 9 W. Va. 559.

Reasonable Belief.—The supreme court of Michigan held, in the case of *Faulks v. People*, 39 Mich. 200; s. c., 33 Am. Rep. 374, that on a prosecution for selling intoxicating liquors to a minor, it is a good defence to show that the seller reasonably believed him of age. The court say: "It cannot be assumed that the legislature would attempt such a wrong as to punish a criminal act which involved no criminal intent; there can be no crime where there was no criminal mind. This principle is as old as the criminal law, and underlies the whole of it. *Pond v. People*, 8 Mich. 150." See to same effect *Farrell v. State*, 32 Ohio St. 456; s. c., 30 Am. Rep. 614.

Knowing or Having Reason to Believe.—Under the New York statute, the words "knowing or having reason to believe him to be," applies to minors as well as to Indians and ap-

that a necessary element of the offence of selling intoxicating liquors to minors is, that the accused knowingly sold the liquor to a minor, and this knowledge must be alleged in the indictment and sustained by the proof;¹ but a contrary doctrine prevails in some courts,² where it is held that the vendor sells at his peril, and that it is incumbent upon him to know that his

prentices, and in an action to recover the penalty therein provided for the sale of spirituous liquors to a minor under the age of eighteen years, the plaintiff has the burden of showing that the defendant knew or had reason to believe that the person to whom the sale was made was not that age. *Perry v. Edwards*, 44 N. Y. 223.

Evidence of Minority—Personal Appearance.—It was held by the supreme court of Indiana, in the case of *Robinus v. State*, 63 Ind. 235; s. c., 51 Am. Rep. 322, note, that a sale of intoxicating liquors to a minor made by the seller in the reasonable and honest belief that such minor is of full age, is not the violation of the liquor law, and that the court has no right to take into account, in determining the guilt or innocence of such seller, the personal appearance of such minor as to age. The court say: "It was further shown, however, by the bill of exceptions, that 'the court, without being requested thereto by the counsel for the State, or by anyone else, having personally inspected the appearance of the witness, Edward Geisendorff, who was present in court and testified as a witness, took his youthful appearance into consideration in determining the question of defendant's guilt or innocence, to which the said defendant at the time objected and excepted.' This action of the court was assigned by the appellant as a cause for a new trial in his motion therefor, and we think it was well assigned. The question presented thereby is not a new question in this court; substantially the same question was decided in the case of *Stephenson v. State*, 28 Ind. 272, and again in the more recent case of *Ingber v. State*, 53 Ind. 251. In these cases it was held in substance, and we think correctly, that the personal appearance of a party or witness cannot be considered by a court or jury as evidence in determining the question of the age of such party or witness. The cases cited are decisive of the case now before us."

Same—Beard of Minor.—The supreme court of Indiana held, in the case of *Hunter v. State*, 101 Ind. 241,

that it is error to withdraw from the consideration of the jury the fact that the minor had a beard, where the question to be determined is the one of reasonable cause to believe the minor over age.

Proof of Knowledge.—The court of appeals of Texas say, in the case of *Hunter v. State*, 18 Tex. App. 444; s. c., 51 Am. Rep. 319, that under a statute punishing the sale of intoxicating liquors to a minor with knowledge that he is under age, the knowledge of the minority must be explicitly proved; it cannot be presumed even in cases of a purchaser only sixteen years old. The court say: "In creating this offence our statute uses the word 'knowingly,' and it is, therefore, an essential element of the offence that the defendant knew at the time he sold the liquor that the purchaser thereof was under the age of twenty-one years. This knowledge must, therefore, not only be alleged, but must be affirmatively proved." *Pressler v. State*, 13 Tex. App. 95.

1. *Pressler v. State*, 13 Tex. App. 95. See *Williams v. State*, 23 Tex. App. 70; s. c., 3 S. W. Rep. 661; *Hunter v. State*, 18 Tex. App. 444; s. c., 51 Am. Rep. 319.

The Texas statute, defining the offence of selling intoxicating liquors to minors, employs the word "knowingly" in such a manner as to constitute the knowledge an essential element of the offence, and in order to support a conviction, the evidence, either direct or circumstantial, must show that when the defendant sold the liquor he knew that the person to whom he sold it was a minor. *Hunter v. State*, 18 Tex. App. 444; s. c., 51 Am. Rep. 319.

2. *Jamison v. Burton*, 43 Iowa 282; *State v. Gilmore*, 9 W. Va. 641; *State v. Cain*, 9 W. Va. 559.

Knowledge by the seller, or reasonable cause to believe, that the buyer of liquor was a minor, is not necessary to constitute the offence, under West Virginia statute, of selling to a minor without consent of his parent, etc. If the buyer was in fact a minor, the seller must show, that the sale was made on

the prescribed written order, in order to justify it. *State v. Gilmore*, 9 W. Va. 641; *State v. Cain*, 9 W. Va. 559.

The sale of intoxicating liquors to a minor is within the prohibition of Iowa code (§ 1539), notwithstanding the seller had no knowledge that the purchaser was under age; and his knowledge of that fact need not be alleged in the petition, in an action for the benefit of the school fund, founded on such sale. *Jamison v. Burton*, 43 Iowa 282.

Effect of Knowledge as Defence or Justification.—It is held by some cases that under a statute forbidding the sale of intoxicating spirits to a minor without written consent of their parents or guardians, an honest belief that the purchaser is of full age will not absolve the seller in case of mistake. *Crampton v. State*, 37 Ark. 108; *Pounders v. State*, 37 Ark. 399; *Redmond v. State*, 36 Ark. 58; s. c., 38 Am. Rep. 24; *Mulreed v. State*, 107 Ind. 62; *Com. v. Barnes*, 138 Mass. 511; *Com. v. Uhrig*, 138 Mass. 592. See as bearing upon this question *Sikes v. State*, 30 Ark. 496; *Smyth v. State*, 13 Ark. 666; *Com. v. Emmons*, 98 Mass. 6; *Com. v. Waite*, 93 Mass. (11 Allen) 264; s. c., 88 Am. Dec. 711; *Com. v. Farren*, 91 Mass. (9 Allen) 489; *Com. v. Boynton*, 84 Mass. (2 Allen) 160; *State v. Hartfiel*, 24 Wis. 60.

Inquiry of Purchaser as to His Age.—In the case of *State v. Hartfiel*, 24 Wis. 60, the evidence for the prosecution showed that the defendant enquired of the minor before letting him have the liquor whether he was of age and received an answer in the affirmative, and also showed that the minor was six feet and one inch in height; the jury were instructed that ignorance or mistake on the part of the accused as to the age of the minor was no defence, and he was convicted. The question of the correctness of the instruction was certified by the supreme court. *DICKSON, C. J.*, said: "The words 'knowingly,' 'wilfully,' or other words of equivalent import, are omitted from the statute, and the offence is made to consist solely in the fact of the sale of intoxicating liquors or drinks to a minor. The authorities cited are to the effect that where a statute commands that an act be done or omitted, which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse." *Citing Barnes*

v. State, 19 Conn. 398; *Com. v. Wash*, 48 Mass. (7 Metc.) 472; *Com. v. Boynton*, 84 Mass. (2 Allen) 160; *Com. v. Farren*, 91 Mass. (9 Allen) 489; *Com. v. Waite*, 93 Mass. (11 Allen) 264; s. c., 87 Am. Dec. 711; *Com. v. Raymond*, 97 Mass. 567; *Com. v. Ellwell*, 43 Mass. (2 Metc.) 190; 2 Greenl. Ev., § 21. See *Redmond v. State*, 36 Ark. 58; s. c., 38 Am. Rep. 24, 27.

A party's belief, however honestly entertained, that a minor to whom he sells liquor without the consent of his parent or guardian is of full age will not justify or excuse him, but will mitigate his punishment. *Crampton v. State*, 37 Ark. 108; *Pounders v. State*, 37 Ark. 399.

A sale to a minor, under the belief that he was of lawful age, based upon appearances, will not excuse defendant, unless it appears he exercised due care to ascertain his age. *Mulreed v. State*, 107 Ind. 62.

One prosecuted for illegally selling liquor cannot defend on the ground of his ignorance of the fact that the purchaser was one of a class to whom a sale could not lawfully be made. *Com. v. Barnes*, 138 Mass. 511; *Com. v. Uhrig*, 138 Mass. 492.

Honest Belief Good Defence.—On the other hand, it is held that the sale of liquor to a minor by a licensed vendor, under the belief that he is an adult, is not an indictable offence. See *Dotson v. State*, 62 Ala. 141; s. c., 34 Am. Rep. 2; *Adler v. State*, 55 Ala. 16; *Kreamer v. State*, 106 Ind. 192; *Hunter v. State*, 101 Ind. 241; *Robinius v. State*, 63 Ind. 235; *Rineman v. State*, 24 Ind. 80; *Farbach v. State*, 24 Ind. 77; *Faulks v. People*, 39 Mich. 200; s. c., 33 Am. Rep. 374. *Compare Crampton v. State*, 37 Ark. 108; *Pounders v. State*, 37 Ark. 399.

In such a case the burden of proof is on the defendant to show honest belief. *Rineman v. State*, 24 Ind. 80; *Farbach v. State*, 24 Ind. 77.

A person cannot be convicted under a statute punishing selling liquor to a minor, if he honestly believed, on creditable information, that the purchaser was of age; for there is no criminal intent. *Adler v. State*, 55 Ala. 16.

Where the seller of intoxicating liquors to a minor, believes, and has good reason to believe, at the time of the sale, that the minor is an adult, he is not guilty of the offence prescribed by § 2094 of Indiana statute prohibiting sales to minors. *Kreamer v. State*, 106

customer is under no disability.¹ This conflict in the decisions is thought to be due to the wording of the various statutes.

It seems that the mere fact that one desiring to purchase intoxicating liquors looked as though he was twenty-one years old and so represented himself, is not sufficient of itself to excuse the sale.²

(3) *Kind and Character of Liquor*.—It has been said that statutes prohibiting the sale of intoxicating liquors to minors includes all fomented liquors commonly used as a beverage,³ cider and domestic wines,⁴ and "bitters."⁵

Ind. 192; *Hunter v. State*, 101 Ind. 241; *Robinius v. State*, 63 Ind. 235.

1. See *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, 37 Ark. 399; *Reich v. State*, 63 Ga. 616; *Farmer v. People*, 77 Ill. 322; *McCutcheon v. People*, 69 Ill. 601; *Flynn v. Galesburg*, 12 Ill. App. 200; *Mulreed v. State*, 107 Ind. 62; *Ulrich v. Com.*, 6 Bush (Ky.) 400; *State v. Hartfel*, 24 Wis. 60.

Showing Good Faith and Due Care.—One prosecuted for selling liquor to a minor must not only show that in good faith he believed from appearances that the buyer was not a minor, but must also show and exercise due care to ascertain the buyer's age. *Mulreed v. State*, 107 Ind. 62.

Some of the cases go further and hold that a dealer in intoxicating liquors must determine for himself, at his peril, whether one to whom he sells is a minor; if a minor, the dealer cannot shield himself from responsibility through his ignorance of the fact. *Flynn v. Galesburg*, 12 Ill. App. 200. Thus it is said by the supreme court of Arkansas, in the case of *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, 37 Ark. 399, that it is no excuse or justification to one who sells liquor to a minor without the written consent of his parents or guardian, that both he and the minor believed, at the time, that the latter was of age.

The supreme court of Illinois, in the cases of *Farmer v. People*, 77 Ill. 322, and *McCutcheon v. People*, 69 Ill. 601, say that upon a trial for selling liquor to a minor without consent of his parents or guardian, the fact that the defendant did not know the purchaser to be a minor furnishes no defence. Where the general law forbids all persons to sell liquor, except to those specially licensed, one who takes a license upon condition that he shall not sell to minors is bound to ascertain

whether a person applying to buy is a minor or not.

Sufficiency of Evidence—Extent of Enquiry.—The sale of spirituous liquors to a minor is sufficient to convict of the offence, unless the defendant, after due enquiry, was honestly mistaken in respect to the minor's age, and to show such mistake; while the dealer need not enquire of the parent alone as to the age of the person to whom he sells, yet he must exercise special diligence to ascertain the truth; and such diligence will not be manifested by enquiry of the minor alone or by such persons as have no better means of knowing than the dealer, but it must be of such persons as to satisfy the jury that the enquiry was honest, and not a mere subterfuge or cover for crime. *Reich v. State*, 63 Ga. 616.

Charge to Jury.—On the trial of an indictment for selling liquor to a minor, it is proper to charge that if the defendant sold liquor to a minor he was guilty, unless he used special diligence to ascertain whether he was a minor or not, and that the diligence should be such as to satisfy the jury that he was making honest enquiry to ascertain the truth. *Reich v. State*, 63 Ga. 616.

2. See *Behler v. State*, 112 Ind. 140; *Bird v. State*, 104 Ind. 384; *Swigart v. State*, 99 Ind. 111; *Moore v. State*, 65 Ind. 382; *Goetz v. State*, 41 Ind. 162.

3. *Markle v. State*, 1 Ala. (Sel. Cas.) 45; s. c., 37 Ala. 139.

4. *Hatfield v. Com.*, 120 Pa. St. 395; s. c., 21 Week. N. C. 455.

5. Upon a trial for selling intoxicating liquor to a minor without consent of his parent, etc., the proof showed that the liquors sold were "bitters" manufactured by defendant according to a formula prepared by a physician. Held, that the defendant had no ground of objection to the want of affirmative

(4) *Sale Not Authorized or Protected by Statute.*—Where the sale of intoxicating liquor to a minor is one of the prohibited sales which a license does not authorize a vendor by retail to make, it is immaterial whether the party making such sale has or has not a license to sell to another and a different class of persons.¹

(5) *Consent, etc., of Parent or Guardian.*—Under some statutes a vendor of intoxicating liquors may sell to a minor upon the written consent or direction of the parent or guardian of such minor.²

proof that he knew the intoxicating character of the liquors sold. Being the manufacturer, he was chargeable with knowledge of what they contained. *Byars v. City of Mt. Vernon*, 77 Ill. 467.

1. *State v. Hamilton*, 75 Ind. 238. See *Parkinson v. State*, 14 Md. 184; s. c., 74 Am. Dec. 522; *Com. v. Tabor*, 138 Mass. 496; *State v. McGinnis*, 30 Minn. 48.

In a prosecution for the sale of intoxicating liquors to a minor, under a statute which forbids "any person" to so dispose of intoxicating liquors, it is not material whether the accused was a person licensed to sell intoxicating liquors, nor whether his occupation was one of those named in that clause of the statute, to wit, that of a saloon keeper. *State v. McGinnis*, 30 Minn. 48.

An act to prohibit sale of intoxicating liquors to minors which make it unlawful for any person or persons, whether licensed or not, to sell or give such liquors to a minor, and which provides a penalty by fine, and that a licensed person shall have his license suppressed, applies to private individuals whether licensed or not. *Parkinson v. State*, 14 Md. 184; s. c., 74 Am. Dec. 522.

2. *Adler v. State*, 55 Ala. 16; *Mascowitz v. State*, 49 Ark. 170; *Pounders v. State*, 37 Ark. 399; *State v. Coenan*, 48 Iowa 567; *Com. v. Davis*, 12 Bush (Ky.) 240; *State v. Lawrence*, 97 N. C. 492; *Lantzner v. State*, 19 Tex. App. 320.

Written Consent of Parent, etc.—Proof that the minor's father had consented that he should drink lager beer does not establish a defence to a prosecution under a statute punishing one who sells to a minor without his father's consent. *Adler v. State*, 55 Ala. 16. The fact that a minor is carrying on business for himself will not justify a vendor of intoxicating liquors in selling to him with-

out the written consent or order of his parents or guardian. *Pounders v. State*, 37 Ark. 399.

"Parent."—The sale or gift of intoxicating liquor to a person under the age of twenty-one years, without the written consent of the parent or guardian of such minor, or other person standing in the place of such parent or guardian, is a penal offence in this State, under the provisions of article 376 of the penal code. "Parent," in common parlance, signifies father or mother, and, by express provision of article 22 of the penal code of this State, is made to include both male and female. "Father" or "mother," therefore, is not equivalent to the statutory word "parent;" and an information does not negative the consent of the "parent" by using the term "father" instead of "parent." The general rule is that the indictment or information should follow and conform to the statute denouncing the offence. When other words are used, the words substituted must be equivalent to the statutory terms, or be of a more comprehensive and extensive signification. *Lantzner v. State*, 19 Tex. App. 320.

In Arkansas.—The written consent of the father of a minor, as follows, "Please let my son Jack have anything in reason, or a drink when he wants it, and oblige a friend," signed and delivered to the defendant by the father, is a continuing authority to sell to such minor, and, until revoked, a complete defence to an indictment for selling liquor to such minor in ordinary retail quantities, without the consent of his parent or guardian. *Mascowitz v. State*, 49 Ark. 170; s. c., 4 S. W. Rep. 656.

In Kentucky.—Whenever a minor is furnished with spirituous, vinous, or malt liquor, by anyone other than his parent, without the special written direction of the father or guardian of such

and under others he cannot.¹

(6) *Joint Sale to Minor and Adult*.—Upon a prosecution for selling intoxicating liquors to a minor, if the evidence shows that there was a sale to the minor alone, or jointly with an adult, the saloon keeper is guilty of a violation of the statute prohibiting such a sale to a minor;² but a defendant cannot be convicted of selling liquor to a minor who merely delivers liquor to him under a purchase by another who treats the minor. In such case the sale is to the purchaser and not to the minor.³

(7) *Giving Away Liquor to a Minor*.—Under a statute prohibiting the sale of intoxicating liquors to a minor, giving such liquors to a minor is not within the terms of the statute, and not in-

minor, there is a violation of the law. *Com. v. Davis*, 12 Bush (Ky.) 240.

The North Carolina Code forbids all dealers in intoxicating "drinks or liquors" to sell in any manner, or to give away, to any unmarried person under the age of 21 years, knowing such person to be under that age, any such drinks or liquors, and makes it a misdemeanor and indictable to do so; and gives the father, or if he be dead, the mother, guardian or employer of any minor to whom such sale or gift shall be made, a right of action against the guilty party. Held, upon the trial of an indictment for the violation of said sections, that the fact that the father of the minor authorized the sale, did not furnish the defendant with any legal excuse or justification. *State v. Lawrence*, 97 N. C. 492.

Order Must be in Writing.—A party cannot justify the act of giving intoxicating liquors to a minor by establishing that he did it by order of the parent unless he shows that the order was in writing. *State v. Coenan*, 48 Iowa 567.

1. See *State v. Clottu*, 33 Ind. 409; *Grepel v. State*, 32 Ohio St. 167; *State v. Lawrence*, 97 N. C. 492.

A liquor seller is no less guilty in selling to a minor because the minor's father has authorized the sale. *State v. Lawrence*, 97 N. C. 492.

Under the Indiana act (1 Gav. & H. 614) providing that a license to sell intoxicating liquors shall not authorize a sale "to any person under the age of twenty-one years," the fact that the father authorized the sale of such liquors to his child is no defence to an indictment for selling intoxicating liquors to a minor. *State v. Clottu*, 33 Ind. 409.

In Ohio.—On the trial of an indict-

ment under *Swan & S. Ohio Stat. 748*, for furnishing intoxicating liquor to a minor, knowing him to be such, with intent that he drink it, a written order from his father, directing the defendant to "sell" beer to the son until forbidden, is not competent evidence for the defence. Otherwise, if the indictment is under the act of 1854 for a sale to a minor. *Grepel v. State*, 32 Ohio St. 167.

2. *Edgar v. State*, 45 Ark. 356. See *Page v. State*, 84 Ala. 446.

Where a minor approaches a bar with one who calls for two drinks, and two glasses and a bottle are set up, and both drink, the bar keeper is guilty of a sale or gift to the minor, though he did not know one of the drinks was intended for him. *Page v. State*, 84 Ala. 446.

Where an adult and minor went into a saloon and drank liquor over the bar, which was paid for by the adult in checks, and it is not proved who called for the drinks, but the minor testified that he did not pay for them, that he was a bar tender at his father's saloon and frequently drank at other saloons without paying, and if the drinks were paid for he did not know it; whether the payment was made in checks, or there was no payment at all, is immaterial, it being the question of sale and not the payment. *Edgar v. State*, 45 Ark. 356.

3. *Ward v. State*, 45 Ark. 351.

"Treating" Minor—"Giving Away."—It is said in *Kruz v. State*, 79 Ind. 488, that an indictment for "giving away" liquor to a minor is supported by proof of a "sale" to a person of age who treated a minor.

And one who sold beer to an adult, who paid therefor, and gave one glass to C, a minor, who drank it, when there

dictable;¹ but where the act prohibits the sale or giving away of such liquors to minors, the rule is otherwise.²

(8) *Purchase by Third Person for Minor.*—One who sells liquor to another for the minor without notice of his purchase cannot be convicted of a sale to the minor;³ and if he at the minor's request, and with his money, purchased whiskey and delivered it to him, is not guilty of selling liquor to a minor,⁴ but such person is an aider and abettor in procuring the sale, and is punishable as such.⁵

(9) *Sale to Minor for Use of Another.*—The sale and delivery of intoxicating liquors to a minor is equally an offence whether made for the use of the minor or the use of any other person.⁶

was nothing to lead the seller to suspect that C furnished the money; held, not liable, under the Illinois Rev. St. 1874, ch. 43, § 6, punishing anyone who "shall sell or give intoxicating liquors to a minor." *Siegel v. People*, 106 Ill. 89.

1. *Gillan v. State*, 47 Ark. 555. See *Simons v. State*, 25 Ind. 331.

2. "Give" and "Sell."—Word "give" has different meaning from the word "sell" in an act making it unlawful to give or sell intoxicating liquor to minors. *Parkinson v. State*, 14 Md. 184; s. c., 74 Am. Dec. 522.

Under the Illinois Liquor Law of 1874, entitled "an act to provide for the licensing of, and against the evils arising from, the sale of intoxicating liquors," is aimed at such as keep a dram-shop; and the provisions of the 6th section, prohibiting the sale or giving away of liquors to minors or intoxicated persons, do not apply to a person who treats a friend at his private house as an act of hospitality. *Albrecht v. People*, 78 Ill. 510.

3. *Gillan v. State*, 47 Ark. 555.

Thus where, in an indictment for selling liquor to a minor, without the consent of his parent or guardian, it was proved that the minor gave the money to a negro to purchase it for him, and that the negro made the purchase of the defendant, in the minor's absence, without disclosing his agency, and the accused did not know, nor had any reason to suspect, that the negro was acting as agent for the minor, he cannot, upon the state of proof alone, be convicted of making a sale to the minor. *Gillan v. State*, 47 Ark. 555; s. c., 2 S. W. Rep. 185.

However, in Ohio, the supplying of intoxicating liquor to a minor to be drunk by him, is a furnishing of the liquor to such minor within the mean-

ing of the act of April 5th, 1866, although it may have been purchased by another and supplied by the seller to the minor in pursuance of such purchase. *State v. Munson*, 25 Ohio St. 381.

4. *Cox v. State* (Miss.), 3 So. Rep. 373. See *Bryant v. State*, 82 Ala. 51; *Young v. State*, 58 Ala. 358; *Johnson v. State*, 63 Miss. 230.

In Alabama, under an indictment for selling or giving intoxicating liquors to a minor (Code 1876, § 4205), a conviction cannot be had against a person who, not being interested in the sale of intoxicating liquor, purchased a pint for the minor, with money furnished for the purpose by the latter. *Bryant v. State*, 82 Ala. 51.

5. *Post*, V, 8 a (12), AIDING AND ABETTING SALE."

6. See *Holmes v. State*, 88 Ind. 145; *State v. Fairfield*, 37 Me. 517; *Com. v. O'Leary*, 148 Mass. 95; *O'Connell v. O'Leary*, 145 Mass. 311; *People v. Garrett* (Mich.) 36 N.W. Rep. 234; *Ritcher v. State*, 63 Miss. 304; *Ross v. People*, 17 Hun (N.Y.) 591; *State v. Lawrence*, 97 N. C. 492.

In such case the person for whose use the sale was made need not be alleged in the complaint. *Com. v. O'Leary*, 148 Mass. 95.

A statute which forbids the sale, giving, or furnishing of liquor to a minor is violated although the liquor delivered to the minor be intended for the use of an adult, the infant being only an agent in making the purchase. *People v. Garrett* (Mich.), 36 N. W. Rep. 234.

One who sells liquor to a minor, not knowing that the minor has been sent by an adult and for his use, is properly convicted of selling to a minor. *Ritcher v. State*, 63 Miss. 304.

The fact that when intoxicating liquor

(10) *Sale for Medical, etc., Purposes.*—Sale to minors for sacramental, medicinal, mechanical or business purposes are not prohibited by the ordinary statute forbidding sale and delivery to minors.¹

(11) *Bartering or Exchanging.*—It is thought that a statute prohibiting selling does not cover an exchange of liquor for other liquor of the same or of a different kind without agreement

was sold to a minor, he was acting for an adult, and purchasing for him, is immaterial, at least when the principal is undisclosed. *Ross v. People*, 17 Hun (N. Y.) 591.

A complaint alleging a sale to a minor may be sustained by evidence of a sale by a person having a license to a minor for the use of an adult, although the fact of its being for such adult's use was disclosed at the time of the sale. *Com. v. O'Leary*, 143 Mass. 95.

The statute prohibiting the sale of liquors to minors, etc., without written order of his parent, etc., is violated by delivery of such liquor to a minor, asking for it in behalf of one to whom it might lawfully have been sold. *State v. Fairfield*, 37 Me. 517.

Statement of Minor at Time of Purchase.—In a prosecution for the unlawful sale of intoxicating liquors to a boy eleven years old, the statement of the boy at the time, or the belief of the defendant founded on such statement, that the liquor was for the boy's sick mother, constitutes no valid or legal offence. *Holmes v. State*, 88 Ind. 145. Compare below, SALE FOR PARENT.

A contract for the sale of intoxicating liquor, made with a minor as the agent of a disclosed principal, is a sale to a minor for the use of another person, within the meaning of Massachusetts Pub., Stat. ch. 100, § 9, cl. 4, and it may be so alleged in the complaint, although the property in the liquor sold passes, not to the agent, but to the principal. *Com. v. O'Leary*, 143 Mass. 95.

Evidence offered to show that a minor to whom the liquor was sold was acting as the agent of an undisclosed principal, held, properly excluded. *Ritcher v. State*, 63 Miss. 304.

Sale for Parent.—Some cases hold that a statute forbidding the sale or delivery of any intoxicating liquor to a minor does not apply to a minor sent by his parents to buy liquor for them. See *State v. McMahon*, 53 Conn. 407; s. c., 55 Am. Rep. 140; *O'Connell v.*

O'Leary, 145 Mass. 311; *St. Goddard v. Burnham*, 124 Mass. 578; *Com. v. Latinville*, 120 Mass. 385. Compare *Holmes v. State*, 88 Ind. 145.

1. *Johnson v. State*, 74 Ind. 197; *Ball v. State*, 50 Ind. 595; *State v. Wool*, 86 N. Car. 708; *State v. Wray*, 72 N. Car. 253. *Contra*, *Page v. State*, 84 Ala. 446; *State v. McBrayer*, 98 N. Car. 619.

Sales for Medical Purposes.—The rule that a person who sells intoxicating liquor, on a proper occasion, in good faith and with due caution, for medical purposes only, is as much shielded by the spirit of the Indiana act of February 27th, 1873, as if he were exempted from the penalties of the act by express words, is applicable to sales to minors. *Ball v. State*, 50 Ind. 595.

A practicing physician who "keeps on hand intoxicating drinks or liquors for the purpose of sale or profit," and thus brings himself within the definition of a dealer in such drinks, is guilty of a violation of the code, § 1077, which forbids "dealers in intoxicating drinks or liquors" to sell or give the same in any quantity to unmarried minors, knowing them to be such, if he prescribes for an unmarried minor, knowing him to be such, or drinks liquors such as, in his judgment, the minor ought to take as a medicine, and thereupon sells or gives him the same, even if he honestly supposes that such act is not forbidden by the law. *State v. McBrayer*, 98 N. Car. 619.

Sale Without Physician's Requisition.

An indictment under Alabama Code, 1876, § 4205, charging a gift or sale of liquors to a minor "without the requisition of a physician for medicinal purposes," charges no indictable offence; the above act having been amended by act of February 26th, 1881, under which the sale is legal if made by or with the consent of the parent, guardian, or person having the management and control of the minor, or upon the prescription of a physician. *Page v. State*, 84 Ala. 446.

as to the price or reference to money payment because of such a transaction, is not a sale, but a barter or exchange.¹

(12) *Aiding and Abetting Sale*.—Anyone aiding or abetting, in the sale of intoxicating liquors to minors, in violation of law is liable to be punished on indictment the same as his principal.²

b. INDIANS.—The statute prohibits the sale of intoxicating liquors to Indians, and the payment of the special internal revenue tax for selling liquors in a collection district does not authorize the licensee to introduce liquors into the Indian country in violation of law, although such Indian country is within the collection district.³

c. NEGROES AND SLAVES.—In some of the States, the law prohibits a sale of intoxicating liquors within certain districts to negroes,⁴ and formerly slaves.⁵

d. INTOXICATED PERSONS AND HABITUAL DRUNKARDS.—There are in some of the States statutes in varying terms forbidding the sale of intoxicating liquors to intoxicated persons and habitual drunkards.⁶

1. Gillan v. State, 47 Ark. 555.

The court say in the above case that: "In Ward v. State, 45 Ark. 351, we were forced to that hold one who gave liquor to a minor could not be convicted of selling him the liquor under the statute, quoting with approval Siegel v. People, 106 Ill. 89. The court there say: 'We cannot construe the word "sell" in such a statute to mean something different from its ordinary import.' An exchange or a barter has a different legal import from a sale, as we pointed out by this court in Cooper v. State, 37 Ark. 412, determined under the statute making it penal to sell, barter or otherwise dispose of mortgaged property. See also Meyer v. Rousseau, 47 Ark. 460. Where one commodity is exchanged for another of the same or a different kind, without agreement as to price, or reference to money payment, the transaction is not a sale, but a barter or exchange. Cases *supra*, Gunter v. Leckey, 30 Ala. 591; Mitchell v. Gile, 12 N. H. 390; Woodford v. Patterson, 32 Barb. (N. Y.) 630; Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555."

2. See Foster v. State, 45 Ark. 361; Johnson v. People, 83 Ill. 431.

A person engaged in making change for parties engaged in unlawfully selling liquors to minors may be convicted, on indictment for selling the liquors, as aiding and assisting in the transaction. Johnson v. People, 83 Ill. 431.

One who with the money of the minor purchases liquor for the latter, in addition to being an agent of the minor

for the purchase, which is not punishable, is also an aider and procuror of the sale and therefore punishable as a principal in violating the statute inhibiting sales to minors. Foster v. State, 45 Ark. 361.

3. U. S. v. Forty-three Gallons of Whiskey, 108 U. S. 491.

4. See Parkinson v. State, 14 Md. 184; s. c., 74 Am. Dec. 522; State v. Sonnerkalb, 2 Nott & McC. (S. Car.) 280.

In the Maryland act of 1858, passed February 17th, 1858, prohibiting the sale of intoxicating liquors in Annapolis or within five miles thereof, to minors and people of color, the word "give" has a different meaning from the word "sell," and the law applies to the case of a party who buys liquor at a hotel and gives it to a minor. Parkinson v. State, 14 Md. 184; s. c., 74 Am. Dec. 522.

5. Shuttleworth v. State, 35 Ala. 415; Powell v. State, 27 Ala. 51; Boltze v. State, 24 Ala. 89; Reinhart v. State, 29 Ga. 522; Com. v. Hatton, 15 B. Mon. (Ky.) 537; Rawlings v. State, 2 Md. 201; Bond v. State, 21 Miss. (13 Smed. & M.) 265; Jolly v. State, 16 Miss. (8 Smed. & M.) 145; Page v. Luther, 6 Jones (N. Car.) L. 413; State v. McNair, 1 Jones (N. Car.) L. 180; State v. Harrington, 12 Rich. (S. Car.) L. 293; Brown v. State, 2 Head (Tenn.) 180; State v. Weeks, 7 Humph. (Tenn.) 522; State v. Bradshaw, 2 Swan (Tenn.) 627; Johnson v. Com., 12 Gratt. (Va.) 714.

6. Tatum v. State, 63 Ala. 147; Wal-

(1) *Who Are Persons of Intemperate Habits.*—An habitual drunkard is one who is in the habit of getting drunk, or that frequently is drunk; but not necessarily one who is constantly or universally drunk.¹

(2) *Notice to Dealer of Intemperate Habit of Purchaser.*—A conviction for unlawfully giving or selling intoxicating liquor to a person in the habit of becoming intoxicated cannot be sus-

ton v. State, 62 Ala. 197; Hill v. State, 62 Ala. 168; Atkins v. State, 60 Ala. 45; Young v. State, 58 Ala. 358; Smith v. State, 55 Ala. 1; Maxwell v. State, 27 Ala. 660; Elam v. State, 25 Ala. 53; Smith v. State, 19 Conn. 493; Barnes v. State, 19 Conn. 398; Humpeler v. People, 92 Ill. 400; Murphy v. People, 90 Ill. 59; Mapes v. People, 69 Ill. 523; Buell v. State, 72 Ind. 523; Allen v. State, 52 Ind. 486; Williams v. State, 48 Ind. 306; Deveny v. State, 47 Ind. 208; Zeizer v. State, 47 Ind. 129; Stewart v. Waterloo Turn Verein, 71 Iowa 226; Dudley v. Sautbine, 49 Iowa 650; State v. Gutekunst, 24 Kan. 252; State v. Heck, 23 Minn. 549; State v. Mahoney, 23 Minn. 181; People v. Hislop, 77 N. Y. 331 (affirming s. c., *sub nom.* People *ex rel.* Hislop v. Cowles, 16 Hun (N. Y.) 577); Crabtree v. State, 30 Ohio St. 382; Adams v. State, 25 Ohio St. 584; Miller v. State, 3 Ohio St. 475.

The offence created by New York laws, of selling liquor to an intoxicated person, is not indictable as a misdemeanor. The penalty is only recoverable by action. People v. Hislop, 77 N. Y. 331 (affirming s. c., *sub nom.* People *ex rel.* Hislop v. Cowles, 16 Hun (N. Y.) 577). See Foote v. People, 56 N. Y. 321.

A corporation organized "for the intellectual and physical improvement of its members," at a regular meeting resolved to have a ball, and a committee was appointed who took charge of the entertainment. At the ball two of the committee sold beer, with the knowledge of the speaker to a person within the prohibition of the statute, and turned over the proceeds to the treasurer of the corporation. Held, that the corporation had subjected itself to the penalty imposed by the Iowa statute for selling beer to a person in the habit of becoming intoxicated (Code, § 1539). Stewart v. Waterloo Turn Verein, 71 Iowa 226.

Y received a dollar from B, whom he knew to be of intemperate habits, and under B's promise that Y should have

any surplus thereof, bought and delivered to B a bottle of whiskey. Held, that Y was not liable to the penalty of the Alabama Code, § 4205, for selling or giving away spirituous liquors. Young v. State, 58 Ala. 358.

Selling Liquor to a Person of Known Intemperate Habits.—To authorize a conviction under an indictment for selling liquor to a person of known intemperate habits (Code, § 4205), it is essential that three facts shall be proved: 1st, that the defendant sold spirituous, vinous or malt liquor to the person named; 2nd, that such person was of intemperate habits; and, 3rd, that the defendant had knowledge of his intemperate habits. Tatum v. State, 63 Ala. 147.

Selling to persons of known intemperate habits, vinous and spirituous liquors, in quantities greater than a quart, is not a violation of the statute. Maxwell v. State, 27 Ala. 660.

Delivery to Intoxicated Person on Another's "Threat."—Where A orders intoxicating liquor to be delivered to B, an intoxicated person, for B's sole benefit, and it is so delivered, the title passes directly to B, though the goods are paid for by A, and thus furnishing intoxicating liquor to an intoxicated person is an indictable offence under the statute. State v. Hubbard, 60 Iowa 466.

1 See HABITUAL DRUNKENNESS, vol. 9, p. 258.

State v. Pratt, 34 Vt. 323. See Tatum v. State, 63 Ala. 152; Mahone v. Mahone, 19 Cal. 626; Harrison v. Ely, 120 Ill. 83; Murphy v. People, 90 Ill. 60; Richards v. Richards, 19 Ill. App. 435; Zeizer v. State, 47 Ind. 129; Wheeler v. Wheeler, 53 Iowa 512; Walton v. Walton, 34 Kan. 198; Com. v. McNamee, 112 Mass. 286; Com. v. Whitney, 71 Mass. (5 Gray), 86; Ludwig v. Com., 18 Pa. St. 174; Trigg v. State, 49 Tex. 676.

It has been said that if the rule or habit be to drink to intoxication when occasion offers, and sobriety or abstinence is the exception, then the charge

tained unless the proof shows that the notice required by statute has been given, informing the defendant that the party to whom he is charged with furnishing the liquor is in the habit of being intoxicated.¹

The sale of spirituous liquors to a common drunkard is an offence within the terms of some statutes prohibiting such sale

"of intemperate habits" is established. It is not necessary that the custom be an every day rule. *Tatum v. State*, 63 Ala. 152.

While it is true that in every clear case a court may assume the facts that disclose a case of habitual intemperance, or that they warrant the opposite conclusion, yet in the main these are questions to be submitted to the jury. *Northwestern Life Ins. Co. v. Muskegon Bank*, 122 U. S. 506.

Evidence that the party had been drunk from three to five times within two years preceding the trial has been held sufficient to authorize the jury to find that he was in the habit of getting intoxicated. *Murphy v. People*, 90 Ill. 59.

To convict for a violation of the statute prohibiting sale of liquor to any person who is in the habit of getting intoxicated, the charge must allege and the proof must show that such person was, at or about the date of the sale, in the habit of getting intoxicated. *Zeizer v. State*, 47 Ind. 129.

Upon the trial of the information, the court instructed the jury that the persons named must have been in the habit of getting drunk at the time of the sale, and that whether they were or not was a question for the jury; and properly refused to instruct them additionally that it was not sufficient that the persons had been frequently intoxicated, and that five occasions of intoxication would not justify a finding of habitual intoxication. *Harrison v. Ely*, 120 Ill. 83.

"Sober and temperate" does not imply total abstinence from intoxicating liquor, the moderate temperate use of intoxicating liquors is said to be consistent with sobriety. *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. Rep. 249, 253. See *Dunn v. Dunn*, 62 Cal. 178; *Miller v. Mut. Ben. Ins. Co.*, 34 Iowa 222; *Van Vankenburgh v. American Popular Life Ins. Co.*, 70 N. Y. 605; *Union Mut. Life Ins. Co. v. Reif*, 36 Ohio St. 599; *Mowry v. Home Life Ins. Co.*, 9 R. I. 346; *Northwestern Life Ins. Co. v. Muskegon Bank*, 122

U. S. 512; *Knickerbocker Life Ins. Co. v. Foley*, 105 U. S. 354; *Hutton v. Waterloo Life Assur. Co.*, 1 Fost. & F. 735.

A drunkard is one whose habit is to get drunk, whose ebriety has become habitual. "Drunkard," "common drunkard," and "habitual drunkard," mean the same thing. *Com. v. Whitney*, 71 Mass. (5 Gray) 86. See *DRUNKARD, DRUNKENNESS*, vol. 6, p. 34.

It has been said that while the word "common" imports frequency, the law does not specify the number of instances at a given time that are necessary to constitute a common drunkard. *Com. v. McNamee*, 112 Mass. 286.

"Intemperate habits" within the meaning of Alabama Code, § 4205, prohibiting the selling of liquor to a person of known intemperate habits cannot be predicated of the person who occasionally drinks to excess. But it is not necessary to show that he is drunk every day; if sobriety is the rule and occasional intoxication the exception, he is not within the statute, but if the habit is to drink to intoxication when occasion offers and sobriety or abstinence is the exception, as when one is accustomed to remain sober while at home, but generally drinks to excess when in company or when visiting the town or village, such person is a person of intemperate habits. *Tatum v. State*, 63 Ala. 147.

What Must be Shown.—On an indictment for selling liquor to a person in the habit of getting intoxicated, it is not essential to show that the party is constantly or usually intoxicated, but it is sufficient to show that he has been frequently so, and has thereby acquired an involuntary tendency to become intoxicated. *Murphy v. People*, 90 Ill. 59.

1. *State v. Gutekunst*, 24 Kan. 252. See *Engle v. State*, 97 Ind. 122; *Taylor v. Carroll*, 145 Mass. 95; *Tate v. Donovan*, 143 Mass. 590; *Kennedy v. Saunders*, 142 Mass. 9.

The Indiana Statute (§ 2093, R. S. 1881) that the notice therein referred to regarding the selling or giving of

whether the seller knew him to be a common drunkard or not.¹ It has been said that a prosecution for giving away intoxicating liquors to a person in the habit of becoming intoxicated cannot be sustained where the evidence shows that the defendant believed and had reason to believe that the man to whom the liquor was given was a sober man and not in the habit of becoming intoxicated.²

intoxicating liquors to a person who is in the habit of becoming intoxicated must be given to a citizen of a township or ward in which the person resides, and an averment that the wife of a citizen of such township or ward has given notice is not sufficient. *Engle v. State*, 97 Ind. 122.

Sufficiency of Notice.—The following notice in writing, signed by the son of a person having the habit of drinking intoxicating liquors to excess, and given to a seller of such liquors, towit: "I forbid you selling or delivering liquor to I. N. Taylor," is a sufficient compliance with Mass. Pub. Stat., ch. 100, § 25. *Taylor v. Carroll*, 145 Mass. 95.

A notice served by a wife on a liquor seller, which was as follows: "I hereby warn you not to harbor my husband, nor to sell him any more beer after this date, or I will put you to trouble," is a sufficient notice to support an action of tort, under Massachusetts Pub. Stat., ch. 100, § 25, and it is not necessary that the notice should state that the person named was in the habit of using intoxicating liquors to excess. *Tate v. Donovan*, 143 Mass. 590.

Recovery of Penalties.—Under a statutory provision that the husband, wife, etc., having "the habit of drinking spirituous or intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person, requesting him not to sell or deliver such liquor to the person having such habit," and imposing a penalty for a subsequent sale, etc., by the person so notified of any such liquor to the person having such habit (Massachusetts Pub. Stat., ch. 100, § 25), the notice need not be in the language of the statute; and a notice by a wife stating that her husband "had been in the habit of getting liquor here and coming home drunk," and requesting the defendant not to give him any more drink, is sufficient to sustain an action for such penalty, although it does not contain the words "spirituous or intoxicating liquor." *Kennedy v. Saunders*, 142 Mass. 9,

1. *Smith v. State*, 19 Conn. 493. See *Hill v. State*, 62 Ala. 168; *Humpeler v. People*, 92 Ill. 400; *State v. Thompson*, 74 Iowa 119; *State v. Ward*, 73 Iowa 533; *Dudley v. Sautbine*, 49 Iowa 650; *Church v. Higham*, 44 Iowa 482; *Com. v. McNeff*, 145 Mass. 406; *Com. v. Julius*, 143 Mass. 132; *Whitton v. State*, 37 Miss. 379; *State v. Heck*, 23 Minn. 549.

Want of Knowledge—Effect on Sale.—The fact that a person selling or giving intoxicating liquors to one in the habit of becoming intoxicated did not know that the person receiving them was intoxicated does not relieve him from liability. *Church v. Higham*, 44 Iowa 482. Thus under the Iowa Pharmacy act ignorance of the habit of intoxication of the person purchasing intoxicating liquors is no defence to an indictment for unlawful sales. *State v. Thompson*, 74 Iowa 119. And under the Massachusetts statute (ch. 100) forbidding the sale of intoxicating liquors to an intoxicated person, it is no defence that the seller did not know at the time of making the sale that the buyer was intoxicated. *Com. v. Julius*, 143 Mass. 132.

It is said in the cases of *Humpeler v. People*, 92 Ill. 400; *Dudley v. Sautbine*, 49 Iowa 650, that proof of the fact that the vender did not know that such person was in the habit of getting intoxicated constitutes no defence.

At the trial of a complaint charging the defendant with maintaining a tenement for the illegal keeping and sale of intoxicating liquor, an instruction that the jury might convict upon evidence of sales to a person who was a drunkard, and known to defendant to be intoxicated, if defendant kept the premises for the purpose of making such sales, held, sufficient, the attention of the jury having been previously called to the necessity of proving knowledge on defendant's part that the person was a drunkard. *Com. v. McNeff*, 145 Mass. 406.

2. *Williams v. State*, 48 Ind. 306. See *Deveny v. State*, 47 Ind. 208.

(3) *Joint Sale to Intoxicated and Third Person.*—Where intoxicating liquors are sold to a third person with the knowledge that a person of known intemperate habits is to join in the drinking of it, and such intemperate person is permitted to drink such liquor in the presence of the party selling, he is guilty of the offence denounced by the statute.¹

8. *Selling in Particular Places and Localities.*—In various of the States there are statutes prohibiting the sale of intoxicating liquors at or near educational institutions,²

Where the defendant, in a prosecution for intoxicating liquor to a person in the habit of getting intoxicated, had no knowledge, at the time of the sale, of the habit of intoxication of such person, who was a stranger to the defendant, and was sober at the time, and had not the appearance of being a person in the habit of getting intoxicated, he is entitled to an acquittal. *Deveny v. State*, 47 Ind. 208.

1. *Walton v. State*, 62 Ala. 197. See *Weireter v. State*, 69 Ind. 269; *State v. Hubbard*, 60 Iowa 466; *Scatchard v. Johnson*, 57 L. J., M. C. 41.

A treated B to liquor when B was intoxicated.—Held, that the liquor seller who sold the liquor was guilty of the offence of disposing of liquor to an intoxicated person, although A and not B paid for it. *State v. Hubbard*, 60 Iowa 466.

Indictment was brought under 1 Indiana Rev. St. 1876, p. 871, § 10, for selling intoxicating liquor in a less quantity than a quart to a person in the habit of becoming intoxicated, after having received written notice not to do so. The evidence showed that defendant, at the time alleged, sold to such person four glasses of beer for twenty cents; that one of these glasses was for such person's own use, and he drank its contents, and that the other three glasses were intended to be a treat for three friends who had accompanied the purchaser to the saloon, and who drank the contents of the said glasses at the same time; that these glasses held less than a pint of beer each, three of them together holding a quart. Held, that the evidence showed a sale of four several glasses of lager, containing each less than a pint within the meaning of the statute. *Weireter v. State*, 69 Ind. 269.

In England, a publican is rightly convicted of selling liquor to a drunken person, when the liquor is consumed by the drunken person, though ordered

and paid for by a sober companion. *Scatchard v. Johnson*, 57 L. J. M. C. 41.

Giving liquor to intoxicated person.—Proof of a gift of intoxicating liquor will support an indictment under the statute for selling liquor to a person in the habit of getting intoxicated. *Church v. Higham*, 44 Iowa 482; *Dahmer v. State*, 56 Miss. 787.

Sale by unlicensed dealer.—The statute forbidding the sale of intoxicating liquor to an habitual drunkard applies not merely to those licensed to sell intoxicating liquor but to "any person." *State v. McGinnis*, 30 Minn. 52. See also *Fitzenrider v. State*, 30 Ind. 238.

2. See *Blackwell v. State*, 36 Ark. 178; *DeBois v. State*, 34 Ark. 381; *Com. v. Jones*, 142 Mass. 573; *Com. v. Everson*, 140 Mass. 292; *Com. v. Heaganey*, 137 Mass. 574; *Com. v. Jenkins*, 137 Mass. 572; *Com. v. Whelan*, 134 Mass. 206; *State v. Hollingsworth*, 100 N. C. 535; *In re Liquor Locations*, 13 R. I. 733; *Boyd v. State*, 12 Lea (Tenn.) 687; *State v. Tarver*, 11 Lea (Tenn.) 658; *Lea v. State*, 10 Lea (Tenn.) 478; *Tillery v. State*, 10 Lea (Tenn.) 35; *Harney v. State*, 8 Lea (Tenn.) 113; *Brewer v. State*, 7 Lea (Tenn.) 682.

Educational Institutions.—A statute preventing the sale or giving away of liquors within a given distance of any academy, college, university, or institution of learning, does not apply to common schools provided by the legislature. This is held to be true even though such common schools are taught in the building of an academy or college. *Blackwell v. State*, 36 Ark. 178.

The supreme court of Tennessee held, in the case of *Lea v. State*, 10 Lea (Tenn.) 478, that a taxing district of the second class organized under Tennessee acts 1871, ch. 127, is an incorporated town within the exemption contained in Tennessee act of 1877, ch. 23, forbidding the sale of liquor within four miles of an institution of learning.

Ascertainment of Distance or Locality.—Under a statute forbidding the granting of licenses for the sale of intoxicating liquor in any building or place within a given number of feet of a public school, the distance is to be measured in a direct line from any part of the building or place to any part of the school. *In re Liquor Locations*, 13 R. I. 733.

Under the Massachusetts statute making it an offence to sell liquor in a building on the same street with a school house, and within a certain distance from it, if the lot on which the school house stands abuts on the street in which is the building in which the liquor is sold, the school must be deemed to be on the street on which the entrances are. *Com. v. Heaganey*, 137 Mass. 574; *Com. v. Jenkins*, 137 Mass. 572.

If the buildings are situated on the same street, that is, have entrances from a common street, the four hundred feet is to be determined by the distance between the two buildings, without including the distance from the building to the street. *Com. v. Jones*, 142 Mass. 573.

In the case of *Com. v. Whelan*, 134 Mass. 206, at the trial of a complaint for an unlawful sale of intoxicating liquors, it appeared that the building in which the sale was made was bounded on one side by C street and on another side by S street, the two streets intersecting each other at the corner of the building; that the only entrance to the building and the only windows of the premises were on C street, the entrance being numbered "28 C street;" that a former entrance and a former window on S street had been permanently closed by boarding up, to meet the requirements of the authorities in granting a license to the defendant; that upon the wall of the building on S street there were two signs on which the defendant's name appeared, and upon the same wall a sign on which were the words, "Entrance 28 C street;" and that the whole building was within four hundred feet of a building on S street, then occupied by a public school. Held, that the defendant's building was on S street, within the meaning of the statute of 1882, ch. 220.

What Sales are Illegal, or Constitute an Offence.—A license issued after an order is made under the power conferred by the Arkansas act of March 2nd, 1875, prohibiting the sale or giving

away, etc., of liquors within three miles of any academy, etc., is no defence to a prosecution for the violation of such order. *Blackwell v. State*, 36 Ark. 178.

A party cannot be indicted under the Arkansas act of March 8th, 1879, for selling liquors within two miles of Judson University, White county, as such a sale is regulated entirely by the Arkansas act of February 27th, 1875. *DeBois v. State*, 34 Ark. 381.

Manufacturers of spirituous liquors cannot, under Tennessee acts, 1877, ch. 23, § 1, sell the same for purposes of consumption within four miles of an incorporated institution of learning, said acts allowing manufacturers to sell "in wholesale packages or quantities." *State v. Tarver*, 11 Lea (Tenn.) 658.

The North Carolina local option law (Code, § 3116), provides that an election in favor of license shall not affect localities in which sale of liquors is prohibited by law. The town of H voted for license. Held, that sales in H were illegal, as it was "within two miles of a" certain church, a locality within which the sale of liquor is prohibited by law," under act 1887, ch. 417. *State v. Hollingsworth*, 100 N. C. 535.

Same—Sale Made from Steamboat on Water.—One may be indicted for selling intoxicating liquor without a license, or within four miles of an incorporated institution of learning, although the sales were made from a steamboat on the waters of a navigable river. *Boyd v. State*, 12 Lea (Tenn.) 687.

Same—Institution of Learning—Sale in Vacation.—The law prohibiting the sale of liquor within four miles of an incorporated institution of learning applies to a sale made in vacation, and although the institution is maintained by the common school fund. *Tillery v. State*, 10 Lea (Tenn.) 35.

Same—Gate in Premises.—Where there is an entrance to licensed premises through a gate on a street on which there is a school house within limit prohibited by statute 1882, ch. 220, the question whether the license is avoided thereby depends upon the purpose for which the gate is used. *Com. v. Everson*, 140 Mass. 292, 434.

Same—Failure to Register Charter—Effects.—Upon a trial of an indictment for selling liquor within four miles of an incorporated school, it appeared that the certificate of charter of the school had not been registered in the office of the county register as required by law. Held, that a conviction could not be

churches,¹ agricultural fairs,² places of exhibition and amusement,³ public or State buildings,⁴

sustained, and that it was immaterial that the name of the school appeared in the list of incorporated companies published by order of the secretary of state. *Brewer v. State*, 7 Lea (Tenn.) 682.

Same—Buyer Not Guilty of Offence.—Under the Tennessee act of 1877, ch. 23, which makes it a misdemeanor, subject to both fine and imprisonment, to sell or tippie any intoxicating beverage within four miles of an incorporated institution of learning, the buyer of the liquor is not guilty of the offence. *Harney v. State*, 8 Lea (Tenn.) 113.

1. *Yowell v. State*, 41 Ark. 355; *State v. Midgett*, 85 N. C. 538.

Sale Near Church.—Where a local option law existed prohibiting the sale or giving away of ardent liquors within three miles of a church in a certain place, and the physician practicing at that place handed a dollar to a member of the firm of saloon keepers at a place four miles distant from that where the sale was prohibited, telling him to give it to his bar tender and to tell the latter to send him a quart of a particular whiskey for prescriptions; but the partner got the whiskey himself at the saloon and on his return delivered it to the physician, such partner being a part owner of the saloon and receiving the money and delivering the whiskey at the place where the sale was prohibited, made it a sale by him at that place. *Yowell v. State*, 41 Ark. 355.

An indictment under North Carolina acts, 1879, ch. 232, for selling spirituous liquor within a certain distance of a church in Hyde county, cannot be supported by evidence of such a sale within the prescribed distance of a house conveyed primarily for educational purposes, with permission to hold divine service therein on suitable occasions, which is ordinarily used for a school house, but in which there is preaching at stated intervals. *State v. Midgett*, 85 N. C. 538.

2. Sale Near Agricultural Fair.—A statute making it an offence to sell liquor within two miles of a place where an agricultural fair is being held; one who sells at a permanent place of business within the limit is liable. *Heck v. State*, 44 Ohio St. 536.

3. *State v. White*, 7 Baxt. (Tenn.) 158; *Otter v. Haughton*, N. Y. Dial.

Reg., June 5th, 1886; *Kramer v. Police Department of New York*, N. Y. Dial. Reg., November 24th, 1885; *Com. v. Cavanagh*, 2 Pa. Co. Ct. 344.

Places of Exhibition.—The act of the proprietor of a theatre, giving persons tickets to a wine room in an adjoining building, accessible by stairs from his bar room whence drinks were sent, held to be a violation of Tennessee acts, 1869, ch. 39, prohibiting the furnishing of liquors inside a place of amusement or "any apartment opening into the same." *State v. White*, 7 Baxt. (Tenn.) 158.

A saloon having a bill board at the door, and in the rear thereof a platform on which male and female minstrels and a clog dancer perform, partakes of the nature of a place of amusement kindred to a theatre, though no admission fee is charged, and comes within the prohibition of the Pennsylvania act of July 9th, 1881; and a liquor license therefor should be revoked. *Com. v. Cavanagh*, 2 Pa. Co. Ct. 344.

Same—Sale in Hotel Connected with.—It is said in the case of *Otter v. Haughton*, N. Y. Dial. Reg., January 5th, 1886, that § 2010 of the New York Consolidation act (Laws of 1882, ch. 410), against the sale of liquors in the auditoriums, or lobbies of a place of exhibition or performance mentioned in § 1988, does not prohibit the sale of liquors in a bar room having no connection with the lobby of a theatre except that a door opens out of it into another room from which a door opens upon the end of a long hallway leading through a hotel building to the theatre.

Same—in "Garden."—The prohibitions of said § 2010 do not apply to a so-called "garden" used as a concert room, where a concert programme is furnished, and no admission fee charged on week days, and which contains no scenery or other appurtenances of a theatre. *Kramer v. Police Department of New York*, N. Y. Dial. Reg., November 24th, 1885. The judgment, however, was reversed in 53 Super. Ct. (J. & S.) 492, without passing upon this point, upon the ground that a court of equity had no jurisdiction to enjoin a threatened arrest for crime.

4. Public Buildings.—The legislature may make it a misdemeanor to sell intoxicating liquor within two miles of

and near railroads during construction.¹

9. Sale by and Liability of Particular Persons.—Sale by Agents, Servants, etc.²—A licensee, to sell intoxicating liquors, is bound at his peril to see that the conditions of the license are complied with by his servants or agents;³ but to render a defendant liable for sales made by his agent or servant, knowledge or consent must

the State prison grounds, or within one mile of the State insane asylum, or within one mile of the grounds of the State university, or in the State capitol, or upon the grounds belonging thereto. *Ex parte McClain*, 61 Cal. 436; s. c., 44 Am. Rep. 554.

1. The Georgia act entitled "to prevent the sale of spirituous liquors near the Ridge Valley Iron Works, in Floyd county," held properly to contain the inhibition, "there shall not be delivered, sold, or furnished by retail, as a beverage, any spirituous or malt liquors within the radius of two and a half miles from said Ridge Valley Iron Works, the words "by retail" qualify "delivered" and "furnished." *McArthur v. State*, 69 Ga. 444.

In North Carolina, an indictment is not maintainable, under laws 1874-75, ch. 126, punishing selling liquors within three miles of the A. & S. railroad during construction of the road, for selling within that distance from the line or route. The sale must be within three miles of a part of the road in course of construction. *State v. Hampton*, 77 N. C. 526.

2. As to the liability of dealers under civil damage acts, for sales made by agent or servant, see CIVIL DAMAGE ACTS. vol. 3, p. 258.

3. *Com. v. Wachendorf*, 141 Mass. 270. See *McCutcheon v. People*, 69 Ill. 601; *Molihan v. State*, 30 Ind. 266; *State v. Wentworth*, 65 Me. 234; s. c., 20 Am. Rep. 688; *Murphy v. McNulty*, 145 Mass. 464; *Com. v. Kelly*, 140 Mass. 441; *Com. v. Barnes*, 138 Mass. 511; *Com. v. Uhrig*, 138 Mass. 492; *Com. v. Emmons*, 98 Mass. 6; *Com. v. Park*, 67 Mass. (1 Gray) 553; *State v. Reiley*, 75 Mo. 521; *State v. Durkem*, 23 Mo. App. 387; *Amerman v. Kall*, 34 Hun (N. Y.) 126; *State v. Dow*, 21 Vt. 484; *Rex v. Medley*, 6 Car. & P. 292; *Rex v. Dixon*, 3 Maule & S. 11.

Selling by Agents.—On the trial of an information for retailing intoxicating liquor without a licence it was proved that the liquor was sold at a saloon, in which the defendant transacted a retail liquor trade, by a person who was his

servant in conducting that trade. Held, that the proof sufficiently connected the accused with the commission of the offence. *Molihan v. State*, 30 Ind. 266.

Under the Illinois liquor law of 1872, the holder of a licence to selling intoxicating liquors is liable to indictment for unauthorized sales made by his agent or servant. *McCutcheon v. People*, 69 Ill. 601.

An indictment or complaint which alleges that the defendant sold spirituous or intoxicating liquor without any legal authority, contrary to Stat. 1852, ch. 322, § 7, is supported by proof that he sold it by his clerk, servant or agent. *Com. v. Park*, 67 Mass. (1 Gray) 553; *State v. Durkem*, 23 Mo. App. 387.

Prima Facie Case.—Proof of a sale by an agent in the principal's saloon is *prima facie* proof of a sale by the principal. *State v. Wentworth*, 65 Me. 234; *State v. Reiley*, 75 Mo. 521; *Amerman v. Kall*, 34 Hun (N. Y.) 126.

An instruction in a criminal prosecution to the effect that the sale of intoxicating liquors, although illegal, by a bar tender in his master's shop and in the regular course of his master's lawful business, is *prima facie* a sale by the master, is erroneous. *Com. v. Briant*, 142 Mass. 463; *Com. v. Stevenson*, 142 Mass. 466.

In order to constitute one a dealer in spirituous liquors, so as to subject him to the penalty imposed by the statute of 1846, it is not necessary that he should actually do the business in person, or even that it should be done in his presence, or by his express command. If he keep liquors, and employ clerks to deal them out in common with other commodities, he is equally as liable for sales made by such clerks as if made by him in person. *State v. Dow*, 21 Vt. 484.

So, if the owner of the store of goods at which spirituous liquors are kept for sale, reside out of this State, and the business of the store is managed by one who is his general agent in that respect, and who has the general direction and supervision of the clerks in the store, the same as his employer

be shown.¹ To convict in such a case the jury must be satisfied of the defendant's assent to and not merely of his knowledge of

would have had if he had been present, such general agent is liable to the penalty imposed by statute, although the liquors be in fact sold by the clerks. *State v. Dow*, 21 Vt. 484.

Under the Alabama acts 1880-81, p. 387, making it unlawful "to sell, give away or otherwise dispose of" intoxicating liquor, held, that a person could not be indicted for simply handing over to another liquor purchased for him by defendant's father as agent, and temporarily left in defendant's possession. *Amos v. State*, 73 Ala. 498.

1. *Wetzler v. State*, 18 Ind. 35. See *Wreidt v. State*, 48 Ind. 579; *State v. Hayes*, 67 Iowa 27; *Taylor v. Pickett*, 52 Iowa 467; *Goods v. State*, 3 Greene (Iowa) 566; *Minden v. Silverstein*, 36 La. An. 912; *Com. v. Putnam*, 70 Mass. (4 Gray) 16; *People v. Roby*, 52 Mich. 577; s. c., 50 Am. Rep. 270; *People v. Blake*, 52 Mich. 566; *Gathings v. State*, 44 Miss. 343; *Gaiocchio v. State*, 9 Tex. App. 387. Compare *Com. v. Kelley*, 140 Mass. 441; *State v. Burke*, 15 R. I. 324.

Intent—Unlawful Sale by Servant.—Thus it is said in the case of *State v. Hayes*, 67 Iowa 27, that one who keeps liquor which he intends shall be sold lawfully, is not liable criminally for an unlawful sale made without his knowledge and consent by his clerk. Consequently where there is nothing to fix upon the defendant guilty knowledge of the sale of liquor in his saloon by another behind the counter, and he was neither present at nor approved of the sale, the charge of selling liquor by the defendant is not proved. *Wreidt v. State*, 48 Ind. 579.

It is said in *Goods v. State*, 3 Greene (Iowa) 566, that evidence that a third person sold "a dram" at the defendant's grocery, in his absence, but without evidence that the store was kept for that purpose, or that the person selling did so with his approbation or was employed for that purpose will not justify a conviction.

But it is said that, under the Mississippi statute prohibiting the sale of liquors without a licence, any person having an interest in liquor so sold may be indicted and convicted, though he was not present at or even knew of the sale. *Gathings v. State*, 44 Miss. 343.

Selling on Sunday—Sale by Bar Keeper.—A defendant charged with common labor on Sunday in selling liquor cannot be convicted on proof of such sale at his bar room by his bar keeper, without also proving his presence or knowledge. *Wetzler v. State*, 18 Ind. 35.

The Bell Punch Law.—In *Gaiocchio v. State*, 9 Tex. App. 387, the appellant, who was a licensed retailer, was indicted and tried for violation of the "bell punch law," by selling a drink of whiskey, and failing to turn a crank of the proper register. The evidence showed that the bar tender made the sale in his absence, and there was no proof of appellant's complicity in the bar tender's failure to register the drinks. The court held that, in order to sustain a conviction, the record must show that the defendant was present, had knowledge of and assented to the sale, and the servant's act in failing to turn the crank.

Order Taken by Agent Off Premises.—But it has been said that the sale of intoxicating liquors is illegal where the order for them is taken by an agent at a different place from his principal's house of business, and not subject to his approval although the principal has a licence. *Taylor v. Pickett*, 52 Iowa 467.

Keeping Saloon Open on Sunday—Opening by Bar Keeper.—It has also been held that the keeper of a saloon may be convicted of keeping it open on Sunday, if, without his knowledge, his clerk or bar keeper opens the saloon and makes a sale of liquor. *People v. Roby*, 52 Mich. 577; s. c., 50 Am. Rep. 270; *People v. Blake*, 52 Mich. 566.

Same—Opening by Son—Instructions.—It is said in *State v. Burke*, 15 R. I. 324, that an instruction to the jury, in a prosecution for the sale of liquor on Sunday, to the effect that the presumption of law is that defendant's son, being in his place of business, acting for him on week days, is his agent, without proof of knowledge on the part of defendant of the unlawful acts done on Sunday or of any authority that the agent might act for him on Sunday, is erroneous.

Intention.—As to intent in such cases, see *Redmond v. State*, 36 Ark. 58; s. c., 38 Am. Rep. 24; *Stern v. State*, 53 Ga.

the sale;¹ and where a sale is made by an agent or servant in dis-

229; s. c., 21 Am. Rep. 226, note 268; *George v. Gobey*, 128 Mass. 289; s. c., 35 Am. Rep. 376; *King v. State*, 58 Miss. 737; s. c., 38 Am. Rep. 344; *Halsted v. State*, 41 N. J. L. (12 Vr.) 552; s. c., 32 Am. Rep. 247; *Farrell v. State*, 32 Ohio St. 456; s. c., 30 Am. Rep. 614.

Same—Michigan Doctrine.—In *People v. Roby*, 52 Mich. 577; s. c., 50 Am. Rep. 270, the court say: "Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. Thus, in Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating. *Com. v. Boynton*, 84 Mass. (2 Allen) 160. And of the offence of selling adulterated milk, though he was ignorant of its being adulterated. *Com. v. Smith*, 103 Mass. 444; *Com. v. Waite*, 93 Mass. (11 Allen) 264; s. c., 87 Am. Dec. 711; *Com. v. Holbrook*, 92 Mass. (10 Allen) 200; *Com. v. Farren*, 91 Mass. (9 Allen) 489. See *State v. Smith*, 10 R. I. 258. In Missouri a magistrate may be liable to the penalty for performing the marriage ceremony for minors without consent of parents or guardian, though he may suppose them to be of proper age. *Beckham v. Nacke*, 56 Mo. 546. Where the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age. *Com. v. Raymond*, 97 Mass. 567. See *King v. Dixon*, 3 Maule & S. 11. In *State v. Baltimore & Sus. Steam Co.*, 13 Md. 181, a common carrier was held liable to a statutory penalty for transporting a slave on its steamboat, though the persons in charge of its business had no knowledge of the fact. A case determined on the same principle is *Queen v. Bishop*, 5 Q. B. Div. 259; s. c., 29 Eng. Rep. 283. If one's business is the sale of liquors, a sale made by his agent in violation of law is *prima facie* by his authority. *Com. v. Nichols*, 51 Mass. (10 Metc.) 259; s. c., 43 Am. Dec. 432. And in Illinois the principal is held liable, though the sale by his agent was in violation of instructions. *Noecker v. People*, 91 Ill.

494. In Connecticut it has been held no defence in a prosecution for selling intoxicating liquor to a common drunkard that the seller did not know him to be such. *Barnes v. State*, 19 Conn. 398. It was held in *Faulks v. People*, 39 Mich. 200; s. c., 33 Am. Rep. 374, under a former statute, that one should not be convicted of the offence of selling liquors to a minor who had reason to believe and did believe he was of age; but I doubt if we ought so to hold under the statute of 1881, the purpose of which very plainly is, as I think, to compel every person who engages in the sale of intoxicating drinks to keep within the statute at his peril. There are many cases in which it has been held under similar statutes that it was no defence that the seller did not know or suppose the purchaser to be a minor. *Redmond v. State*, 36 Ark. 58; s. c., 38 Am. Rep. 24; *Farmer v. People*, 77 Ill. 322; *McCutcheon v. People*, 69 Ill. 601; *Ulrich v. Com.*, 6 Bush (Ky.) 400; *Com. v. Emmons*, 98 Mass. 6; *State v. Cain*, 9 W. Va. 559; *State v. Hartfiel*, 24 Wis. 60. And in *Com. v. Finnegan*, 124 Mass. 324, the seller was held liable, though the minor had deceived him by falsely pretending he was sent for the liquor by another person. So a person has been held liable to a penalty for keeping naphtha for sale under an assumed name, without guilty knowledge, the statute not making such knowledge an ingredient of the offence. *Com. v. Wentworth*, 118 Mass. 441. Other cases may be cited, and there is nothing anomalous in these. A person may be criminally liable for adultery with a woman he did not know to be married. *Fox v. State*, 3 Tex. App. 329; s. c., 30 Am. Rep. 144. Or for the carnal knowledge of a female under ten years of age, though he believed her to be older. *State v. Newton*, 44 Iowa 45; *Queen v. Prince*, L. R., 2 Cr. Cas. 154."

1. *Com. v. Putnam*, 70 Mass. (4 Gray) 16. See *Com. v. Dunbar*, 75 Mass. (9 Gray) 298; *Com. v. Briant*, 142 Mass. 464; *Com. v. Stevenson*, 142 Mass. 466; *State v. Denoon*, (W. Va.) 5 S. E. Rep. 315.

Presumption by Jury.—It is said in the case of *Com. v. Locke*, 145 Mass. 401, that "evidence of the bar keeper's conduct was admissible in connection with the other facts as tending to show

obedience of orders, the master will not be liable.¹ But a general authority by an employer to his clerk to sell, unlawfully, will render him answerable criminally for any single sale made by the clerk in pursuance of such authority.²

a. **LIABILITY OF AGENT OR SERVANT GENERALLY.**—In order to constitute the offence prohibited by the statute, it is not necessary that the defendant should own the liquor,³ or have had

that the defendant was guilty. If liquor was kept for sale in the defendant's bar room by the defendant's bar keeper, the jury might think it unlikely, as matter of common experience, that it would be kept for sale there without the defendant's consent, and might infer his consent on that ground.⁴ *Citing* Com. v. Briant, 142 Mass. 463, 465; Com. v. Holmes, 119 Mass. 195; Com. v. Edds, 80 Mass. (14 Gray) 406, 409; Com. v. Nichols, 51 Mass. (10 Metc.) 259.

1. Lathrope v. State, 50 Ind. 555, 557; Com. v. Wachendorf, 141 Mass. 270; State v. Shortell, 93 Mo. 123; Kirkwood v. Autenreith, 21 Mo. App. 73. See Grosch v. Centralia, 6 Ill. App. 107; Minden v. Silverstein, 36 La. An. 912. Compare Noecker v. People, 91 Ill. 494; Dudley v. Sautbine, 49 Iowa 654; Com. v. Wachendorf, 141 Mass. 270; Riley v. State, 43 Miss. 397.

Sale Without Licence.—It is said in Noecker v. People, 91 Ill. 494, that where a party keeps liquors for sale without a licence granted by the statute, he is responsible for any sales by his clerks, no matter what his instructions to them are, and it is no defence that he has sold upon a physician's prescription to one who pretended that the liquor was wanted for medicine.

But the court of appeals of Missouri hold in the case of Kirkwood v. Autenreith, 21 Mo. App. 73, that while a sale of liquor by an employe is *prima facie* evidence of the liability of an unlicensed employer, yet this may be rebutted by proof that the sale was made without the employer's knowledge, and in disobedience of his orders.

2. Kinnebrew v. State (Ga.), 5 S. E. Rep. 56. See Forrester v. State, 63 Ga. 349; Hofner v. State, 94 Ind. 84; Com. v. Nichols, 51 Mass. (10 Metc.) 259; s. c. 43 Am. Dec. 432; Hall v. McKechnie, 22 Barb. (N. Y.) 244.

Thus it has been held that retailing, done in a man's kitchen by his servant, and in his presence, with his consent and approbation, may be deemed his

own act as well as the act of the servant. Forrester v. State, 63 Ga. 349. And it is said in Hofner v. State, 94 Ind. 84, that where the evidence tends to show that the sale was made by the bar tender of the defendant, in his presence, it is no error to instruct the jury that if an agent of the defendant, in his presence and with his knowledge and consent, made such a sale, the defendant would be liable.

In a suit for the penalty under the liquor laws, it was proved that the defendants were proprietors of a store, doing business together, and in the store daily, and that sales were made there by their clerk and in their presence, held, that the proof warranted the conclusion that the sales were by their authority, and they thereby incurred the penalty in like manner as if they had personally sold. Hall v. McKechnie, 22 Barb. (N. Y.) 244.

Held, further, that the penalty for each offence is single, that the defendants were united in committing the offence and were jointly liable for the penalties incurred. Hall v. McKechnie, 22 Barb. (N. Y.) 244.

But while a shop keeper is liable criminally for the unlawful sale of spirituous liquor in his shop, made with his assent by a servant or agent employed in his business, yet the unlawful sale by such servant or agent is only *prima facie* evidence of the assent thereto by the shop keeper, and his liability to punishment therefor. Com. v. Nichols, 51 Mass. (10 Metc.) 259; s. c. 43 Am. Dec. 432, and in Com. v. Churchill, 136 Mass. 148, it is said that an indictment under Mass. Pub. St. ch. 101, §§ 6 & 7, for keeping a tenement for the illegal sale of liquors, is not supported by proof that defendant, a servant of the licensee of the premises, made illegal sales under the personal supervision of his employer.

3. State v. Wadsworth, 30 Conn. 55; Com. v. Cotton, 138 Mass. 500; Com. v. Sinclair, 138 Mass. 493; Com. v. O'Reilly, 116 Mass. 15; Thompson v.

authority from the owner to sell it;¹ and it is no defence to an indictment for selling liquor without license that the defendant sold it as the agent of another person.²

State, 5 Humph. (Tenn.) 138; Tardiff v. State, 23 Tex. 169; State v. Bugbee, 22 Vt. 32. Compare Morgan v. State, 81 Ala. 72; Campbell v. State, 79 Ala. 271; Com. v. Murphy, 140 Mass. 440. *n.*

Where spirituous liquors are sold by an agent, contrary to the statute, both principal and agent are guilty and liable to indictment. Thompson v. State, 5 Humph. (Tenn.) 138.

Thus it is said in Tardiff v. State, 23 Tex. 169, that a clerk in the establishment of a vendor of ardent spirits is included in the clause of the Texas Licence act, rendering liable to the penalty "any person or firm who shall sell or be in anywise concerned in selling spirituous liquors." And the supreme judicial court of Massachusetts say in the case of Com. v. O'Reilly, 116 Mass. 16, that on the complaint under the Mass. Stat. of 1869, ch. 415, § 36, for keeping intoxicating liquors with intent to sell them in violation of law, it is sufficient to authorize a verdict of guilty to prove that the defendant was in possession and exercised control of the liquors with intent to sell the same in violation of law, although he was not the owner of the liquors.

Illegal Sale—Inn Holder's License.—At the trial of a complaint against an inn holder's clerk for an unlawful sale of intoxicating liquors, the judge instructed the jury "that if the defendant was not in the room with the proprietor, and the door was locked between him and the proprietor, and the defendant took orders for intoxicating liquors and delivered the liquor to the party ordering it and took pay therefor, it was a sale by the defendant." The court held, that the defendant had no ground of exception. Com. v. Cotton, 138 Mass. 500. See Com. v. Sinclair, 138 Mass. 493.

Alabama Doctrine.—It is said by the supreme court of Alabama, in Campbell v. State, 79 Ala. 271, that one who has no interest in the liquor sold or in the money paid for it, and who acts merely as the buyer's friend or agent, does not violate the Alabama statute against selling. See Morgan v. State, 81 Ala. 72. And it is said by the supreme judicial court of Massachusetts, in the case of Com. v. Cotton, 138

Mass. 500, that one charged with selling liquor from a wagon, upon which he carried other things for sale, may be shown that his employer authorized occasionally to give liquors to customers. See Com. v. Murphy, 140 Mass. 440. *n.*

1. State v. Wadsworth, 30 Conn. 55; State v. Finan, 10 Iowa 19.

The supreme court of Iowa say, in the case of State v. Finan, 10 Iowa 19, that one who sells intoxicating liquors, although it be as the owner or agent of another, and without his authority, as a volunteer and without pecuniary reward, is nevertheless liable under the statute.

2. State v. Stucker, 33 Iowa 395; Roberts v. O'Conner, 33 Me. 496; Com. v. Galligan, 144 Mass. 171; Com. v. Williams, 86 Mass. (4 Allen) 587; Com. v. Hadley, 52 Mass. (11 Metc.) 66; State v. Canton, 43 Mo. 48; State v. Bryant, 14 Mo. 340; Hays v. State, 13 Mo. 246; French v. People, 3 Park. C. C. (N. Y.) 114; State v. Bugbee, 22 Vt. 32; Boldt v. State, 72 Wis. 7; s. c., 35 N. W. Rep. 935.

The accused set up the defence that he was acting merely as the agent of the persons who got the liquors of him. It was proven conclusively, however, that such persons paid him for what they got, and at the time they got it. Held, that instructions for the defence, on the liability of such an agent, were properly refused. Boldt v. State, 72 Wis. 7.

In a suit to recover a penalty for selling intoxicating liquors, incurred under the fifth section of the act of 1846, ch. 205, in Maine, the fact that the defendant made the sale as the servant of another person, constitutes no defence. Roberts v. O'Conner, 33 Me. 496.

Under the Iowa statute, revision, section 1562, making "clerks, servants and agents" liable to be "charged and convicted" as "principals may be" for liquor selling, and under section 1564, providing that "in addition to the penalties prescribed in the three preceding sections, whoever shall erect or establish, continue or use any building" for liquor selling "shall be deemed guilty of a nuisance," etc., a bar tender or clerk in any liquor saloon may be indicted for a nuisance. State v. Stucker, 33 Iowa 395.

One who is personally present at any time, however brief, having the entire control and superintendence of the house, although he is only a clerk or servant of the household, will be liable on an indictment for keeping and maintaining a house as a liquor nuisance,¹ because an agent having the actual possession and participating in the unlawful purpose is equally guilty with his principal.² But where a sale is made on the premises in the presence of or under the actual supervision of the employer, the agent or servant cannot be convicted for an illegal sale.³

When a person is indicted on the Massachusetts Rev. Stat., ch. 47, § 1, 2, for presuming to be a common seller of spirituous liquor, and also for selling spirituous liquor in a single instance, to be used in or about his house or other buildings, without being first duly licensed as an inn holder or common victualler, and is proved to have done the acts charged in the indictment, he is liable to the penalties imposed by those sections, although he was not the owner or lessee of the building in which the sales were effected, and was merely a hired agent or bartender, without any interest in the profit of the sales, and acted in the presence and under the control of his employer; unless his employer was duly licensed as an inn holder or common victualler. *Com. v. Hadley*, 52 Mass. (11 Metc.) 66.

If the servant in carrying on the business of his employer, and in the absence of his employer, was authorized by the latter to make illegal sales of intoxicating liquors, and he made such sales, both may be found guilty of maintaining a liquor nuisance. *Com. v. Galligan*, 144 Mass. 171.

Two were jointly indicted under the statute for illegally selling intoxicating liquors. Held, to be no defence to one that he acted as clerk for the other, it not being alleged that there was any compulsion. *French v. People*, 3 Park. Cr. Cas. (N. Y.) 114.

Assuming without authority to act as agent for the owner does not exonerate one from criminal responsibility for selling intoxicating liquor; but merely acting as messenger and transmitting the liquor from the seller to the buyer, and the money from the buyer to the seller, does not render one criminally responsible. *Com. v. Williams*, 86 Mass. (4 Allen) 587.

Sale without License—Liability of Servant.—One who sells spirituous liquors as the servant of another, neither he nor his principal having any license,

under the statutes of this state, is liable personally to indictment, although he acted without compensation in making the sale. *State v. Bugbee*, 22 Vt. 32.

1. *Com. v. Maroney*, 105 Mass. 467, n.; *Com. v. Kimball*, 105 Mass. 465; *St. Johnsbury v. Thompson*, 59 Vt. 300. See *Com. v. Brady*, 147 Mass. 584; *Com. v. Murphy*, 145 Mass. 250; *Com. v. Burke*, 114 Mass. 261; *Com. v. Dowling*, 114 Mass. 259; *Com. v. Tryon*, 99 Mass. 442; *Com. v. Gannett*, 83 Mass. (1 Allen) 7; s. c. 79, Am. Dec. 693; *Com. v. Mann*, 70 Mass. (4 Gray) 213; *Com. v. Drew*, 57 Mass. (3 Cush.) 279.

2. *Menkin v. City of Atlanta*, 78 Ga. 668; s. c., 36 Alb. L. J. 6. See *Com. v. Cotton*, 138 Mass. 500; *Com. v. Sinclair*, 138 Mass. 493; *State v. Canton*, 43 Mo. 48.

The court say, in *Menkin v. City of Atlanta*, *supra*, "that the accused was not the owner but only the hired agent is no excuse for him. The agent's possession is that of the owner, and if the agent participates in the unlawful purposes he is equally guilty with his principal. In dealing with crime the law gives no heed to a plea of agency. In criminal transactions voluntary agents are accomplices."

Carrying Beer in Saloons.—It is said by the supreme court of Missouri in the case of *State v. Canton*, 43 Mo. 48, that under subdivision 9, § 1, art. 4 of ordinances number 5421 of the ordinances of St. Louis, any person "found employed" carrying beer in saloons, whether they act as proprietors or servants, are liable to be arrested and proceeded against as vagrants.

3. *Pickens v. State*, 20 Ind. 116; *Com. v. Murphy*, 145 Mass. 250; *Com. v. Galligan*, 144 Mass. 171; *Com. v. Churchill*, 136 Mass. 148.

A licensed vendor of intoxicating liquors may employ an agent to carry on his business, who will not be liable on an indictment for illegal sales of

b. DRUG CLERKS.—Under a statute which forbids the sale of intoxicating or spirituous liquors without a license, a druggist who has such liquors in his store, which are sold in violation of the statute, by his clerk, is responsible for the sale and may be punished therefor, notwithstanding the sale was made without his knowledge, and contrary to his instructions.¹ But one who as clerk of another sells intoxicating liquors, for the sale of which his master has a druggist's license, cannot be prosecuted for selling without himself having a license.²

such liquors. *Pickens v. State*, 20 Ind. 116.

1. *Treadage v. State* (Miss.), 3 So. Rep. 245; *State v. Denoon* (W. Va.), 5 S. E. Rep. 315.

In the case of *State v. Denoon*, *supra*, the court says: "It is claimed by the defendant that as the sale here is shown to have been made not by him but by his clerk without his knowledge, and contrary to his directions, he was wholly innocent of any wrong intent or purpose to violate the law, and therefore innocent of any offence. In support of this claim he cites and relies upon *Anderson v. State*, 22 Ohio St. 305; 1 Bish. Cr. L., § 219; 3 Lawson Cr. Def. 200-217, 267-279, and cases there cited. See *Com. v. Nichols*, 51 Mass. (10 Metc.) 259; s. c., 43 Am. Dec. 432; *Reg. v. Holbrook*, 13 Cox, C. C. 650. These authorities seem to sustain the position of the defendant; but on the other hand, the authorities are numerous to the effect that where statutes prohibit or command an act to be done without qualification, in such cases ignorance or mistake of fact will not excuse their violation. This is peculiarly the case in regard to statutes respecting revenue and police matters, for the mere violation of which, irrespective of the motives or the knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the party to know the facts and to obey the law at his peril. Many of the cases sustaining this view will be found in a note to *Farrell v. State* 32 Ohio St. 456; s. c., 30 Am. Rep. 617, and the result there deduced from the cases is stated thus: 'First, when to an offence knowledge of certain facts is essential, then ignorance of these facts is a defence; second, when a statute makes an act indictable, irrespective of guilty knowledge, then ignorance of fact is no defence.' *Com. v. Emmons*, 98 Mass. 6; *Halsted v. State*, 41 N. J. L. (12 Vr.) 552; *State v. Hartfiel*, 24 Wis. 60; s. c., 32 Am. Rep. 247.

In the case of *Treadage v. State* (Miss.), 3 So. Rep. 245, a druggist whose license for selling liquor had expired was convicted under the prohibitory law for the sale by his clerk of a bottle of whiskey, without his knowledge, against his orders, and in his absence, although he reprimanded the clerk and endeavored to rescind the sale. The conviction was sustained. The court say: "The appellant was the owner of the liquor sold; it was in his store as a part of the stock in trade, and he had been engaged in retailing under a license which had expired at the time of the sale for which he was indicted. That his clerk violated his instructions, and sold without his knowledge or consent, is immaterial, under section 1112 of the code, which subjects, not only the person violating the law by personally selling, but also any person who may own or have any interest in any vinous or spirituous liquor sold contrary to this act. There is a combination of all the circumstances requisite under the act to fix the penalty of its violation upon the appellant, and it is wholly immaterial (because made so by statute) that he had no criminal intent." *Citing Fahey v. State*, 62 Miss. 402; *Gathings v. State*, 44 Miss. 343; *Riley v. State*, 43 Miss. 397; *Whitton v. State*, 37 Miss. 379.

2. *State v. Mullenhoff*, 74 Iowa 271; *State v. Hunt*, 29 Kan. 762.

Sale for Medicinal Purposes.—In a case where the defendant attempted to justify sales of intoxicating liquor for medicinal purposes, as an assistant to a registered pharmacist, under Iowa Stat., ch. 75, Acts 18th Gen. Assem., which forbids one not a registered pharmacist to dispense medicine except as an aid to and under the supervision of a registered pharmacist, an instruction to the jury that defendant was authorized to assist a registered pharmacist under his immediate personal direction and supervision was proper. *State v. Mullenhoff*, 74 Iowa 271.

c. SALE TO MINORS.—A sale of liquor to a minor by an agent, clerk, or bartender, of the owner of a saloon, or drug store, is a sale by the owner for which he is liable where it was made in the regular course of the master's lawful business, although the sale was made without his knowledge and in violation of his *bona fide* instructions to such agent, clerk or bar tender.¹ And a bar tender whose business is to sell liquors is within the prohibition of a

Physician's Clerk.—In *Gault v. State*, 34 Ga. 533, it was held that the clerk of a physician, who kept a drug store, was rightly convicted for selling a pint of whiskey, even upon a physician's order and for medicinal purposes, as he had no license to retail; although his master had a physician's license.

1. *Mogler v. State*, 47 Ark. 109; *Edgar v. State*, 45 Ark. 356; *Snider v. State*, (Ga.) 7 S. E. Rep. 631; *Loeb v. State*, 75 Ga. 258; *Carroll v. State*, 63 Md. 551. See *People v. Roby*, 52 Mich. 577; s. c., 50 Am. Rep. 270; *Byington v. Simpson*, 134 Mass. 169, 170; *George v. Gobey*, 128 Mass. 289; *Roberge v. Burnham*, 124 Mass. 277; *Com. v. Holmes*, 119 Mass. 195; *Com. v. Edds*, 80 Mass. (14 Gray) 406; *Com. v. Putnam*, 70 Mass. (4 Gray) 16; *Com. v. Dunbar*, 75 Mass. (9 Gray) 298. Compare *Cloud v. State*, 36 Ark. 151; *Thompson v. State*, 45 Ind. 495; *Hanson v. State*, 43 Ind. 550; *Com. v. Hayes*, 145 Mass. 289, 294; *Com. v. Stevenson*, 142 Mass. 466; *Com. v. Briant*, 142 Mass. 463; s. c., 56 Am. Rep. 707.

In **Arkansas**, it is no defence to a prosecution for selling intoxicating liquor to a minor that defendant was absent from his saloon when his bar tender sold the liquor to the minor; nor does the fact that defendant had given directions to his bar tender to refuse to make sales to minors aid him further than to commend a mitigation of punishment. *Mogler v. State*, 47 Ark. 109.

In *Cloud v. State*, 36 Ark. 151, it is held that, under an act imposing a penalty upon any person who should sell liquor to a minor without the written consent of his parent or guardian, the owner of the liquor cannot be punished for an unauthorized sale by his clerk or partner, in his absence, and without his authority or consent. *Aliter* if sold since the act of the eighth of March, 1879, came in force, imposing a penalty upon any person who shall sell for himself or another, or be interested in such sale.

In **Georgia**, the Code, § 4540 (a), *ex vi termini* makes all persons connected with the sale of liquor to a minor liable criminally. Under said provision the proprietor of a tippling house is liable for sales made by his clerk. *Loeb v. State*, 75 Ga. 258.

Under the Georgia Code, sec. 4540, a man indicted for selling intoxicating liquor to minors cannot defend on the ground that the sales were made, not by him, but by his clerk. *Snider v. State* (Ga.), 7 S. E. Rep. 631.

In **Maryland**, under an indictment for the violation of a statute, providing that "if any person shall sell . . . liquor to a minor . . . he shall pay a fine," defendant is liable, though the sale was made by his bar keeper without his knowledge and in violation of his *bona fide* instructions to the bar keeper. *Carroll v. State*, 63 Md. 551.

A licensed dealer in spirituous liquors, indicted for unlawfully selling liquor to a minor, cannot escape the penalty of the offence by proving that the sale was made by his bar keeper, during his absence, without his knowledge, and contrary to his instructions given in good faith, and which were so understood by the bar keeper. The intent in such case is immaterial in determining the guilt. *Carroll v. State*, 63 Md. 551.

In **Indiana**, the proprietor who has a license is not criminally liable where his bar tender, in his absence, and without his knowledge, sells liquor to a minor. *Hanson v. State*, 43 Ind. 550.

Where, in the absence of the proprietor of a saloon, his bar keeper sold intoxicating liquor to a minor, and on the trial of a prosecution therefor against said proprietor there was nothing in the evidence tending to show that he had authorized his bar keeper to sell to minors, or in any manner in violation of law, held, that there could be no conviction. *Thompson v. State*, 45 Ind. 495.

In **Massachusetts**, an illegal sale to a minor, by a servant in his master's shop and in the regular course of his master's lawful business, is not necessarily, *prima facie*, a sale by the mas-

statute against selling liquors to minors,¹ whether he is the owner of the saloon or the liquors, or is merely employed to sell the liquors.² In such a case it is no defence that the seller did not know or suppose the purchaser to be a minor, and honestly believed him to be of full age,³ and the minor had deceived him by falsely pretending that he was sent for the liquor by another person.⁴

ter. Com. v. Stevenson, 142 Mass. 466; Com. v. Briant, 142 Mass. 463; s. c., 56 Am. Rep. 707.

"In Com. v. Briant, 142 Mass. 463; s. c., 56 Am. Rep. 707, and in Com. v. Stevenson, 142 Mass. 466, the complaints were for unlawfully selling intoxicating liquors to a minor, and the rulings which were held to be erroneous were to the effect that a sale of intoxicating liquors by a bar tender in his master's shop, and in the regular course of his master's business, was *prima facie* a sale by the master, whether made to a minor or any other person. In Com. v. Briant, 142 Mass. 463; s. c., 56 Am. Rep. 707, it was said that, although we should admit that a jury might be warranted in inferring that such a sale was authorized, it would not follow that a court could rule that there is a presumption of fact that it was so, which is the purport of the instruction fairly construed." See Com. v. Hayes, 145 Mass. 295.

1. Such as Ala. Rev. Code, § 3619.

2. Marshall v. State, 49 Ala. 21.

3. Redmond v. State, 36 Ark. 58; s. c., 38 Am. Rep. 24; Barnes v. State, 19 Conn. 398; Farmer v. People, 77 Ill. 322; McCutcheon v. People, 69 Ill. 601; Ulrich v. Com., 6 Bush (Ky.) 400; Com. v. Finnegan, 124 Mass. 324; Com. v. Lattinville, 120 Mass. 386; Com. v. Emmons, 98 Mass. 6; Com. v. Goodman, 97 Mass. 117; State v. Haynes, 71 N. C. 79; State v. Cain, 9 W. Va. 572; State v. Hartfiel, 24 Wis. 60; United States v. Dodge, 1 Deady, U. S. D. C. 186; Reg. v. Prince, L. R. 2 C. C. 154; s. c., 13 Moak, Eng. Rep. 385. *Aliier* under Georgia and Indiana a statutes. Stern v. State, 53 Ga. 229; s. c., 21 Am. Rep. 266; Goetz v. State, 41 Ind. 162; Brown v. State, 24 Ind. 113; Farbach v. State, 24 Ind. 77. See Dotson v. State, 62 Ala. 141; s. c., 34 Am. Rep. 2; Sikes v. State, 30 Ark. 496; Smyth v. State, 13 Ark. 696; Dudley v. Sautbine, 49 Iowa 650; s. c., 31 Am. Rep. 165; Com. v. Waite, 93 Mass. (11 Allen) 264; s. c., 87 Am. Dec. 711;

Com. v. Farren, 91 Mass. (9 Allen) 489; Com. v. Boynton, 84 Mass. (2 Allen) 160; People v. Roby, 52 Mich. 577; s. c., 50 Am. Rep. 270; Halsted v. State, 41 N. J. L. (12 Vr.) 552; s. c., 32 Am. Rep. 247; Reg. v. Booth, 12 Cox, C. C. 231; s. c., 4 Moak, Eng. Rep. 521; Reg. v. Mycock, 12 Cox, C. C. 28; s. c., 2 Moak, Eng. Rep. 177; Reg. v. Olifier, 10 Cox, C. C. 402.

Compare Faulks v. People, 39 Mich. 200; s. c., 33 Am. Rep. 374; Farrell v. State, 32 Ohio St. 456; s. c., 30 Am. Rep. 614, and note 617.

4. Com. v. Finnegan, 124 Mass. 324. See People v. Roby, 52 Mich. 577; s. c., 50 Am. Rep. 270.

Intent.—As to intent in such cases see Redmond v. State, 36 Ark. 58; s. c., 38 Am. Rep. 24; Stern v. State, 53 Ga. 229; s. c., 21 Am. Rep. 266, and note 268; George v. Gobey, 128 Mass. 289; s. c., 35 Am. Rep. 376; King v. State, 58 Miss. 737; s. c., 38 Am. Rep. 344; Halsted v. State, 41 N. J. L. (12 Vr.) 552; s. c., 32 Am. Rep. 247; Farrell v. State, 32 Ohio St. 456; s. c., 30 Am. Rep. 614, and note 617.

The intent becomes a question of fact for the jury. for purposely doing of act is not necessarily and inevitably criminal. Com. v. Greene, 111 Mass. 392; Com. v. Mason, 105 Mass. 163; Jeff v. State, 39 Miss. 593; s. c., 2 Morris St. Cas. 1422; Mask v. State, 36 Miss. 77; s. c., 2 Morris St. Cas. 1100; Wood-sides v. State, 13 Miss. (2 How.) 655; s. c., 2 Morris St. Cas. 95; State v. Malloy, 34 N. J. L. (5 Vr.) 410; Evans v. People, 49 N. Y. 86; People v. McDonald, 43 N. Y. 66; People v. Jones, 54 Barb. (N. Y.) 311; People v. Hamill, 2 Park. Cr. Cas. (N. Y.) 223; People v. Johnson, 1 Park. Cr. Cas. (N. Y.) 291, 564; Kemble's Case, 1 City Hall Rec. 177; Bluff v. State, 10 Ohio St. 547.

Ignorance of Fact.—See Farrell v. State, 32 Ohio St. 456; s. c., 30 Am. Rep. 614, and note 617.

Mistake of Fact.—It has been said that if the defendant honestly believed from the appearance of an infant, and from his answers to questions, that he

d. SALE TO INTOXICATED PERSONS OR HABITUAL DRUNKARDS.—In most of the States there are statutes in varying terms forbidding the sale of intoxicating liquor to drunkards.¹ Under these statutes it is held that a master is not liable for the penalty imposed if his servant, in the course of his master's business, without the master's knowledge or consent, and in his absence sells to such a person.²

e. HUSBAND AND WIFE.—It is a general rule that a defendant cannot be convicted for an illegal sale of intoxicating liquors, where the sale is made by his wife and done without his knowledge

was of full age, there can be no conviction. *Stern v. State*, 53 Ga. 229; s. c., 21 Am. Rep. 266. But this case is denied by the supreme court of Iowa in *Dudley v. Sautbine*, 49 Iowa 650; s. c., 31 Am. Rep. 168.

1. *Tatem v. State*, 63 Ala. 147; *Walton v. State*, 62 Ala. 197; *Hill v. State*, 62 Ala. 168; *Atkins v. State*, 60 Ala. 45; *Smith v. State*, 55 Ala. 1; *Elam v. State*, 25 Ala. 53; *Smith v. State*, 19 Conn. 493; *Barnes v. State*, 19 Conn. 398; *Humpeler v. People*, 92 Ill. 400; *Murphy v. People*, 90 Ill. 59; *Mapes v. People*, 69 Ill. 523; *Buell v. State*, 72 Ind. 523; *Allen v. State*, 52 Ind. 486; *Williams v. State*, 48 Ind. 306; *Deveny v. State*, 47 Ind. 208; *Zeitzer v. State*, 47 Ind. 129; *Dudley v. Sautbine*, 49 Iowa 650; *State v. Gutekunst*, 24 Kan. 252; *State v. Heck*, 23 Minn. 549; *State v. Mahoney*, 23 Minn. 181; *People v. Hislop*, 77 N. Y. 331; *Crabtree v. State*, 30 Ohio St. 382; *Adams v. State*, 25 Ohio St. 584; *Miller v. State*, 3 Ohio St. 475.

2. See *O'Leary v. State*, 44 Ind. 91; *Hanson v. State*, 43 Ind. 550; *Hipp v. State*, 5 Blackf. (Ind.) 149; *People v. Parks*, 49 Mich. 333; *State v. Mahoney*, 23 Minn. 181; *State v. Shortell*, 93 Mo. 123.

In *Indiana*, under an indictment against a saloon keeper for selling intoxicating liquors to one he knew to be in the habit of becoming intoxicated, the defendant is not liable where the sale was made in his absence by his bartender without his knowledge or consent, and against his express direction. *O'Leary v. State*, 44 Ind. 91; *Hanson v. State*, 43 Ind. 550.

An inn keeper is not liable to be indicted for the offence committed in his absence, and without his knowledge, by his bar keeper, of selling spirituous liquors to an intoxicated person. *Hipp v. State*, 5 Blackf. (Ind.) 149.

In *Michigan*, a liquor dealer cannot be held criminally responsible for the

sale of liquor by his clerk, and without his knowledge and concurrence, to habitual drunkards. *People v. Parks*, 49 Mich. 333.

In *Minnesota*, a single sale of liquor to an habitual drunkard, made by the clerk of defendant in his absence, is not sufficient to raise a presumption of an authority, from the defendant to the clerk, to make the sale. The presumption from a clerk being employed at the saloon would be that he had authority from the defendant to make such sales as were lawful. *State v. Mahoney*, 23 Minn. 181.

Missouri Revised Statutes, § 5462, prohibiting the sale of intoxicating liquors to an habitual drunkard does not authorize the conviction of a dramshop keeper for the acts of his agent in excess of the authority of the latter. *State v. Shortell*, 93 Mo. 123.

Notice Not to Sell.—But it is held in *George v. Gobey*, 128 Mass. 289; s. c., 35 Am. Rep. 376, that a master is liable to the penalty imposed by the statute where his servant, in the course of the master's business, sells intoxicating liquors, after notice requiring the master not to do so to a person who has the habit of drinking intoxicating liquors to excess, notwithstanding the fact that the master has instructed the servant not to make a sale to such person, and the sale is without the knowledge or consent of the master. See *Shugart v. Egan*, 83 Ill. 56; s. c., 25 Am. Rep. 359 and note.

Under an indictment for furnishing liquor to persons of known intemperate habits, proof that defendant knew that his clerk was selling liquor to improper persons, or that he in any manner assented to illegal sales at his bar, charged in the indictment, will support a conviction. *Zeigler v. Com.* (Pa.) 12 Cent. Rep. 497, 14 Atl. Rep. 237.

Same—Instructions to Judge.—*Pennsylvania.*—On the trial of an indict-

or consent and against his will;¹ but it is otherwise in a case where the sale is made with the husband's knowledge or consent and by his direction.²

Where the property is owned by the wife but such property or the business therein is controlled by the husband at the time of the sale of the intoxicating liquors, he will be guilty of the offence of

ment far wilfully selling liquor to persons of known intemperate habits, it is not error for the court to charge the jury that if the defendant knew that his clerks—"agents"—were selling liquor to improper persons, or if, in any manner, he assented to or promoted the illegal sales charged in the indictment, he was as guilty as though they were made directly by himself. *Zeigler v. Com.*, (Pa. St.) 14 Atl. Rep. 237.

1. *Com. v. Hill*, 145 Mass. 305. In this case the court say: "We are aware that, in some of the decisions, expressions have been used which indicate that it is a substantive part of the law, that, to excuse himself, the husband must show that he has used all reasonable and practicable means to restrain his wife; but, taking all the decisions together, we think it appears that his whole conduct, including what he did and said, and as well what he could reasonably have done and did not do, is admitted as evidence only for the purpose of proving or disproving his consent in fact to the acts of his wife." *Citing Com. v. Pratt*, 126 Mass. 462; *Com. v. Carroll*, 124 Mass. 30; *Com. v. Kennedy*, 119 Mass. 211; *Com. v. Barry*, 115 Mass. 146; *Com. v. Cheney*, 114 Mass. 281; *Com. v. Tryon*, 99 Mass. 442; *Com. v. Welch*, 97 Mass. 593; *Com. v. Wood*, 97 Mass. 225; *Com. v. Putnam*, 70 Mass. (4 Gray) 16.

2. *Mulvey v. State*, 43 Ala. 316; s. c., 94 Am. Dec. 684. See *State v. McDaniel*, 1 Houst. Cr. Cas. (Del.) 506; *Com. v. Hill*, 145 Mass. 305; s. c., 10 Crim. L. Mag. 283; *Com. v. Pratt*, 126 Mass. 462; *Com. v. Carroll*, 124 Mass. 30; *Com. v. Kennedy*, 119 Mass. 211; *Com. v. Reynolds*, 114 Mass. 306; *Com. v. Coughlin*, 80 Mass. (14 Gray) 389; *State v. Lymburn*, 1 Brev. (S. C.) 397; s. c., 2 Am. Dec. 669; *Rex v. Perkins*, 4 Car. & P. 537; s. c., 19 Eng. C. L. 515; *Anon.*, 1 Lew C. C., 17; s. c., 34 Eng. C. L. 539.

Evidence that the defendant's wife unlawfully sold liquor without his knowledge or consent, or as his agent or servant, will support a conviction of him for an illegal sale. Commonwealth

v. Kennedy, 119 Mass. 211; *Commonwealth v. Reynolds*, 114 Mass. 306.

Guilty Knowledge.—A husband, with guilty knowledge thereof, is liable for his wife's illegal keeping of liquors, although she has filed a certificate for doing business on her own account, and holds a United States license as a retail liquor dealer. *Com. v. Barry*, 115 Mass. 146.

Sale Without License.—A husband is liable, whose wife in his presence retails spirituous liquors without a license. *Geuing v. State*, 1 McCord (S. C.) 573. But, on the other hand, a husband is not criminally liable for the act of his wife in selling liquor without license, when the sale is made in his absence and contrary to his express instructions. *State v. Baker*, 71 Mo. 475.

Where a married woman, living with her husband, keeps a store in the house, and sells liquor without a license, her husband is liable to be indicted and convicted for the offence, although he was not present at the sale, and had often remonstrated with her for selling intoxicating liquors. *State v. McDaniel*, 1 Houst. Cr. Cas. (Del.) 506.

Sale by Wife in Husband's House.—Unlawful sales of intoxicating liquor, made by a wife in a husband's house in his absence, may be given in evidence to charge him for the offence. *Com. v. Coughlin*, 80 Mass. (14 Gray) 389.

Hotel Rented by Wife—Sale of Liquors by Her.—If a married woman keeps intoxicating liquors for sale in violation of law, in a hotel hired by her, and her husband aids her in such keeping, or if, without actual and actively aiding her, he is present, and has knowledge of the fact and of her intent, the presumption of law is that she is acting under his coercion, and he can be convicted of such illegal keeping. *Com. v. Pratt*, 126 Mass. 462.

House Owned by Wife—Sale of Liquors by Her in.—A husband knowingly permitting his wife unlawfully to keep liquors for sale in a house owned by her, but under his control as the family domicil, can be convicted for the keeping, although he has no interests in the

selling, although the sale was made by a clerk.¹ But it seems that a married woman is liable under the statutes of the various States for selling without license spirituous liquors of her husband's in his absence, and as his agent.²

f. LIABILITY OF PARTNER FOR SALE BY COPARTNER.—Where one partner sells ardent spirits unlawfully in the absence and without the knowledge or consent of the other, the latter is not liable.³

stock or in the profits. *Com. v. Carroll*, 124 Mass. 30. The statutes enlarging the rights of married women have not changed the law in this regard. *Com. v. Carroll*, 124 Mass. 30.

A husband cannot be convicted of maintaining a liquor nuisance where it appears that the house was owned by his wife, who used it for such unlawful purpose of her own free will, and without his consent, and against his will, even though it does not appear that he has used all reasonable and practicable means to control her conduct; and evidence that from time to time, during the five years next preceding the date first alleged in the indictment, he had used such means and ordered, directed and persuaded her not to make such use of the premises, is admissible as showing the state of his mind during the period alleged in the indictment. *Com. v. Hill*, 145 Mass. 305; *s. c.*, 10 Crim. L. Mag. 283.

1. *Faircloth v. State*, 73 Ga. 426. See *Commissioners of Excise v. Dougherty*, 55 Barb. (N. Y.) 332.

One who violates the statute prohibiting the sale of liquors without a license, cannot relieve himself from liability by setting up the defence that his wife owned the tavern where the liquor was sold, and that he sold as her agent, unless there is proof that the wife had a license. *Commissioners of Excise v. Dougherty*, 55 Barb. (N. Y.) 332.

But in the case of *State v. Hunt*, 29 Kan. 762, the defendant was prosecuted criminally for selling spirituous, malt, vinous, fermented and other intoxicating liquors, without having a permit therefor from the probate judge of the county. Upon the trial it was shown that the defendant sold such liquors as the clerk and managing agent of his wife, who owned the drug store in which the liquors were sold, and who had a druggists' permit to sell intoxicating liquors, issued by the probate judge of the county, the court

held that the defendant is not liable.

2. *Com. v. Welch*, 97 Mass. 593; *State v. Haines*, 35 N. H. 207; *Utica Excise Commrs. v. Palmer*, 3 N. Y. St. Rep. 200; *State v. Goss*, 59 Vt. 266.

It has been said that it is no defence to an indictment of a wife for being a common seller of intoxicating liquor that her husband provided it, and she unlawfully sold it under his coercion. *Com. v. Welch*, 97 Mass. 593.

Wife Delivering Liquor Sold by Husband.—A wife was convicted as a common seller, on proof that in husband's absence she had delivered and taken pay for liquors that he had previously bargained and sold. Authorities cited in *State v. Goss*, 59 Vt. 266.

The conviction of a husband for maintaining a liquor nuisance is no bar to the conviction of his wife for being a common seller, etc., although the same testimony is relied on to prove both offences. *Com. v. Welch*, 97 Mass. 593.

A wife who in pursuance of a contract made by her husband for the illegal sale of intoxicating liquors delivers the same to the purchaser in his absence, may be punished under Massachusetts Stat. 1855, ch. 215, § 17. *Com. v. Whalen*, 82 Mass. (16 Gray) 25.

Married Women Carrying on Separate Business.—A married woman, in possession of premises and carrying on a separate business of her own therein, who sells spirituous liquors to be drunk on the premises without having a license therefor, is liable in an action to recover the penalty prescribed for the violation of the excise laws (N. Y. L. 1857, ch. 628, § 14), as though unmarried, and can be sued in the same manner, her husband not being liable alone or jointly with her. *Utica Excise Commrs. v. Palmer*, 3 N. Y. St. Rep. 200.

3. *Acree v. Com.*, 13 Bush (Ky.) 353; *Whitton v. State*, 37 Miss. 397; *State v. Hughes*, 22 W. Va. 743.

By Mississippi Revised Code, art. 9, p. 199, one partner can be convicted

except in those cases where the sale is made to a minor;¹ but if one of the two partners sells spirituous liquors unlawfully for account of the firm and with the consent of the other partner, both are liable for such sale.²

g. LANDLORD AND TENANT.—In many of the States where there are statutes prohibiting the selling of liquor without a license, to be drunk on the premises, it is provided that where a tenant keeps intoxicating liquors with intent to sell them, the landlord is also liable to prosecution under the prohibitory liquor law in those cases where he leased the premises to the tenant for that purpose, or where the tenant keeps or sells the liquor by his authority or permission.³ The reason of this is that the lessor of a

upon a sale of liquor by his associate without his consent, and in his absence. *Whitton v. State*, 37 Miss. 379.

A partner of a wholesale liquor firm in Wood county visited Taylor county and there solicited orders for whiskey, which was delivered in jugs by the firm to an express agent in Wood county, to be shipped to the purchasers, who received it in Taylor county; this partner collected the agreed price for the whiskey. Held, that this partner could not be indicted for the sale of liquor in Taylor county, as the sale was complete when the whiskey was delivered to the express agent. *State v. Hughes*, 22 W. Va. 743.

1. *Waller v. State*, 38 Ark. 656; *Robinson v. State*, 38 Ark. 641.

Under a statute providing that any one who shall sell or be interested in the sale of liquors to a minor, shall be guilty of a misdemeanor, held, that A, a partner in a saloon, might be convicted of a sale by his copartner, though A was absent at the time and had no knowledge of it. *Waller v. State*, 38 Ark. 656; *Robinson v. State*, 38 Ark. 641.

2. *State v. Neal*, 27 N. H. (7 Post.) 131.

3. *Plunkett v. State*, 69 Ind. 68; *Pearson v. International Distillery*, 72 Iowa 348; *State v. Potter*, 30 Iowa 587; *Anderson v. Brewster*, 44 Ohio St. 576; *Bellinger v. Griffith*, 23 Ohio St. 619. See *Crocker v. State*, 49 Ark. 60; *Shugart v. Egan*, 83 Ill. 56; s. c., 25 Am. Rep. 359 and note, 362-369; *State v. Abrahams*, 6 Iowa 117; s. c., 71 Am. Dec. 399; *Martin v. Blattner*, 68 Iowa 286; *State v. Ballingall*, 42 Iowa 87; *Cordes v. State*, 37 Kan. 48; *Koester v. State*, 36 Kan. 27; *State v. Frazier*, 79 Me. 95; *State v. Stafford*, 67 Me. 125; *Com. v. Wentworth*, 146 Mass.

36; *Conklin v. Tice*, 1 N. Y. Sup. 803.

Ohio Doctrine—"Dow Liquor Law."—Thus under section 2 of the Ohio Stat. of May 14th, 1886, known as the "Dow Law," a valid lien is created upon the real property when the tenant holds under a lease, either written or parol, made after the passage of the statute. *Anderson v. Brewster*, 44 Ohio St. 576.

The lien of a judgment recovered under Ohio act of 1870 to provide against the evils resulting from the sale of intoxicating liquors, is limited to the real estate of the judgment debtor. The provisions of section 10 of the act, as amended, declaring that real estate owned by the judgment debtor shall be held liable for the payment of a judgment, not being designed to create a lien on such property, but to authorize it to be subjected to the payment of a judgment in a suit against the owner instituted for the purpose. *Bellinger v. Griffith*, 23 Ohio St. 619.

Indiana Doctrine.—On a prosecution under Indiana act of March 17th, 1875 (1 R. S. 1876, p. 869), for selling liquor without a license to be drunk on the premises, where the evidence shows the house where the liquor was drunk to have been at the time in the actual possession and occupancy and under the immediate control of a person other than the defendant, with whom the latter lived as a member of his family without any independent authority over the house, it is not the house of the defendant within the meaning of the statute. *Plunkett v. State*, 69 Ind. 68.

In an action to abate as a nuisance a distillery unlawfully manufacturing intoxicating liquors, prosecuted against the lessee alone, where the owner of the property is not brought into ques-

building used as a place for unlawful sale of intoxicating liquors becomes an aider and abetter in violating the law.¹ But it is thought that in the absence of a statute to the contrary the owner of premises upon which intoxicating liquors are kept for sale contrary to law, is not guilty of an offence, if he leased them for a lawful purpose, and did not affirmatively assent to such unlawful use; and that the mere failure to prevent the illegal use of such premises for the sale of liquors, does not subject him to the penalty of the statute.²

tion, and it is shown that the machinery is used in violation of law, it is not error to decree the closing of the establishment, or to decree the sale of the personal property to satisfy the costs, as the decree is not binding on the lessor, who is not a party to the action. *Pearson v. International Distillery*, 72 Iowa 348.

1. *Martin v. Blattner*, 63 Iowa 286; *State v. Frazier*, 79 Me. 95.

But to constitute an offence under the statute it must appear that the tenement was left for the illegal use, or that the illegal use was permitted. The court say, in the case of *State v. Frazier*, 79 Me. 95, that "one who has authority to let a tenement and receive the rents has control of it within the meaning of the statute; and if he knowingly permits the illegal use, that is, consents to it, he becomes liable for aiding in maintaining a nuisance; but the mere fact that he has control of the tenement does not make him liable; he must be proved to consent to the illegal use; and if such use is known to him, and he takes no measures to prevent it, his inaction may be evidence of his consent to such use, or that he permitted it; but his permission of the use must be proved, to charge him under the statute; and these same rules apply to the owner, and the same facts must be proved in order to charge him. *State v. Stafford*, 67 Me. 126.

2. *Crocker v. State*, 49 Ark. 60; *Shugart v. Egan*, 83 Ill. 56; s. c., 25 Am. Rep. 36, 28; *State v. Abrahams*, 6 Iowa 117; s. c., 71 Am. Dec. 399; *State v. Ballingall*, 42 Iowa 87; *Cordes v. State*, 37 Kan. 48; *Koester v. State*, 36 Kan. 27; *State v. Stafford*, 67 Me. 125; *Com. v. Wentworth*, 146 Mass. 36; *Conklin v. Tice*, 1 N. Y. Sup. 803.

Effect of Knowledge of Landlord.—Under the Maine Rev. Stat., ch. 17, §§ 1 & 4, on an indictment for maintaining a nuisance, mere knowledge of an owner of leased premises that they are used

for liquor selling does not expose him to punishment; there must be positive proof of permission or consent. *State v. Stafford*, 67 Me. 125.

The supreme court of Kansas held, in the case of *Cordes v. State*, 37 Kan. 148, that the owner of leased premises can only be made liable under the statutory provisions of the prohibitory law of that state when he knowingly permits the occupant to use the premises for the unlawful sale of intoxicating liquors; but knowledge sufficient to excite the suspicion of a prudent man and put him on enquiry is held equivalent to knowledge of the ultimate fact.

Under those statutes which make it a misdemeanor for any person owning, using or controlling a house or tenement to sell or give away, or allow to be given away, any ardent or vinous spirits, a landlord who leases a house for a lawful purpose is not bound to interfere, and invoke the law when he subsequently finds that the tenant is using the premises for the sale of liquor. *Crocker v. State*, 49 Ark. 60. Thus where a landlord leased his premises for a term of years, retaining no control over them, and subsequently a temporary injunction was issued restraining him and the subtenant from keeping a saloon upon the premises in violation of law, and afterwards while the original lessee was in possession, a subtenant opened a saloon therein and sold intoxicating liquors without a permit, the court held that the mere knowledge of the landlord of such use of the premises, and his omission to take steps to avoid the lease by re-entry was not sufficient to justify his punishment for contempt for disobedience of the temporary injunction. *Koester v. State*, 36 Kan. 27.

In Illinois, New York, Michigan and Ohio, the sale by the tenant, contrary to the provisions of the act, works a forfeiture of all his rights under the lease; and consequently in those states,

h. AIDERS AND ABETTERS.—Under some statutes¹ any person who counsels, aids or abets in the commission of the offence of selling intoxicating liquors contrary to law, may be charged, tried and convicted in the same manner as if he were the principal offender.²

i. KEEPERS OF INNS AND RESTAURANTS AND COMMON VICTUALLERS.—The keepers of inns³

at least, the landlord would be liable at all hazards for sales made with his knowledge because he would not have the excuse of inability to prevent the sale and thus would be held to "permit" it. *State v. Ballingall*, 42 Iowa 87. But knowledge on his part is essential; mere inactivity to ascertain the fact, or a mere failure to prevent such a use of his premises, would be insufficient. *Shugart v. Egan*, 83 Ill. 56; s. c., 25 Am. Rep. 362 n.; *State v. Abrahams*, 6 Iowa 117.

Reservation of control.—The Massachusetts statute provides (Pub. Stat., ch. 101, § 9) for the punishment of one in control of a building, who allows it to be used for the illegal sale of liquors, or if after notice of such use he fails to take reasonable measures to eject the occupant. The supreme judicial court, in the case of *Com. v. Wentworth*, 146 Mass. 36, held that under this statute a lessor cannot be convicted unless the lease specially reserves his control of the building, notwithstanding the fact that section 8 of this statute provides that the owner may recover possession by entry or action in case of such illegal sale.

Evidence.—Evidence that a lessor, before leasing the building, stated that his prospective tenant intended to keep a hotel and could get a license by reason of the friendship of a high county official; that he was several times about the hotel while it was being fitted up, and was in the habit of going there two or three times a week; together with evidence that there was a regular bar room in the hotel where every one could get liquor who asked for it, is a sufficient proof of a leasing for the purpose of the sale of intoxicating liquor, and knowledge that the premises were used for that purpose. *Conklin v. Tice*, 1 N. Y. Sup. 803.

In an action under the Kansas Prohibitory Liquor Law, section 18, against the owner of leased premises, to enforce a lien which has been adjudged against the occupant for the unlawful sale of intoxicating liquors, it is not essential

to a recovery that the petition or evidence should show that the owner witnessed or had knowledge of the particular sales; it is enough in such case that the owner knowingly permitted the occupant to use the premises for the unlawful sale of intoxicating liquors. *Cordes v. State*, 37 Kan. 48.

1. Such as the Compiled Laws of Kansas, 1879, ch. 82, § 115.

2. *State v. Shenkle*, 36 Kan. 43. See *State v. Mosley*, 31 Kan. 355; *State v. Brown*, 21 Kan. 50; *State v. Cassady*, 12 Kan. 550.

3. *State v. Cloud*, 6 Ala. 628. See *Gray v. Com.*, 9 Dana (Ky.) 300; s. c., 35 Am. Dec. 136; *Foster v. Haines*, 13 Me. 307; *Benson v. Moore*, 15 Wend. (N. Y.) 260; *Burner v. Com.*, 13 Gratt. (Va.) 778.

Keeping a house of public entertainment, without first having obtained a licence therefor, is an offence punishable by indictment or presentment, although spirituous liquors are not sold. *State v. Cloud*, 6 Ala. 628.

Definition.—In Georgia the words "tavern," or "house of entertainment," as used in the act of 1791, are held to be synonymous, and that the word tavern, in that act, is intended to mean the common inns of the common law. *Bonner v. Wellborn*, 7 Ga. 296.

Same—License.—The possession of a licence does not make, nor the want of it prevent, a person from being an inn holder at common law. *Norcross v. Norcross*, 53 Me. 163.

Same—Keeper of "Summer Boarders."—One whose business it is to rent houses and furnish board, lodging and entertainment for a season at a watering place, to the visitors who resort there, is not the keeper of a tavern, or house of entertainment, within the view of the act of 1791 of the laws of Georgia. *Bonner v. Wellborn*, 7 Ga. 296.

One licensed as inn keeper has no right to sell liquor by the gallon to be carried away. *Benson v. Moore*, 15 Wend. (N. Y.) 260.

A licensed inn holder is not liable,

and restaurants¹ and common victuallers² are liable to the penalties provided by statutes regulating the sale and traffic in intoxicating liquors for sales made without license, and for other acts violative of such statutes.

under the Maine statute of 1834, ch. 141, to the penalty of \$10 for selling spirituous liquor in a particular instance. But if he presume to be a common retailer without being licensed as such, he is liable under that statute to the penalty of \$50. *Foster v. Haines*, 13 Me. 307.

A tavern keeper, duly licensed, may have his bar room in an apartment which is not connected by any door way with his main building, but separate from it, and may there retail spirituous liquors, by himself or his partner, without a violation of law, provided this separate room constitutes, in good faith, a part of the licensed tavern, and is not used as a fraudulent shield for a "grocery." *Gray v. Com.*, 9 Dana (Ky.) 300; s. c., 35 Am. Dec. 136.

Unlicensed Ordinary.—A person is not guilty of keeping an unlicensed ordinary who, being licensed to keep a house of private entertainment, sells spirits to be drunk at the "house," etc., in addition to furnishing lodgings, etc., at that place. *Burner v. Com.*, 13 Gratt. (Va.) 778.

1. See *Nicrosi v. State*, 52 Ala. 336; *Baldwin v. Chicago*, 68 Ill. 418; *Com. v. Everson*, 140 Mass. 292; *State v. Hogan*, 30 N. H. (10 Fost.) 268; *State v. Clark*, 28 N. H. (8 Fost.) 176; s. c., 61 Am. Dec. 611; *Kelly v. Excise Commrs.*, 54 How. (N. Y.) Pr. 327.

A restaurant keeper, regularly licensed as such by the city of Montgomery, having a wholesale, but no retail license from the State, who sells vinous liquors only to persons taking meals at his restaurant, the liquors being drunk by them only while eating, is guilty of an indictable offence under section 3618 of the revised code. *Nicrosi v. State*, 52 Ala. 336.

A restaurant or lodging house is not an inn, such that the proprietor can claim a license to sell liquor, under a law allowing licenses to inn keepers. And the fact that a lodging house sometimes furnishes meals will not constitute it an inn. But a house kept "on the European plan" is an inn. *Kelly v. Excise Commrs.*, 54 How. (N. Y.) Pr. 327.

Public Bar.—A person may be convicted of keeping a "public bar" if he

sells liquor over it to anyone, although the bar is also used for luncheon purposes. *Com. v. Everson*, 140 Mass. 292.

Keeping Open Bar Room.—A restaurant keeper may properly be convicted for keeping an open bar room between midnight and 5 o'clock A. M., in violation of an ordinance, although he sells no liquor after midnight, and draws a curtain around his bar after that hour. *Baldwin v. Chicago*, 68 Ill. 418.

Refreshment Room—Keeping Liquor in.—An ordinance enacted by a city that no intoxicating liquors shall be used or kept in any refreshment room or restaurant within the city for any purpose whatever is violated by the keeping of liquor in a cellar under a refreshment saloon or restaurant. *State v. Clark*, 28 N. H. (8 Fost.) 176; s. c., 61 Am. Dec. 611.

In *State v. Hogan*, 30 N. H. (10 Fost.) 268, the respondent was charged with a breach of a city ordinance, which provided that "no intoxicating liquors shall be used or kept in any refreshment saloon or restaurant within the city for any purpose whatever," and it appeared that the shop where the alleged offence was committed, was used by the respondent for the manufacture and sale of tobacco, snuff and cigars, and also for the sale of strong beer by the glass, and for no other purposes, the court held that there was no breach of the ordinance shown.

Same—What Is.—A shop which is used for the manufacture and sale of tobacco, snuff and cigars, is not a refreshment saloon or restaurant. *State v. Hogan*, 30 N. H. (10 Fost.) 268.

2. See *State v. Davis*, 23 Me. 403; *Com. v. Salmon*, 136 Mass. 431; *Com. v. Rogers*, 135 Mass. 536.

Common Victualler—Keeping Public Bar.—A person, licensed as a common victualler, and to sell intoxicating liquors to be drunk on the premises, may be convicted of keeping a "public bar," within the Pub. Stats., ch. 100, § 9, cl. 5, if he sells and delivers, not in connection with food, intoxicating liquors indiscriminately to such persons as may call for them, over a bar or counter, although there is no public display of the

j. SOCIAL CLUBS.—The distribution of liquors by a *bona fide* club among its members is not a sale within the inhibition of a liquor law, even though the person receiving the liquor gives money in return for it,¹ and the law prohibiting the sale of liquor on Sunday does not apply to such a club.² It is otherwise, however,

liquors, and the bar is also used for luncheon purposes. *Com. v. Rogers*, 135 Mass. 536.

The same court say in *Com. v. Salmon*, 136 Mass. 431, that a license to a common victualler, to sell intoxicating liquors to be drunk on 'the premises, is no defence to a complaint for exposing and keeping for sale intoxicating liquors with intent unlawfully to sell the same in this commonwealth, if the licensee keeps a public bar, or maintains a partition which interferes with a view of the interior of the premises, in violation of the Pub. Stats., ch. 100, § 9, cl. 5, and § 12; and of the Stat. of 1882, ch. 250, § 1.

All who take it upon them to be common sellers of spirituous liquors, without being licensed therefor, in less quantities than twenty-eight gallons at a time, are liable to the penalty provided by the statute, whether they take it upon themselves to be common victuallers or not. *State v. Davis*, 23 Me. 403.

1. *Seim v. State*, 55 Md. 566; s. c., 39 Am. Rep. 419; *Com. v. Ewig*, 145 Mass. 119. *Compare Chesapeake Club v. State*, 63 Md. 446; *State v. Lockyear*, 95 N. Car. 633.

Where the steward of a social club furnished liquor to the members at a fixed price sufficient to cover the cost, but not for the purpose to profit, *held*, a sale, and in violation of the Local Option act. *State v. Lockyear*, 95 N. Car. 633.

Under the Maryland act of 1882, ch. 112, known as the "Local Option law," of Anne Arundel County, providing, among other things, "that in case of any violation of any provision of this act by any company, corporation or association, each or any member of such company, corporation or association shall be liable and shall suffer imprisonment as prescribed in this act for persons violating the same, an indictment will lie against a body corporate, *e. g.*, a social club, for violating the provisions of the act, the action in terms expressly declaring that the corporation or association violating the law shall be liable to indictment and

punished. *Chesapeake Club v. State*, 63 Md. 446.

Social Club—Sale of Liquor at Ball.—But the rule that the police may not invade the precincts of a social club has no application where it gives a ball, and sells tickets, and wines, and liquors to all persons willing to pay for them. *Cercle Francais de L'Harmonie v. French*, 44 Hun (N. Y.) 123.

2. *Seim v. State*, 55 Md. 566; s. c., 39 Am. Rep. 419.

Liability of Officers and Servants.—The officers of a social club, whose steward furnishes the members with food, and with beer and a glass, at a fixed price, to be consumed at the club, the money so received being expended for the expenses of the club, are not guilty of "selling" beer on Sunday, within the meaning of an excise law. *Seim v. State*, 55 Md. 566; s. c., 39 Am. Rep. 419.

Same—Sale by Steward.—A private club, owning intoxicating liquors, and employing one of its members as a steward, paying him for his services and for the use of a room where the liquors are kept, the steward delivering the liquor to other members on checks which he had previously sold them, and the money for which he uses in buying liquors in the name of the club, the steward may not be convicted of keeping intoxicating liquors with intent to sell them. *Com. v. Pomphret*, 137 Mass. 564; s. c., 50 Am. Rep. 340.

Same—Selling by Agent.—A person who acts as the agent or employe of a social club, to keep and deal out its liquors to members purchasing and presenting tickets, may be indicted and punished for a violation of section 1563 of the Iowa revision, punishing any person who shall own or keep or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquors with intent to sell the same in the State. *State v. Mercer*, 32 Iowa 405.

It is no defence to an indictment for retailing liquor without a license, that the accused was merely the agent of a corporation which owned the liquor and the bar where it was sold; that no one but

where such club is simply a device resorted to as a means of evading the statute.¹

members or stockholders, or persons specially invited, could gain admission to the room; and that liquor was sold to none but members, and the money paid went into the treasury of the corporation. *Martin v. State*, 59 Ala. 34.

1. See *Rickart v. People*, 79 Ill. 85; *Marmont v. State*, 48 Ind. 21; *State v. Mercer*, 32 Iowa 405; *Com. v. Smith*, 102 Mass. 144.

Devices to Evade the Statute.—Laws prohibiting or regulating the sale or traffic in intoxicating liquors have furnished a fruitful source of attempts at evasion. Thus in *State v. Mercer*, 32 Iowa 405, an organization was formed called the "Winterville Social Club," the object of which was to supply its members with intoxicating liquors, to be used as a beverage. The manner in which this club carried on its operations was not explained further than it was shown that defendant had possession of the liquors used, and sold tickets to members of the club, which were exchanged for or given in payment of intoxicating liquors in defendant's house by the members of the club presenting the tickets. The liquors were served out to the ticket holders and members of the club by defendant. Persons became members by signing their names in some book and by buying tickets, but what was the contents of the book does not appear. Upon the trial, the defendant offered in evidence the articles of association of the club, but they were excluded. The court say:

"The articles of the association are not in the abridgment of the record before us. It is therefore not possible for us to determine that they were material and admissible as evidence. But if we are to consider that they were of the purport as claimed by the defendant's counsel in their argument, we must conclude that they were correctly excluded by the district court. They appear, by the statement of counsel, to have been nothing more than the foundation of an organization, the object and intent of which was to evade the law for the suppression of intemperance, a rather clumsy device by which the defendant and the members of the 'social club' hoped to defeat that law and establish a place of resort where they could be supplied with intoxicating

liquors for unlawful use. The fact that under the arrangement of selling tickets, the members of the club became owners of the liquors to the extent of the money paid, does not make the sale of the liquors in that way lawful. The acts of selling the tickets was the sale, in fact, of the liquors. It is confessed that such sales were for the purpose of supplying the liquors to the purchasers to be used as a beverage.

In Indiana, a society or club of persons was formed, having a treasurer and other officers; it met every Sunday, and each person on becoming a member paid into the treasury a certain sum and monthly assessments thereafter, to form the basis of a fund to pay expenses and for relief, and the treasurer, by order of the club, and for the club, on each Saturday evening purchased a keg of "lager beer," an intoxicating liquor, and placed it in the hall where the meetings were held, and on Sunday whenever a member desired a glass of beer he got it, drank it on the premises, and delivered to the treasurer five cents, which money was placed in the treasury to keep up the funds, pay expenses, and for relief for sickness and other mishaps to members. The supreme court of that State say, in the case of *Marmont v. State*, 48 Ind. 21, that the delivery of a glass of beer under such circumstances to a member of the club, and receiving five cents therefor by the treasurer, constituted a sale by the treasurer, as agent of the club, within the meaning of the statute prohibiting the sale of intoxicating liquor on Sunday. The court said:

"Under the arrangement as agreed upon, the keg of beer belonged to the society. The appellant was the agent of the society, and if he sold in violation of law he is liable to be convicted, in the same manner and upon the same principle as a bar tender of a person who holds a permit under the statute in question is liable, who sells in violation of the statute. As the keg of beer when purchased belonged to the society, the question arises whether the society, by its agent, could make a valid sale of such beer to the persons composing such society. We know of no principle of law which prevents it. We know that it is the daily habit of partners to sell the firm property to persons com-

posing the firm, and quite frequently the members of the firm are permitted to purchase such goods or articles as they may need at cost.

"When a firm purchases, with partnership funds or upon credit, a sack of coffee or a barrel of sugar, the coffee belongs to the firm; but when a part of each is taken out and transferred to each member of the firm, either for cash or upon credit, a valid transfer has been effected from the firm to the individual members. So, while the beer was in the keg, it was the common property of the society, but when a portion was withdrawn and delivered to a member of the society, upon credit or for cash, the portion so withdrawn ceased to belong to the society and became the separate property of the member so receiving it, and the transaction invested him with the power to drink it himself, to give it away, to sell it, or to throw it away. But, says the learned counsel for appellant, there was no gain or profit to the appellant. It is not necessary that there should be gain or profit to him. It is sufficient if the sale or transfer enured to the benefit of his principal—the society. It is agreed that each member, upon his initiation, paid fifty cents and thereafter a monthly assessment of ten cents, to form the basis of a fund for payment of expenses and reliefs of the society; and that the money received for each glass of beer drawn for and used by a member of said association goes into the society's treasury, to keep up its funds for payment of expenses, procuring refreshments, and for reliefs; which expenses are for fuel, rents of hall, newspapers, the beer used, and the donations or reliefs payable to each member of said association, who, from sickness or other mishaps, may require assistance; and a standing committee from the members of said society is appointed to see after and enquire into and direct the payment of necessary reliefs in all such cases. We are not informed what profits are realized from the sale of each keg of beer, but it must be considerable, or the proceeds would not be sufficient to pay expenses and furnish the necessary reliefs to the sick and unfortunate members of the society.

"When the society appointed the appellant its agent for the sale of beer to the members of the association, it consented that each member might become the owner of such portion of the partnership property as he might be willing

to pay for, and appropriate it to his individual use. If the transaction set out in the agreed statement of facts be not an evasion and violation of the law, then a number of persons may do that lawfully which if done by one person would be unlawful. It would be a reproach of the law and its administration, if a combination of persons could, by such an arrangement, evade the law and thwart the legislative will."

In *Rickart v. People*, 79 Ill. 85, an association was formed for the avowed purpose of promoting temperance, friendship, etc. They claimed to have bought the dram-shop of one of their members, who was elected their treasurer, and who continued in the possession of the dram-shop, having no license to sell intoxicating liquors. Each member was required to pay one dollar, for which he received a ticket, with the numbers from 1 to 20 inclusive upon it, and upon presenting this ticket at the bar the member received liquors or cigars as he wished, and paid for the same by having numbers punched out of his ticket, each number representing five cents. Any person could become a member by paying one dollar. The treasurer received all the money and rendered no account to the other members. He also bought all the liquors and cigars. The jury found that this was but a device to evade the law and that the treasurer was guilty of unlawfully selling intoxicating liquors, which finding was sustained on appeal. The court said:

"Any person, it appears, could become a member of the association simply by buying a ticket. The witness whose testimony we have before cited says, 'that he supposed a person might join the club, call for a glass of beer, get it, have his ticket punched and then offer back his ticket and demand the balance of the money paid in by him, get it and cease to be a member of the club.' It is added, however, nothing of the kind had ever occurred, but the witness states he had known an instance of a person, who was not a member, drinking beer that belonged to the club in the club room. All this is plainly a device on the part of the defendant and those who desire to patronize his bar, to avoid the provisions of the law, and to enable him to sell intoxicating liquors at retail as he formerly had done, without first obtaining a license to keep a dram shop. The purpose and object is so transparent

that the subject need not be seriously discussed. The whole thing is a subtle artifice, planned with a view to avoid the penalties denounced against persons violating the law. The ticket arrangement was simply paying in advance and getting the liquors at convenient seasons, when desired. The proposition is absurd that the ticket holders really owned the liquors with which the bar was stocked. Each party bought tickets, to be used at the bar room when he wanted anything, and for no other purpose. Should we adopt the theory of the defence, that the several ticket holders, or parties constituting the association, in fact owned the liquors in the saloon, it would make no better case for defendant, and a vastly worse one for the parties associated with him. In that view the liquors would belong to the company as partnership stock, and the company would have no more rightful authority to sell to the individual members, or partners at retail, without a license to keep a dram shop, than a mere stranger would have. Buying the tickets, as we have seen, was simply buying twenty drinks and paying for them in advance. Each one paid for whatever he got, as he would have done had he bought of a licensed seller. It is preposterous to assume that a number of persons may, with impunity, associate themselves together as a firm, or voluntary company, purchase a quantity of liquors and retail them out to the several members as they would to strangers. Such an enterprise is unlawful, and all concerned would be guilty of violating the statute. If such a device could be tolerated, it would render all legislation on this subject nugatory. But the alleged association is a mere fiction. It is nothing but a device, under the guise of a copartnership company, adopted to enable defendant to sell intoxicating liquors to whomsoever might desire to buy at his counter, and to enable him to do so without taking out a license as the law requires. The real object of the parties engaged in the business was purposely concealed in the articles of the association. Had it been an honest enterprise there would have been nothing to conceal. It was adopted under legal advice, and is obviously nothing but a shift, or device, to evade the provisions of the law, and whatever liquors were either given away or sold for tickets under that arrangement, come within the definition of 'unlawful selling.' It was

a question of fact whether the association was a mere shift or device to evade the provisions of the law, and the jury having found it was, we see no reason to be dissatisfied with the conclusion reached."

In *Com. v. Smith*, 102 Mass. 144, several persons formed a club of which the defendant was a member. They advanced a certain sum of money each, which was put into the common fund; the defendant was chosen agent of the club, and under instructions of the club purchased liquors and refreshments for the club; the fund was taken by the defendant and invested for them, and a certain number of checks, of the amount of five cents each, were delivered to each member of the club, to the extent of the money advanced by each; these checks were transferable only to other members of the club; upon presentation of the checks by any number to the defendant, he would deliver to that member liquor of the club, to the amount of the check presented; on several occasions the defendant had delivered liquor to the witness, as such member, upon checks; upon distributing the liquor in the manner aforesaid, it was calculated that the liquor would so far overrun the amount to be delivered upon the checks as to leave in undelivered liquor about twenty per cent. of the original cost; and the defendant was to have this residue, to compensate him for his services as agent, and for the use of his room by the club. On the trial the presiding judge, in view of all the evidence, ruled that if the liquor in the defendant's possession was bought by him as the agent of the club, and the liquor so purchased was that of the club, the members advancing the money to purchase the same, and if checks were distributed to each of the members according to the amount advanced to each, and the defendant was a member of the club, and delivered to each member upon presentation of such checks, from time to time, the amount of liquor represented by such checks, that would be a sale by the defendant.

On appeal this was *held* to be error. The court say:

"The arrangements described in the bill of exceptions for the formation of a club, the purchase of liquors with their joint funds, and their distribution among the members by the agency of the defendant, may have been a mere evasion of the law. Whether it was really so, however, was really

§ k. MANUFACTURERS AND GROWERS.—Under a statute¹ providing for the punishment of the manufacturer² of spirituous or intoxicating liquors for sale, a common seller of liquors not manufactured by himself is included,³ as well as one who sells liquors manufactured by himself;⁴ but it has been held that a wine grower is not indictable for selling wine on his own premises without a license; or for permitting it to be drunk at such

a question of fact, to be passed upon by the jury, under proper instructions. The court was not warranted in assuming, as a matter of law, that it was necessarily an evasion, or that, as a matter of law, the facts stated, to use the language of the presiding judge, "would be a sale." It certainly might happen, and not unfrequently has happened, that a number of persons unite in importing wines, or other liquors, from a foreign country, to be divided between them according to some agreed proportion. It could not seriously be contended that the person who should receive the liquor so imported, at his place of business, and make or superintend the division among the contributors to the purchase money, is a seller of intoxicating liquors, or that they buy the liquors of him. It is difficult to see how it could make any difference that the liquors are of various kinds and were purchased in this country instead of being imported from abroad, or that the person who is to make the distribution delivers them in small quantities, and keeps his account by means of tickets or checks. If the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance, within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale. On the other hand, if the whole arrangement were a mere evasion, and the substance of the transaction were a lending of money to the defendant, that he might buy intoxicating liquors to be afterwards sold and charged to the associates, or if he was authorized to sell, or did sell, or keep any of the liquors with intent to sell, to any persons not members of the club, he might well be convicted. This however, would be a question not of law

but of fact, and would fall wholly within the province of the jury."

1. Such as Mass. Gen. Stat. 1852, ch. 322, § 12.

2. A person who leases his still house and still, knowing that the lessee takes them for the purpose of distilling spirits from corn, is not guilty of a violation of the act forbidding the distillation of spirits from corn, if he has not any interest in the liquor made. *State v. Summey*, 1 Winst. (N. C.) L., No. 2, 108.

Liquor obtained by running the beer through the still once is "spirituous liquor" within the act. *State v. Summey*, 1 Winst. (N. C.) L., No. 2, 108.

3. *Com. v. Bralley*, 69 Mass. (3 Gray) 456.

4. *Keller v. State*, 11 Md. 525. See *Cable v. State*, 8 Blackf. (Ind.) 531; *Stickrod v. Com.*, 86 Ky. 285; *Acree v. Com.*, 13 Bush (Ky.) 353; *State v. Hazell*, 100 N. C. 471; *State v. Lovell*, 47 Vt. 493; *Clemmons v. Com.*, 6 Rand. (Va.) 681.

A brewer cannot maintain an agency in any town and sell his beer there without a license from such town, because a brewer so selling intoxicating liquors is not to be regarded as selling directly to the consumer. *Peitz v. State*, 68 Wis. 538.

Distillers.—Indiana Doctrine.—A person may be liable under the Ind. Stat. of 1843, for keeping a distillery for a tippling house where he sells liquor without license, and where noisy, drunken people gather together and get to quarreling and fighting, etc., to the great annoyance and disturbance of the people, although the quarreling, fighting, etc., were in the street. *Cable v. State*, 8 Blackf. (Ind.) 531.

Kentucky Doctrine.—A conviction of a distiller for making at his distillery a sale of spirits, which was unlawful when made, is good, although before trial a law was passed authorizing like sales. *Acree v. Com.*, 13 Bush (Ky.) 353.

The particular whiskey for the sale of which defendant was indicted was manufactured by him at his distillery

place;¹ and it has been said that tolls earned by a grist mill situated on a farm are not products of the farm within the meaning of the statute,² which imposes a license on the sale of liquors except when sold by a person at the place of manufacture in quantities not less than one quart and manufactured from the products of his own farm.³

4. DRUGGISTS, PHYSICIANS, ETC., MEDICAL PURPOSES.—In some States there are statutes prohibiting the sale or giving away of intoxicating liquors to the classes of persons therein named, unless made upon the requisition of a physician for medical purposes.⁴ Under such a statute the requisition must be a

before the act prohibiting its sale was passed. *Held*, no defence. *Stickrod v. Com.*, 86 Ky. 285.

By the statute provision that "distillers are allowed to obtain license to sell liquor in the same way, and under the same terms, restrictions and penalties as merchants," it was not intended to prohibit distillers from selling liquor of their own manufacture, by the barrel, unless licensed. *Lawson v. Com.* 14 B. Mon. (Ky.) 225.

In North Carolina, that one is a licensed distiller, under the laws of the United States, and the whiskey sold of his own manufacture, affords no immunity for a sale contrary to State law. *State v. Hazell*, 100 N. C. 471. But a sale of whiskey, made by defendant three or four yards from his distillery, though on his farm, is not a sale "at the place of manufacture," within the meaning of acts 1885, ch. 175, § 34, allowing any person to sell liquor or wines of his own manufacture at the place of manufacture, without a license. *State v. Hazell*, 100 N. C. 471.

In Pennsylvania, a distiller of whiskey, who has paid the annual county tax for a distiller's license, may sell the whiskey manufactured by him, in quantities not less than one gallon, at any one place within the county other than at his distillery. *Britton v. Com.*, 105 Pa. St. 311.

Nothing in the Pennsylvania statutes relating to distillers' licenses limits the right to sell anywhere in the county. *Britton v. Commonwealth*, 105 Pa. St. 311.

In Vermont, one may not distil cider brandy for his own use, or to sell according to law. Our statute prohibits the sale of distilled liquor, and is not in conflict with any provision of the constitution of that

state, nor of the United States. *State v. Lovell*, 47 Vt. 493.

In Virginia, the 13th section of the Virginia act for the regulation of ordinaries, etc., is not to be construed as permitting persons, from the produce of whose estates ardent spirits are made, or distillers, to retail them to be drunk at the place where sold. *Clemmons v. Com.*, 6 Rand. 1 (Va.) 681.

1. *State v. Jaeger*, 63 Mo. 403.

2. N. C. acts 1887, ch. 135, § 31.

3. *State v. Emery*, 98 N. C. 768.

4. See *Carson v. State*, 69 Ala. 235; *State v. Hunt*, 29 Kan. 762; *State v. Shackle*, 29 Kan. 341; *McGuire v. State*, 37 Miss. 369; *People v. Safford*, 5 Den. (N. Y.) 112; *State v. Thornburg*, 16 S. C. 482; *Wood v. Smith*, 23 Vt. 706; *State v. Chandler*, 15 Vt. 425.

Purposes for Which Sold.—It is no answer to a charge of selling liquor by retail without a license, though it was sold to the purchaser under the direction and prescription of a licensed physician, unless it is also shown that it was prescribed for medical purposes. *People v. Safford*, 5 Den. (N. Y.) 112.

Sale to Druggist.—A sale of spirituous liquor in Vermont, by one having a license under the statute of 1846, to sell intoxicating liquor for medical, chemical, and mechanical purposes, made to a person having a similar license, is not rendered unlawful by the fact that the liquors are thus sold in large quantities, and for the purpose of being again sold by the vendee, pursuant to his license. *Wood v. Smith*, 23 Vt. 706.

Sale by Practicing Physician.—It is said by the supreme court of Alabama, in *Carson v. State*, 69 Ala. 235, that where a special prohibitory act does not exempt the practicing physician from its operation, he is liable if he

verbal or written application or request to the seller by the physician himself.¹ But where a statute forbids the sale of ardent spirits to any person, and for any purpose without a license, a druggist cannot lawfully sell such spirits, even as a medicine, upon a prescription of a physician.²

administer intoxicating liquors to his patient, but not for using liquors necessary for compounding medicine manufactured and sold by him. The court said: "It was contended under this state of facts, that if the appellant gave or sold the bitters in question as a prescription, and in good faith, he would not come within the prohibition of the statute and should be acquitted. . . . We know of no principle of law which would authorize us to incorporate so important an exception into the statute. The facts of the case may have constituted a good reason why the grand jury should have refused to find a bill, but there is no exception made in the statute in favor of physicians, druggists, or other persons whomsoever, and this court cannot engraft one in their favor without the exercise of legislative power which it does not possess. The question presented is not a novel one, though not before decided in this state. Mr. Wharton states the rule to be, that 'unless there is an express exception in the statute, the fact that the liquor was bought for medicine is no defence.'" 2 Whart. Cr. L., § 2439.

1. *Bain v. State*, 61 Ala. 75. See *State v. Suesse*, 20 Mo. App. 423.

Under such a statute it is immaterial and will not constitute a defence that the seller believed that what he sold was a medicine or was not intoxicating. *Com. v. Ramsdell*, 130 Mass. 68; *Com. v. Hallett*, 103 Mass. 452; *Com. v. Bathrick*, 60 Mass. (6 Cush.) 247; *Com. v. Sloan*, 58 Mass. (4 Cush.) 52. See *Com. v. Pierce*, 138 Mass. 165, 180; *Com. v. Farran*, 91 Mass. (9 Allen) 480; *Reg. v. Prince*, L. R., 2 C. C. 154. This is upon the principle that the defendant was bound to know the quality of the articles manufactured or kept for sale. *Com. v. Savery*, 145 Mass. 212, 214; *Com. v. Hallett*, 103 Mass. 452; *Com. v. Emmons*, 98 Mass. 6, 8; *Com. v. Raymond*, 97 Mass. 567; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Boynton*, 84 Mass. (2 Allen) 160.

However, in *King v. State*, 58 Miss. 737; s. c., 38 Am. Rep. 344, where defendants were indicted for selling intoxicating liquors without a license,

and the liquor in question was called "Home Bitters," and was composed of 30 per cent. of alcohol, and the rest of water, bark, peeling, seeds, etc., and the defendants alleged that they sold it as a medicine, the court held correct a charge to the effect that if the compound was intoxicating and was sold as a beverage "the jury should convict, but if it was sold in good faith and only as a medicine, they should acquit although the compound was intoxicating."

2. *Woods v. State*, 36 Ark. 36; s. c., 38 Am. Rep. 22; *Wright v. People*, 101 Ill. 126. See *Intoxicating Liquor Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284. *Compare Com. v. Ramsdell*, 130 Mass. 68.

In *Com. v. Ramsdell*, 130 Mass. 68, a statute forbidding the sale or keeping for sale without authority all spirituous or intoxicating liquors, was held not to apply to a druggist who keeps liquors only for the purpose of mixing them with other ingredients according to prescriptions of physicians to be used as medicine, and also for the purpose of manufacturing such compounds as are commonly made by druggists to be sold for the purpose of being used as medicine for remedies for sickness and disease. The court said: "In order to determine whether the statute applies to a sale, the true test is to enquire whether the article sold is in reality an intoxicating liquor. If it is, the sale is illegal, although it is sold to be used as a medicine, or it is attempted to disguise it under the name of a medicine, or it is a mixture of liquor and other ingredients. *Com. v. Hallett*, 103 Mass. 452; *Com. v. Bathrick*, 60 Mass. (6 Cush.) 247; *Com. v. Sloan*, 58 Mass. (4 Cush.) 52. But if the article sold cannot be used as an intoxicating drink, it is not within the prohibition of the statute, although it contains as one of its ingredients some spirituous liquor. The sale of such article is not within the mischief intended to be remedied by the statute, nor within the fair meaning of its language."

In the case of *State v. Laffer*, 38 Iowa 422, the court below refused to charge that if the liquor was sold only af-

ter being compounded into medicine with other drugs, and was sold as a medicine, in good faith and with no intent to violate the law, the defendant should be acquitted; and charged that unless the liquor had been so changed that it had lost its distinctive character, it was a violation of the law to sell it, but if it had been so changed that it could not be used as a beverage, and had become a medicine and of such a character that it could not reasonably be styled or used as intoxicating drink, its sale was not illegal. These instructions were approved, the court saying: "So long as the liquors retain their character as intoxicating liquors, capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall under the ban of the law, but when they are so compounded with other substances as to lose the distinctive character of intoxicating liquors, and on no longer desirable for use as a stimulating beverage, and are in fact medicine, then their sale is not prohibited.

Druggists' Sale for Medical Purposes.—On a prosecution under the Maine statute, restricting the sale of intoxicating liquors, it is said in *State v. Brown*, 31 Me. 520, to be no defence that the liquor was sold and used solely for medical purposes. The defendant had no license, although no one else in the town had any license to sell for medical purposes.

The supreme court of Massachusetts say in the case of *Com. v. Sloan*, 58 Mass. (4 Cush.) 52, that it is no justification for the sale of spirituous liquor without license, though at the time of such sale there was no druggist or other person licensed to sell liquors within the county; that the sale was made upon the order or prescription of a physician; and that the spirit thus obtained was necessary for the buyer's use, either as a medicine or for the preservation of his health.

Sale for Medical Purposes—Indiana Doctrine.—It is said in *Nixon v. State*, 76 Ind. 524, that a *bona fide* sale of intoxicating liquors for medical purposes is not a violation of any of the provisions of the Indiana statute regulating the sale of intoxicating liquors. The same court said in *Hooper v. State*, 56 Ind. 153, that the courts will imply an exception of *bona fide* sales for medical purposes from the operation of an act prohibiting in general terms the selling of intoxicating liquors.

It is said in *Hottendorf v. State*, 89 Ind. 282, that section 5320 of the Ind. Rev. Stat. of 1881 is not violated by selling less than a quart of intoxicating liquor without license, in good faith, for medical purposes, but prudence and caution by the seller is required. And it was previously held that a sale on proper occasion in good faith, and with due care and for medical purposes only, is as much shielded by the spirit of the Indiana act of February 27th, 1873, as if he were exempted from the penalties of the act by express words. *Ball v. State*, 50 Ind. 595. The question of whether liquors were sold for medical purposes must be determined upon the facts of each particular case, when it is doubtful whether the sale was made in good faith or for such purpose, or was colorable only. *Hottendorf v. State*, 89 Ind. 282.

Same.—Iowa Doctrine.—It is said in the case of *State v. Ward*, 75 Iowa 637, under a statute providing that pharmacists can "sell intoxicating liquors for the actual necessities of medicines only." A pharmacist who has violated the provisions of the statute cannot, on an information for having in possession intoxicating liquors, protect himself by alleging that the liquor when seized was not in his actual possession.

Same.—Kansas Doctrine.—The supreme court of Kansas, in the case of *State v. White*, 31 Kan. 342, held that a druggist who has a permit from a probate judge of his county to sell intoxicating liquor for medical, scientific and mechanical purposes, and no offence is charged against him, he cannot be convicted of the offence of selling intoxicating liquors for medical, scientific and mechanical purposes in an irregular manner.

Same.—Missouri Doctrine.—Under an act to tax and license merchants, the Missouri court held that a person who, under a merchant's license is principally engaged in selling drugs and medicines, although incidentally admitting into his store articles not strictly falling under the denomination of drugs and medicines, was authorized to sell liquors in any county for medical purposes. *State v. Mitchell*, 28 Mo. 562; *State v. Wells*, 28 Mo. 565.

It is said in *State v. Robertson*, 24 Mo. App. 232, that under the Missouri act of 1881 regulating the sale of medicines by druggists, which repealed the act of 1879 regulating the sale of in-

(1) *Sale by Druggists Without License.*—Under a statute prohibiting the sale of ardent spirits by any person for any purpose without

toxicating liquors by druggists, a registered pharmacist who sells intoxicating liquors for medical utility, in less quantity than one gallon, though not having the prescription of any physician therefor, and not having a license as a dram shop keeper, provided it had been done in good faith, is not guilty of any offence. But it would seem that one who would justify his sales of liquor under the privilege accorded by the Missouri statutes to druggists, must show himself to have in his employ a duly registered druggist. *State v. Suess*, 20 Mo. App. 423.

Same—Rule in Nebraska.—It is said in *Warrick v. Rounds*, 17 Neb. 411, that under the Nebraska statute a druggist without a permit is absolutely prohibited from selling intoxicating liquor upon any pretext, and with a permit is equally prohibited from selling except in the best of faith, and strictly for the purpose specified by law.

Same—North Carolina Rule.—In *State v. Wray*, 72 N. C. 253, it was held that a druggist, who in good faith and with due caution sells as a medicine, by the direction of a practicing physician, spirituous liquors in a quantity less than a quart, is not indictable therefor. The court said: "The letter of the law has been broken, but has the spirit of the law been violated? The question here presented has been much discussed, but it has not received the same judicial determination in all the states in which it has arisen. In this conflict of authority we shall remember that the reason of the law is the life of the law, and when one stops the other should also stop. What was the evil sought to be remedied by our statute? Evidently the abusive use of spirituous liquors, keeping in view at the same time the revenues of the state. The special verdict is very minute in its details, and makes as strong a case for the defendants as perhaps will ever find its way into court again. A physician prescribes the brandy as a medicine for a sick lady, and directs her husband to get it from the defendants, who are druggists. It may be a pure article of brandy, such as the physician was willing to administer as a medicine, was not to be obtained elsewhere than at the defendants' drug store. The doctor himself goes to the defendants and directs them to let the witness have the brandy as a

medicine for his wife. And the further fact is found, which perhaps might have been assumed without the finding, that French brandy is an essential medicine, frequently prescribed by physicians and often used; and the farther and very important fact is established, that in this case it was bought in good faith as a medicine, and was used as such. After this verdict we cannot doubt that the defendants acted in good faith and with due caution in the sale which is alleged to be a violation of the law. In favor of defendants, criminal statutes are both contracted and expanded. 1 Bish. Cr. L., § 261. Now unless this sale comes within the mischief which the statute was intended to suppress, the defendants are not guilty; for it is a principle of the common law that no one shall suffer criminally for an act in which his mind does not occur. The familiar instance given by Blackstone illustrates our case better than I can do by argument. The Bolognian law enacted 'that whosoever drew blood in the street should be punished with the utmost severity.' A person fell down in the street with a fit, and a surgeon opened a vein and drew blood in the street. Here was a clear violation of the letter of the law, and yet from that day to this it has never been considered a violation of the spirit of the law. Perhaps it will give us a clearer view of the case if we put the druggist out of the question, and suppose that the physician himself, in the exercise of his professional skill and judgment, had furnished the liquor in good faith as a medicine. Can it be pretended that he would be more guilty of a violation of our statute than the surgeon was guilty of a violation of the Bolognian law? We think not. But we should not have it understood that physicians and druggists are to be protected in an abuse of the privilege. They are not only prohibited from selling liquor in the ordinary course of business, but also from administering it as a medicine unless it be done in good faith, and after the exercise of due caution as to its necessity as a medicine. The sale of liquor without a license, in quantities less than a quart, is *prima facie* unlawful, and it is incumbent upon one who does so sell to show that it was done under circumstances which render it lawful."

a license, a druggist cannot lawfully sell such spirits, even as a medicine, upon the prescription of a physician, unless he be properly licensed to do so.¹

(2) *Sale as a Beverage and to be Drunk Upon the Premises.*—Under a statute forbidding a druggist to sell liquor to be drunk by the purchaser on the premises where sold, or in any place adjacent thereto, he will not be protected by his license in making such a sale of the liquors to be drunk on the premises,² unless it be shown that the drinking was done without his knowledge or consent.³

(3) *Necessity and Sufficiency of Prescription; Certificate and Representations of Purchaser.*—Under a statute forbidding the

1. *Woods v. State*, 36 Ark. 36; s. c., 38 Am. Rep. 22; *Wright v. People*, 101 Ill. 126; *Warrick v. Rounds*, 17 Neb. 411. See *Dennehy v. Chicago*, 120 Ill. 627; *Torbert v. Clough*, 72 Iowa 220; *Intoxicating Liquor Cases*, 25 Kan. 751; s. c., 37 Am. Rep. 284; *Rosenham v. Com. (Ky.)*, 2 S. W. Rep. 230; *State v. Wharton*, 85 Tenn. 449; reviewing and discussing *King v. Jacksonville*, 3 Ill. 305; *Goddard v. Jacksonville*, 15 Ill. 588; *Byers v. Olney*, 16 Ill. 35; *O'Leary v. Cook County*, 28 Ill. 534; *Block v. Jacksonville*, 36 Ill. 301; *Kettering v. Jacksonville*, 50 Ill. 39; *Strauss v. Pontiac*, 40 Ill. 301; *Ashton v. Ellsworth*, 48 Ill. 299; *Gunnarssohn v. Sterling*, 92 Ill. 571. Compare *Donnell v. State*, 2 Ind. 658.

Necessity of and Right to Licenses, Generally.—A Kentucky statute requires merchants and druggists who sell liquors which are not to be used exclusively for medical purposes to procure a license therefor (acts 1884, 1st sess.). Held, that a druggist was a merchant, and entitled to a merchant's license, but that even if he was not, and no provision was made by the law for supplying him with a license, he would not, in that case, be entitled to sell without one. *Rosenham v. Com. (Ky.)*, 2 S. W. Rep. 230.

Under the provisions of the Tennessee act of 1870 (Code 10, § 696) no druggist could sell vinous or alcoholic liquors without taking out a license therefor, except for communion purposes or for medical purposes upon a physician's prescription. *State v. Wharton*, 85 Tenn. 449.

Under West Virginia statute, ch. 107, § 4, there can be no sale, by a druggist, of intoxicating liquors without a license, except alcohol for mechanical purposes and liquors for medicinal

purposes upon a physician's prescription. *State v. Cox*, 23 W. Va. 797.

But it was held by the supreme court of Indiana, in *Donnell v. State*, 2 Ind. 658, that a druggist, upon a proper occasion, *bona fide*, and with due caution, did retail liquor to be used merely as a medicine; he will not be considered as having violated a statute prohibiting the retailing of liquors without a license.

2. *Spake v. People*, 89 Ill. 617.

In *State v. Knowles*, 57 Iowa 669, a registered pharmacist sold a pint of whiskey to a stranger upon his simple statement that he was accustomed to take it as medicine, and wanted it as medicine. A conviction was sustained, the court observing: "We incline to think it is true liquors might be prescribed by a physician and yet the circumstances surrounding the transaction might be such as to warrant the jury in concluding the liquor was sold as a beverage. Conceding a person may prescribe for himself and lawfully determine that he should take intoxicating liquors as medicine, and that a druggist in such case may lawfully sell such liquor, it does not follow that it is always so prescribed or sold. It is undoubtedly true the claim that it is taken and sold as medicine may be a subterfuge, and that while in form sold as medicine, it was in fact a beverage, and so understood by both buyer and seller. The druggist must act in good faith, and the mere fact that a person says he wants intoxicating liquors as medicine will not exonerate the druggist if the circumstances are such as to warrant the court or jury in concluding that in truth and in fact it was sold as a beverage."

3. Under the Missouri statute prohibiting druggists from selling or giving away any alcoholic liquors as a beverage.

sale of ardent spirits by any person for any purpose without a license, a druggist cannot lawfully sell such spirits, even as medicine, upon the prescription of a physician.¹ The prescription of the practicing physician must be in writing, and must have all the requisites prescribed by the statute.² There must be a separate prescription for each sale, by a druggist, of spirituous and intoxicating liquors prohibited.³ But it has been said that simply keeping intoxicating liquors without a license only for the purpose of mixing them with other ingredients, according to the prescription of physicians, to be used as medicines, and of manufacturing such compounds as are commonly used by druggists for medical purposes, is not a violation of prohibitory statutes.⁴

age, it has been held that they may sell liquor for medical purposes even without a physician's prescription. *State v. Roller*, 77 Mo. 120.

1. *Woods v. State*, 36 Ark. 36; s. c., 38 Am. Rep. 22. See *State v. Roller*, 77 Mo. 120; *State v. Robinson*, 24 Mo. App. 232.

It seems that under the Missouri act of March 26th, 1881, relating to the sale of intoxicating liquors by druggists being inconsistent with the act of May 19th, 1879, and for that reason a repeal of the latter act by implication, it follows that druggists, while they may not sell as a beverage, may sell for medical purposes without a physician's prescription required by the act of 1879. *State v. Roller*, 77 Mo. 120; *State v. Robertson*, 24 Mo. App. 232.

Prescription by Physician.—Under the Missouri act of 1883, the prescription on which a druggist may sell liquor must be the prescription of a regularly registered and practicing physician, and a prescription not shown to be such is inadmissible on the trial of a druggist for selling. *State v. Millikan*, 24 Mo. App. 462.

2. *State v. Cox*, 23 W. Va. 797, 799.

But it is said in *State v. Wray*, 72 N. C. 253, that a druggist who, in good faith and with due caution, by the direction of a practicing physician, sells as a medicine spirituous liquors in a quantity less than a quart is not indictable therefor, because the letter and not the spirit of the statute is broken thereby.

3. *Carrington v. Com.*, 78 Ky. 83. See *State v. Clevenger*, 25 Mo. App. 653; *State v. Wright*, 20 Mo. App. 412; *Harper v. State*, 3 Lea (Tenn.) 211.

4. *Com. v. Ramsdell*, 130 Mass. 68. See *Warrick v. Rounds*, 17 Neb. 411;

State v. Shaw, 58 N. H. 72; *State v. Brown*, 60 N. H. 205.

Under a statute authorizing druggists to keep liquors for compounding their medicines, it was held that such statute does not authorize them to be sold to others to be compounded with medicines. *State v. Brown*, 60 N. H. 205. And also that a statute authorizing any registered pharmacist "to keep spirituous liquors for compounding their medicines" does not authorize them to sell spirituous liquor not compounded with medicine. *State v. Shaw*, 58 N. H. 72. Under such a statute a druggist selling liquor without a license cannot escape liability on the ground that there was quinine in the liquor, and that he sold it as a medicine. *Warrick v. Rounds*, 17 Neb. 411.

In *State v. Laffer*, 38 Iowa 422, the court below refused to charge that if the liquor was only sold after being compounded into medicine with other drugs, and was sold as a medicine, in good faith and with no intent to violate the law, the defendant should be acquitted, and charged that unless the liquor had been so changed that it had lost its distinctive character, it was a violation of law to sell it, but if it had been so changed that it could not be used as a beverage and had become a medicine, and of such a character that it could not reasonably be styled or used as an intoxicating drink, its sale was not illegal. These instructions were approved, the court saying: "So long as the liquors retain their character as intoxicating liquors, capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall under the ban of the law, but when they are so compounded with

Under some statutes a retail druggist cannot sell pure alcohol except upon the certificate of a purchaser stating the use for which it is wanted.¹

(4) *Place of Sale*.—Under a permit to sell liquors, the sales must be strictly confined to the objects for which the sale is granted, and to the place where the sale is permitted.²

(5) *Giving Away*.—Where the statute prohibits the sale or giving away of intoxicating liquors except under conditions named, such a restriction applies to licensed pharmacists, as well as to saloon keepers, and they are liable for giving away intoxicating liquors for unlawful purposes, no matter how artfully done.³

(6) *Sale by Druggists Who Are Also Physicians*.—It seems that a druggist who is also a practicing physician may prescribe and sell whisky or other intoxicating liquors, notwithstanding the

other substances as to lose their distinctive character of intoxicating liquors, and no longer desirable for use as a stimulating beverage, and are in fact medicine, then their sale is not prohibited."

In *Com. v. Ramsdell*, 130 Mass. 68, a statute forbidding the sale or keeping for sale without authority, of spirituous or intoxicating liquors, was held not to apply to a druggist who kept liquors only for the purpose of mixing them with other ingredients, according to prescriptions of physicians, to be used as medicine, and also for the purpose of manufacturing such compounds as are commonly used by druggists, to be sold for the purpose of being used as medicines for remedies for sickness and disease. The court said, in substance: In order to determine whether the statute applies to a sale, the true test is to enquire whether the article sold is in reality an intoxicating liquor. If it is, the sale is illegal, although it is sold to be used as a medicine, or it is attempted to disguise it under the name as a medicine, or it is a mixture of liquor and other ingredients. *Commonwealth v. Hallett*, 103 Mass. 452; *Commonwealth v. Bathrick*, 60 Mass. (6 Cush.) 247; *Commonwealth v. Sloan*, 58 Mass. (4 Cush.) 52. But if the article sold cannot be used as an intoxicating drink, it is not within the prohibition of the statute, although it contains as one of its ingredients some spirituous liquor. The sale of such articles is not within the mischief intended to be remedied by the statute or within the fair meaning of its language.

1. *Com. v. Pierce*, 147 Mass. 161.

In *Bryant v. State*, 65 Miss. 435, a licensed druggist was indicted for sell-

ing alcohol in a county where the Local Option act was in force. He showed that the purchaser represented that the alcohol was to be used for medicine. The court charged that the jury must convict if the defendant had no certificate from a physician to make the sale, and the appellate court held that the question of defendant's good faith in making the sale should have been submitted to the jury, because the act of March 11, 1886, § 9, permits such sale without a certificate.

But in *Jakes v. State*, 42 Ind. 473, where on the trial of an indictment for the sale of intoxicating liquors without a license under the act of 1859, the proof was that the defendant, a druggist, sold a pint of liquor on the statement of a purchaser that it was for medical purposes, and that it was so used, the court held that the defendant should have been acquitted.

2. *State v. Copp*, 34 Kan. 522.

Thus where a druggist's permit is to sell liquor, all his clerks and agents may sell the same for him in his drug store without violating the law; but such sales must be made in the drug store where the business is carried on and the permit to sell is posted, and the druggist cannot sell under his permit intoxicating liquors to any other than the class of persons designated therein, or at any other or different place than a store where a permit is posted; and if any clerk or agent of the druggist sells or barter intoxicating liquors at any different place than at the said store of the druggist, the permit of the druggist is no protection of such clerk or agent for selling or bartering intoxicating liquors. *State v. Copp*, 34 Kan. 522.

3. *State v. Harris*, 64 Iowa 287.

local option law;¹ but where the statute authorizes a sale to be made only on a prescription of some regularly practicing physician, a druggist, who is himself a regularly practicing physician, cannot sell under his own prescription.²

(7) *Sale by Physicians*.—It has been said that where a physician administers liquor as a medicine upon his professional judgment of its necessity, the act is not within the statute.³

It is said that where a physician sells liquor to persons who apply therefor, by their own suggestion, and not because of his prescription as their medical adviser, the fact that he is a practicing physician is no defence to a prosecution for illegally selling intoxicating liquors;⁴ and the mere fact that the physician knew that the purchaser's wife was sick, has been held not to show that the liquor was sold for medical purposes.⁵

It has been said to be no defence to an indictment charging the sale or gift of intoxicating liquors or bitters in violation of a local statute prohibiting the sale of spirituous and intoxicating liquors, that the defendant was a licensed practicing physician, and gave or sold them in good faith as a prescription to a person who was under his treatment, notwithstanding the fact that it is shown that such was the proper or scientific treatment of the disease for which he was prescribing.⁶

10. Adulteration.—In some States the statutes require that persons trafficking in intoxicating liquors shall not only procure a license, but shall take an oath,⁷ and give a bond,⁸ not to adulterate the liquors sold.

1. *Boone v. State*, 10 Tex. App. 418; s. c., 38 Am. Rep. 641.

2. *State v. Anderson*, 81 Mo. 78.

3. *Sarrls v. Com.*, 83 Ky. 328; *State v. Larrimore*, 19 Mo. 391.

But under the Kansas statute it would seem that a physician having no permit therefor, cannot lawfully furnish intoxicating liquors as a medicine, even to a patient who is actually sick, and charge and receive pay for the sale. *State v. Fleming*, 32 Kan. 588. See *State v. Hall*, 39 Me. 107.

It is said in *Thomason v. State*, 70 Ala. 20, that under the Alabama code prohibiting the sale of liquor without a revenue license, no exemption is made in favor of a sale for medical purposes by the family physician of the purchaser, and such a sale is a violation of the statute.

Recording Prescription.—The supreme court of Kentucky held in *Sarrls v. Com.*, 83 Ky. 328, that where a statute requires the physician to record every prescription of liquor in a book to be kept by him, and provides a penalty for his failure to do so, under an indictment against the physician for unlawfully

selling liquor; the only question is whether he in good faith prescribed the liquor as a medicine when necessary as such, and if so he is not guilty, although he may have failed to record the prescription, that being a separate and distinct offence.

4. *State v. Cloughly*, 73 Iowa 626.

5. *Thomason v. State*, 70 Ala. 20.

6. *Carson v. State*, 69 Ala. 235.

7. *Levi v. State*, 4 Baxt. (Tenn.) 289; *Hall v. State*, 9 Lea (Tenn.) 574; *Newman v. State*, 7 Lea (Tenn.) 617.

Oath Not to Adulterate.—In *Newman v. State*, 7 Lea (Tenn.) 617, where a druggist sold a man a quart of liquor upon a physician's prescription, without having taken the oath not to adulterate as required by the Tennessee statute, he was held to be liable to indictment.

It is said in *Hall v. State*, 9 Lea (Tenn.) 574, that an oath "not to mix or adulterate with any poisonous substance whatever," is not a compliance with a statute requiring an oath "not to mix or adulterate with any substance whatever."

8. See *State v. Ferguson*, 72 Mo. 297; *Levi v. State*, 4 Baxt. (Tenn.) 289.

11. Exporting and Importing.—It has been said that the sale of intoxicating liquors for exportation from a State is not forbidden by the liquor law prohibiting the manufacture and sale,¹ but the better doctrine is that exportation from a State is not a purpose for which intoxicating liquors may be lawfully manufactured and sold where there is a statute prohibiting the manufacture and sale of intoxicating liquors.²

The importer of intoxicating liquors, under the laws of the United States, may himself sell them while remaining in the original casks or packages without regard to any State prohibitory law,³ although he has knowledge that the purchaser intends to resell the liquor in violation of the law.⁴

It has been said that a person who is not himself the importer may sell intoxicating liquors in the original unbroken packages or casks in which they were imported, in quantities not less than those prescribed by the laws of the United States;⁵ but a different doctrine prevails in some of the States.⁶

12. Illegal Transportation—*a. THE OFFENCE IN GENERAL.*—Under a statute making it an offence to receive for the purpose of conveying to another person liquor intended for sale contrary to the statute regulating the traffic in intoxicating liquor, the offence consists in receiving for the purpose of conveying to the purchaser and thus completing the intended sale;⁷ but it is

Druggists and physicians, it is said in *State v. Ferguson*, 72 Mo. 297, are not exempted from giving the bond required by the Missouri statute, of all persons dealing in liquors, notwithstanding the fact that by a section of the same statute, they are permitted to mix the adulterated liquors for medical and mechanical purposes.

1. *Hanley v. Powers*, 11 R. I. 82.

2. *Pearson v. International Distillery Co.*, 72 Iowa 348; s. c., *sub nom.*; *Kidd v. Pearson*, 128 U. S. 1; 23 Am. & Eng. Corp. Cas. 221. See *Mugler v. Kansas*, 123 U. S. 627; s. c., 18 Am. & Eng. Corp. Cas. 614.

3. *State v. Robinson*, 49 Me. 285. See *Pearson v. International Distillery Co.*, 72 Iowa 348; s. c., *sub nom.* *Kidd v. Pearson*, 128 U. S. 1; 23 Am. & Eng. Corp. Cas. 221; *Richards v. Woodward*, 113 Mass. 285; *Bradford v. Stevens*, 76 Mass. (10 Gray) 379; *Jones v. Hard*, 32 Vt. 481.

It is said by the supreme court of Iowa in the case of *State v. United States Express Co.*, 70 Iowa 271, that intoxicating liquors imported into Iowa by an express company, and there held for delivery to the consignees on payment of the purchase price, are under the Iowa Code, §§ 1542, 1543, 1553, as

amended by ch. 143 of the laws of the twentieth assembly, contraband, as held for sale.

4. *Richards v. Woodward*, 113 Mass. 285.

5. *Bradford v. Stevens*, 76 Mass. (10 Gray) 379.

It is said in *King v. McEvoy*, 86 Mass. (4 Allen) 110, that one who receives from an importer, and duly forecloses a mortgage on a cask of spirituous liquors, which is in a United States warehouse, in bond, and pays the duties and receives the cask of liquors, does not thereby become the importer thereof, within the meaning of the statute.

6. See *Wynehamer v. People*, 20 Barb. (N. Y.) 567; s. c., 2 Park. C. C. (N. Y.) 377 and 421; *People v. Quant*, 2 Park. C. C. (N. Y.) 410.

7. *Com. v. Locke*, 114 Mass. 288.

The purchaser's intention in regard to the liquor is immaterial, and it is not necessary that he should be named. *Com. v. Locke*, 114 Mass. 288.

Transportation in Town.—Under a statute prohibiting the transportation of intoxicating liquors "from place to place," having reasonable cause to know that they were intended to be sold, includes the transportation of such liquors from one place to another in the same

thought that where liquors have been lawfully sold, a mere messenger cannot be held guilty of illegally transporting them by bringing them to a purchaser residing in a town where such sale cannot be lawfully made.¹

b. BY CARRIERS AND EXPRESS COMPANIES.—The law neither requires nor permits common carriers to do illegal acts, and they are not bound to transport and deliver intoxicating liquors or other commodities if thereby they incur a penalty.² A common carrier, such as an express company, is bound to know whether the goods received for shipment are such as the law authorizes to be bartered or sold, and it cannot be allowed to make itself the agent of one who is violating the law of the State;³ but it is not a carrier's duty to know the contents of any package offered to him for carriage, where their attendant circumstances do not awaken his suspicion as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, consequently he cannot be charged as matter of law with notice of the purchase and character of the packages received for transportation.⁴

c. SALES OF LIQUORS TO BE TRANSPORTED TO OR DELIVERED IN ANOTHER TOWN OR STATE—(1) *Generally.*—One having a license to retail liquor in a certain town violates his license by filling an order from another town by taking or sending liquor there and collecting the price at the time of the delivery;⁵

town. *Com. v. Waters*, 77 Mass. (11 Gray) 81.

Lawful Sale in Another City.—It is no defence to a complaint for carrying intoxicating liquor with reasonable cause to believe that it was intended to be sold in violation of the law, from place to place in a city where it was not lawful to sell such liquor, that it was lawfully sold in another city, to a person to whom the defendant was carrying it. *Com. v. McLaughlin*, 108 Mass. 477.

1. *Falvey v. Faxon*, 143 Mass. 284. Compare *State v. Campbell* (Iowa), 40 N. W. Rep. 100; *Com. v. McLaughlin*, 108 Mass. 477.

It is said in *State v. Campbell* (Iowa), 40 N. W. Rep. 100, that the carrying of liquors from wholesale dealers to retail dealers, in the same city, is a conveying within the meaning of a statute imposing a penalty for conveying liquors "from one place to another within the State."

2. *State v. Goss*, 59 Vt. 266.

3. *State v. United States Express Co.*, 70 Iowa 271.

Sending Goods C. O. D.—Where a dealer in one State ships intoxicating liquors to a party in another State by express C. O. D. order, which is in

effect a direction by the consignor not to deliver the liquors to the consignee except on the payment, the express company is the agent of the consignor and may be lawfully convicted under an indictment charging him with keeping liquors for unlawful purposes. *State v. O'Neil*, 58 Vt. 140. See *State v. Goss*, 59 Vt. 266.

In *State v. Campbell* (Iowa), 40 N. W. Rep. 100, it is said that the words "any other person," a specification in a statute of certain companies, and other carriers and their agents, etc., who are prohibited from carrying intoxicating liquors without a certificate, means simply other persons of like kind, or in like employment as those specified.

4. *Nitro Glycerine Cases*, 82 U. S. 524; *State v. Goss*, 59 Vt. 266; denying *Crouch v. London & N. W. R. Co.*, 14 C. B. 255, and *dictum* in *Riley v. Horne*, 5 Bing. 217. See *Brass v. Maitland*, 6 El. & Bl. 471; s. c., 1 Smith Lead. Cas. (7th Am. ed.) 389, 411.

5. *United States v. Kline*, 26 Fed. Rep. 515. See *State v. Four Jugs of Intoxicating Liquors*, 58 Vt. 140; *United States v. Shriver*, 23 Fed. Rep. 134; s. c., 31 Alb. L. J. 163.

Thus it is said, in *Berger v. State*, 50

but the law of a State prohibiting the sale of liquor cannot extend to sales made in another State in which sales are lawful, where the sale is completed in the latter State.¹

(2) *Where Sales Made or Completed.*—The illegality of the sale of intoxicating liquors frequently depends upon the place where the sale is made; this is governed by the place where the sale is completed by delivery, where the vendor is to and does pay the freight to the place of delivery, the place of delivery becomes the place of sale.² The same is true where liquors are sent by

Ark. 20, that where a person in a non-liquor license town sends an order for liquor left with him to a licensed dealer in another town, who fills the order, putting the liquor in a bottle, and with many others of the same nature sends it, labelled with the customer's name in a locked box, to the person sending the order, who opened the box and delivered the liquor to a customer; the court held the defendant guilty of the offence of selling ardent spirits. In this case the court say that if after selecting the goods ordered they had been consigned to the carrier for the purpose of being delivered to the person for whom the liquor was intended, the carrier would be regarded as standing in the place of the buyer for the purpose of delivery, and the property would have vested in him at the place of sale and shipment, and that the sale would have been completed there, in which case there would have been no violation of the liquor law. *Citing* Parsons Oil Co. v. Boyett, 44 Ark. 230; State v. Carl, 43 Ark. 353; Frank v. Hoey, 128 Mass. 263; Webber v. Howe, 36 Mich. 150; Boothby v. Plaisted, 51 N. H. 436; s. c., 12 Am. Rep. 140; Garbracht v. Com., 96 Pa. St. 449; s. c., 42 Am. Rep. 550; Sarbecker v. State, 65 Wis. 171.

1. Smith v. Godfrey, 28 N. H. 379; s. c., 61 Am. Dec. 617.

Penal Statutes of Foreign States.—It is a well settled principle of law that the penal statutes of one State are not in force beyond the limits of the State which enacted them. See Teall v. Felton, 1 N. Y. 546; Delafield v. State of Ill., 2 Hill (N. Y.) 169; Scoville v. Canfield, 14 Johns. (N. Y.) 338; s. c., 7 Am. Dec. 467; Dickson v. Dickson, 1 Yerg. (Tenn.) 110; s. c., 24 Am. Dec. 444; Suffolk Bank v. Kidder, 12 Vt. 464; s. c., 36 Am. Dec. 354.

It is said, in State v. Comings, 28 Vt. 508, that the delivery in Vermont of intoxicating liquors *in transitu*, by the

procurement of a nonresident owner of the liquors, is a violation of the Vermont statute, the delivery being the more essential act of the offence which is a misdemeanor.

In State v. Emery, 98 N. Car. 668, an indictment charged the unlawful selling and retailing of spirituous liquors in the county of Wake; the only witness testified that he bought liquors of the defendant in the city of Raleigh, Wake county; a motion in arrest of judgment was refused, because it did not appear that there was an exception to the law in regard to Raleigh township.

2. Weil v. Golden, 141 Mass. 364. See Blackwell v. State, 42 Ark. 275; Berger v. State, 50 Ark. 20; State v. Basserman, 54 Conn. 88; Com. v. Shurn, 145 Mass. 150; Com. v. Burgett, 136 Mass. 450; People v. Capen, 26 Hun (N. Y.) 377; *Re Young's Liquors*, 15 R. I. 243.

When a person licensed to sell in one town sends liquor to another town where there are no licenses, for sale, he is guilty of illegal selling in the latter town, and the liquors are forfeited to the State. *Re Young's Liquors*, 15 R. I. 243.

Where liquor has been ordered from M by a resident of another place and was delivered, paid and receipted for in the latter place, it is sufficient evidence of a sale therein. Com. v. Shurn, 145 Mass. 150.

A, who had a billiard saloon in X, where the local option law prevailed, directed B to give A's son money for some whiskey at said saloon, which money A sent to his dram shop outside of X, got the whiskey there, and through his son delivered it to B at said saloon; the court held, that this was a sale at X. Blackwell v. State, 42 Ark. 275.

A, who had a place of business in B, where he sold liquors, advertised that he would sell persons in H, at B prices, free of expressage, and that applications might be left in the post office box in H,

express, C. O. D.¹ But delivery to a common carrier being delivery to the consignee, if a dealer in one county sends liquors by express to a buyer residing in another, and the latter pays the

which was hired by an employe of A. Upon an application being left in the box, it was taken by the employe to A, who delivered a bottle of whiskey to an expressman in B, who carried it to the person ordering it in H. *Held*, that A might be convicted of a sale in H. *Com. v. Burgett*, 136 Mass. 450.

A, as servant of B, took from C an order for a case of lager, in Corinth, where no licenses for sales thereof were granted, carried it to B at Glenn's Falls, where B delivered to A the quantity ordered, which A thereupon took to Corinth, delivered to C and received the pay. *Held*, that the sale was made at Corinth, and A was liable for violation of the excise law. *People v. Capen*, 26 Hun (N.Y.) 377.

A brewer was in the habit of sending into a town adjoining that in which he carried on business, and which had voted against the granting of licenses for the sale of intoxicating liquors, a wagon, on regular trips, for the delivery of ale and beer to persons residing in such adjoining town. *Held*, that he might properly be convicted of selling intoxicating liquors in that town, upon proof of the delivery of beer therein to purchasers by the driver of the wagon as his agent; that under the statute providing that where any town shall have voted against the granting of licenses for the sale of intoxicating liquors, a delivery of such liquors within such town shall be deemed a sale in the town, although the contract for the sale shall have been made in another town (*Conn. L. 1882*, ch. 107, pt. 2, § 2), the complaint properly charged a sale in that town; and that under that statute he was liable for the delivery by his agents. *State v. Basserman*, 54 Conn. 88.

1. *State v. O'Neil*, 58 Vt. 140.

Thus where a dealer in one State ships intoxicating liquors to parties in another State by express on a C. O. D. order, which order is in effect a direction by the consignor to the express company not to deliver the liquors to the consignee except upon payment, when the liquors have been delivered by the express company to the consignee in the State to which they are

shipped and paid for, the sale is in that State and the vendor is liable to a conviction there for an illegal sale. *State v. O'Neil*, 58 Vt. 140.

In the case of *State v. Carl*, 43 Ark. 353; s. c., 51 Am. Rep. 565, one Davidson, at Ozark, sent a written order to Carl & Toby, merchants at Little Rock, to send him one gallon of whiskey by express, C. O. D. It was sent accordingly, the seller agreeing with the express company that if it was not taken within thirty days it might be returned, and they would pay therefor both ways. Davidson received and paid for the liquor, and the court held the sale to have been completed at Little Rock.

In *Pilgreen v. State*, 71 Ala. 368, it was held that when goods are forwarded through an express company, by instructions of the purchaser, marked "C. O. D.," the carrier is the agent of the purchaser to receive the goods from the seller, and the agent of the seller to collect the price from the purchaser; and the sale is complete when the goods are delivered to the carrier. The court said: "Upon all sales of specific goods in the possession of the vendor, the contract is complete when the buyer and seller agree; the property in the goods then passes to the buyer, and the risk of loss by accident, or from any other cause than the fault or negligence of the seller, is cast upon the buyer as an incident of ownership, though actual possession may not pass, and he may not be entitled to it until he pays the price, or performs some other like stipulation. 1 Pars. Cont. (6th ed.) 525. An illustration given in some of the books is, 'if a man sell his horse for money, though he may keep him until he is paid, yet the property of the horse is in the bargainor or buyer.' When buyer and seller are distant from each other, the delivery of the goods to a carrier by the seller, in accordance with the specific request of the purchaser, is a delivery to the purchaser. 1 Pars. Cont. (6th ed.) 532; Benj. Sales (3rd Am. ed.), § 181. Applying these settled rules of the law of sales of personal property to the facts, the transaction cannot be located at Columbiana. All the dealings between the buyer and the

charges for the carriage of the liquor, the sale is completed at the place where the liquors are delivered to the carrier.¹

(3) *Sale or Delivery by Agent*.—It is a violation of the excise law to send liquors from a place where a licence permits a sale to another place where such sale is unlawful, by a servant or agent of the seller to be delivered to and paid for by the purchaser,² because a delivery by an agent of the seller is a delivery by the

seller were at Calera. There the offer of the buyer was received, accepted and acted upon, and there every act was done which it was intended the seller should do. The general property in the thing sold there passed to the buyer, by the delivery to the carrier of his own appointment, though he could not entitle himself to possession until he paid the price to the carrier. The carrier was his agent to receive the thing sold at Calera, and was the agent of the seller to receive the price. It would have been a neglect of duty, as a collecting agent, rendering the express company liable to the seller, if there had been a delivery of the whiskey without payment of the price; and if possession had been wrongfully obtained, it may be the seller could have reclaimed it. The general property, however, passed to the buyer by the delivery to the express company at Calera; the risk of loss then passed to him, though there may have remained in the seller a special property, and though the buyer could not, without the payment of the price, entitle himself to the absolute property and to the actual possession. 'In law,' as is observed by MR. BENJAMIN, 'a thing may in some cases be said to have in a certain sense two owners, one of whom has the general and the other a special property in it.' *Benj. Sales* (Kerr's edition), § 1. And this occurs in the sales of personal property when the bargain is struck, and the payment of the price is intended to be simultaneous with the delivery of possession. The seller has a lien on the property for the price, and the right of possession until it is paid. A sale, which will be in violation of the statute under which the conviction is had, must, within the designated locality, pass the title, a sale made in the different locality where the liquor is set apart and delivered to the purchaser, or to a carrier for him, passing title, is not within its words or spirit. *Garbracht v. Com.*, 96 Pa. St. 449; s. c., 42 Am. Rep. 550. *Compare Baker v. Boucicault*, 1 Daly (N. Y.) 23."

1. *Brechwald v. People*, 21 Ill. App.

213. See *Rindskopf v. D'Ruyter*, 39 Mich. 1; s. c., 33 Am. Rep. 340; *Garbracht v. Com.*, 96 Pa. St. 449; s. c., 42 Am. Rep. 550; *State v. Hughes*, 22 W. Va. 743.

Where a member of a firm of wholesale and retail licensed liquor dealers, doing business in one county, visits another county and there solicits and obtains an order on his firm for whiskey, which is shipped in jugs by railroad, and delivered to the firm by an express agent in the county where the firm does business, for transportation to the purchasers in their county, who received the whiskey and paid the express charges, and subsequently, when on a visit to the county where the railroad was, the partner collected in that county the price agreed to be paid by the purchasers, the sale was completed when the whiskey was delivered to the express agent for transportation, there being up to that time only an executory contract therefor, and hence the partner cannot be indicted in the county where the sale was taken. *State v. Hughes*, 22 W. Va. 743.

2. *People v. Capen*, 26 Hun (N. Y.) 377. See *Berger v. State*, 50 Ark. 20; *State v. Basserman*, 54 Conn. 88; *Peitz v. State*, 68 Wis. 538.

In *State v. Basserman*, 54 Conn. 88; s. c., 9 Cr. L. Mag. 123, the town of H had voted against the granting of licenses for the sale of spirituous and intoxicating liquors in the town. Defendant was a brewer living and carrying on his business in the town of New Haven, to which H adjoined, where he had a license for sale of spirituous and intoxicating liquors, ale and lager beer, at wholesale and retail, and he was in the habit of sending wagons on regular trips, once or twice a week, through the town of H for the delivery of ale and lager to various persons residing there. *Held*, that under the statute of 1832, p. 178, § 2, which makes the delivery in a nonlicensed town a sale by the vendor or his agent, defendant was properly convicted of a sale in H. The delivery by his agent was a delivery by defendant.

seller himself,¹ and where an employe of a seller of intoxicating liquors in another State who there receives an order for such liquors, and under authority from his employer to receive or reject orders, accepts the order, he may be indicted and punished in the State to which the liquors are taken, if the liquors are, in pursuance of his direction, delivered to the buyer in such latter State.²

(4) *Sale, etc., by Travelling Salesmen.*—Where liquors are ordered by sample of the travelling agent of the firm in another State, where the sale of intoxicating liquors is lawful, and they are put up marked to the purchaser, and shipped from the firms' place of business, the sale is regarded as made, and the contract completed at the place of shipment.³

A brewer owning a building in a town some fifteen miles distant from his duly licensed place of business, sent beer there to be stored and sold by his agent to any one who desired to get it, without obtaining a license from the authorities of such town. *Held*, that his agent, who had sold a keg of beer directly to a consumer, was properly convicted for selling beer without a license. *Peitz v. State*, 68 Wis. 538.

1. *State v. Basserman*, 54 Conn. 88.

2. *Com. v. Eggleston*, 128 Mass. 408.

See *Com. v. Hadley*, 52 Mass. (11 Metc.) 66; *Com. v. Drew*, 57 Mass. (3 Cush.) 279. Also, *Adams v. People*, 1 N. Y. 173. 1 Whart. Cr. L. (7th ed.), §§ 278, 604.

Under a statute prohibiting the sale of intoxicating liquors by sample, by soliciting, or procuring orders therefor, or otherwise, without first taking out a license for the privilege, the offence is committed by procuring an order from a dealer in one State and sending it to the principal in another, who accepted the order and shipped the liquors. *State v. Ascher*, 54 Conn. 299.

The supreme court of Wisconsin held, in the case of *Sar Becker v. State*, 65 Wis. 171, that when the contract is silent on the subject, and there is nothing in the transaction indicating a different intention, and a manufacturer residing in one city receives, through his agent residing in another, an order for beer from a customer there, and fills the order by delivering the beer to a common carrier at the place of manufacture, consigned to such customer at his place of residence, or to such agent for him, the sale is complete, and the title passes at the place of shipment, even though the customer, on receiving the beer at his place of residence, pays to such

agent there the purchase price; and the absence of a license to sell liquors in the county where the purchaser resided will not render the agent liable for selling without obtaining a license there. The court cite *City of Kansas v. Collins*, 34 Kan. 434; *Com. v. Farnum*, 114 Mass. 267; *Janney v. Sleeper*, 30 Minn. 473; *Somers v. McLaughlin*, 57 Wis. 358; *Ranney v. Higby*, 4 Wis. 154; *Fragano v. Long*, 4 B. & C. 219. The court say: "The same principle has frequently been applied, in the sale of liquors, to a purchaser residing in a place where all such sales, without a license, were prohibited; citing *Tegler v. Shipman*, 33 Iowa 194; *Frank v. Hoey*, 128 Mass. 263; *Dolan v. Green*, 110 Mass. 322; *Brockway v. Maloney*, 102 Mass. 308; *Abberger v. Marrin*, 102 Mass. 70; *Finch v. Mansfield*, 97 Mass. 89; *Boothby v. Plaisted*, 51 N. H. 436; s. c., 12 Am. Rep. 140; *Hill v. Spear*, 50 N. H. 253; s. c., 9 Am. Rep. 205; *Garbracht v. Com.*, 96 Pa. St. 449; s. c., 42 Am. Rep. 550; *Shuenfeldt v. Junkermann*, 20 Fed. Rep. 357.

3. *Gross v. Scarr*, 71 Iowa 656; *Tegler v. Shipman*, 33 Iowa 194; *Boothby v. Plaisted*, 51 N. H. 436; s. c., 12 Am. Rep. 140; *Hill v. Spear*, 50 N. H. 253; s. c., 9 Am. Rep. 205; *Carbracht v. Com.*, 96 Pa. St. 449; s. c., 42 Am. Rep. 550. *Compare State v. Ascher*, 54 Conn. 299.

A travelling agent for a licensed wholesale liquor dealer, doing business in Erie, took orders for whiskey in Mercer county, and sent them to his employer in Erie, who shipped the goods by railroad to purchasers in Mercer county; the court held that Erie was the place of sale and delivery, and that the agent could not be convicted of selling liquors without a license in Mercer

13. Keeping for Unlawful Sale.—Where the owner of intoxicating liquors retains possession of them, intending to deliver them on an unlawful contract for sale, such possession is within a statute or a municipal ordinance which prohibits the keeping of such liquors for unlawful sale,¹ although they are not exposed to per-

county. *Garbracht v. Com.*, 96 Pa. St. 449; s. c., 42 Am. Rep. 550.

A commercial traveller, in *Connecticut*, solicited and obtained an order for spirituous liquors to be furnished by his employers doing business in another State, and transmitted the order to them; and, in pursuance of the order, the goods were forwarded and went into the possession of the person so ordering them. *Held*, that the agent was guilty of a violation of the Connecticut statute imposing a fine upon "any person who, without a license therefor, shall, by sample, by soliciting or procuring orders or otherwise, sell any spirituous and intoxicating liquors." *State v. Ascher*, 54 Conn. 299.

But in *Webber v. Howe*, 36 Mich. 150, where a liquor dealer from Ohio in person solicited and received in Michigan an order for liquors, which were afterwards shipped in Ohio, and delivered to the vendee in Michigan, it was *held* to be a sale in Michigan. JUDGE COOLEY says: "Had the order been sent from this State to dealers in Ohio, and filled there, or had an agent of the Ohio parties, who had no authority to agree upon sales, taken the order in this State, and transmitted to his principals, who accepted and filled it," the sale would have been completed in Ohio; citing *Orcutt v. Nelson*, 67 Mass. (1 Gray) 536; *McIntyre v. Parks*, 44 Mass. (3 Metc.) 207; *Kling v. Fries*, 33 Mich. 275; *Garland v. Lane*, 46 N. H. 245. See, to same effect, *Keiwert v. Meyer*, 62 Ind. 587; *Hausman v. Nye*, 62 Ind. 485.

1. *Griffin v. City of Atlanta*, 78 Ga. 679; *Menken v. City of Atlanta*, 78 Ga. 668; s. c., 36 Alb. L. J. 6. See *State v. Connelly*, 63 Me. 212; *State v. Kaler*, 56 Me. 88; *State v. McCann*, 61 Me. 116; *Com. v. Savery*, 145 Mass. 212; *Com. v. Welch*, 140 Mass. 372; *Com. v. Henderson*, 140 Mass. 303; *Com. v. Atkins*, 136 Mass. 160; *Com. v. Fraher*, 126 Mass. 56; *Com. v. Goodman*, 97 Mass. 117; *State v. Murphy*, 15 R. I. 543.

It is said in *Com. v. Goodman*, 97 Mass. 117, that the guilty intent within the statute need not include a knowl-

edge by the seller of the intoxicating quality of his liquor. In the more recent case of *Com. v. Savery*, 145 Mass. 212, that the person keeping liquor for sale is bound to know its kind and quality.

The fact that the offender will be liable to a prosecution under a statute for the unlawful act of selling liquors when the sale is consummated will not prevent his being punished under an ordinance for the keeping of liquors for an unlawful sale. *Griffin v. City of Atlanta*, 78 Ga. 679.

Authority to Sell in Small Towns.—In *State v. Connelly*, 63 Me. 212, it is said that a complaint under the Maine Revised Statute (ch. 27, §§ 33 and 35), for keeping liquors with intent to sell them within the State, in violation of law, will lie against one who has authority to sell in some town or city within the State.

Intention to Sell and Deliver.—The supreme court of Rhode Island say, in the case of *State v. Murphy*, 15 R. I. 543, that under the laws of that State, the keeping of prohibited liquors for sale to be used as a beverage is inimical to the statute only when the keeper intends not only to sell, but also to deliver as well as to sell within that State.

Quality of Liquor—Intention to Test.—On indictment for having lager beer upon the premises with intent to sell the same, defendant testified that he purchased it for three per cent. beer, and that if he had found when he had opened it that it was lager beer, he would not have sold it. *Held*, that in the absence of evidence that he actually intended to test it before he offered it for sale, the jury could not be required to speculate upon the probability of his finding out that it contained more than three per cent. of alcohol before he sold it. *Com. v. Savery*, 145 Mass. 212.

Illegal Seizure—Defence of.—The fact that the officer proceeded illegally, in making search for and seizure of intoxicating liquors kept for unlawful sale, is no defence to the prosecution of the person for keeping them. *State v. McCann*, 61 Me. 116.

sons visiting the premises,¹ and are deposited where their presence cannot be known to the public;² neither is it necessary that the keeper shall intend to make the unlawful sale himself. Where there is a keeping with the intent that an unlawful sale shall be made in the State by any person, or with the intent to aid or assist in such unlawful sale, the law is violated.³

14. Keeping Place for Illegal Sale; Nuisance.—*a. KEEPING PLACE GENERALLY.*—It has been said that the "keeping of a place" for the unlawful sale of liquors is a distinct offence from selling, notwithstanding the fact that the statute does not define the place as one of "public resort";⁴ also that the finding of intoxicating liquors in any other building than the one used as a private dwelling affords presumptive evidence that they are kept by the owner for sale and will support an indictment for keeping and maintaining a house for selling intoxicating liquors.⁵

1. *Com. v. Atkins*, 136 Mass. 160; *Com. v. Fraher*, 126 Mass. 56; *Com. v. McCue*, 121 Mass. 358. See *Com. v. Tay*, 146 Mass. 146; *Com. v. Welch*, 140 Mass. 372; *Com. v. Henderson*, 140 Mass. 303; *Com. v. Peto*, 136 Mass. 155; *Com. v. Sprague*, 128 Mass. 75.

2. *Com. v. Fraher*, 126 Mass. 56.

3. *State v. Kaler*, 56 Me. 88.

4. *Oshe v. State*, 37 Ohio St. 494.

5. *State v. Norton*, 41 Iowa 430. See *Com. v. Rooney*, 142 Mass. 474.

Where there was evidence that defendant, charged with continually unlawfully keeping and maintaining a building for the illegal keeping and illegal sale of intoxicating liquors, was in his house, in apparent control, selling intoxicating liquor, the court properly submitted the case to the jury under instructions that, if the defendant kept the whole building described in the complaint during any part of the time named therein, and used any part thereof for illegal keeping or illegal sale of intoxicating liquor, they could convict. *Com. v. Rooney*, 142 Mass. 474.

At the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, it appeared that the defendant had a license of the first class to sell such liquors to be drunk on the premises; and the evidence for the government tended to show two sales of liquors by the defendant, which were carried away from the premises by the buyer. The judge instructed the jury that if the defendant was the proprietor of the premises, and made either of the sales testified to, they must return a

verdict of guilty. *Held*, that the instruction was erroneous. *Com. v. Patterson*, 138 Mass. 498.

Connecticut Doctrine.—Under the Connecticut statutes imposing a penalty on every person who shall, without license, keep a place where it is reputed that intoxicating liquors are kept for sale, it is sufficient that the place was reputed to be one where intoxicating liquors are kept for sale, and it is not necessary that it be reputed that they were kept for sale without a license. *State v. Buckley*, 40 Conn. 246; *State v. Morgan*, 40 Conn. 44.

The statute seems to presume that if a place has the reputation of being one where spirituous liquors, ale and lager beer are kept for sale, and therefore makes it criminal for a man to keep such a place which has such a reputation, the foundation of the reputation, therefore, must be the fact that such liquors are kept for sale. If it has its origin from any other source it is spurious and of no importance. The reputation here intended grows out of such indications as to convince men of ordinary sagacity that such liquors are in fact kept in these places for sale. It comes from persons passing and repassing and who see there the ordinary concomitants of drinking saloons. They perhaps see the intemperate loitering before them; or persons going in apparently sober and coming out intoxicated. They see casks, decanters and jugs labelled with the names of the various intoxicating liquors. They see beverages prepared and drunk resembling such liquors; and indeed everything that usually attends drinking saloons.

b. WHAT CONSTITUTES A NUISANCE AND WHO IS GUILTY OF MAINTAINING IT.—Intoxicating liquors do not in themselves constitute a common nuisance.¹ But where a law regulating the traffic in intoxicating liquors requires a license to be procured therefor, a person selling without having procured such license is guilty of a misdemeanor, and the house where such sale is made is a public nuisance,² although not kept in a disorderly manner.³ A place may be a liquor nuisance although the selling was carried, not as a main purpose, but as incidental and subordinate to the main business of the seller.⁴ The crime of selling intoxicating liquors is not an essential part of the crime of keeping a liquor nuisance where the two are created by distinct statutes.⁵ In a prosecution for maintaining a nuisance for keeping a place for the sale of intoxicating liquors, it is no defence that the defendant in good faith believed that he had a right to sell.⁶

c. ADJOINING ROOMS, APPENDAGES, ETC.—Where rooms are adjoining and are used either for storing or selling intoxicating liquors contrary to law, the whole is thereby rendered a nuisance.⁷

Such persons communicate their knowledge to others, and in a short time the places acquire the reputation of being establishments where such liquors are kept for sale. The reputation, therefore, is "founded in fact," that is, it is based upon, or grows out of, the fact that such liquors are kept for sale. *State v. Morgan*, 40 Conn. 44.

1. A building in which intoxicating liquors are kept cannot be broken open and the liquors destroyed by those whose relations and friends frequent the building and obtain intoxicating liquors there. *Brown v. Perkins*, 78 Mass. (12 Gray) 89.

2. *Howard v. State*, 6 Ind. 444; *State v. Waynick*, 45 Iowa 516.

It is said by the supreme judicial court of Massachusetts, in the case of *Com. v. Murray*, 138 Mass. 508, that a person may be convicted of keeping and maintaining a common nuisance under the Massachusetts statute upon evidence of illegal sales of intoxicating liquors, notwithstanding the fact that he has a license for the sale of such liquors.

Under the Iowa Code, § 4091, providing that houses where drunkenness, quarrelling and breaches of the peace are carried on to the disturbance of others, are nuisances; a place where such acts are done but once is a nuisance. *State v. Pierce*, 65 Iowa 85.

A person licensed to retail spirituous liquors who causes and procures, for

lucre, evil-disposed persons to congregate in and about the house in which the liquors are sold, and permits them to remain there drinking, cursing, blackguarding, fighting, etc., the house is a public nuisance, and the keeper of it is indictable. *State v. Mullikin*, 8 Blackf. (Ind.) 260.

An instruction by the court to the jury, on the trial of an indictment for keeping such a nuisance, that, if they find the defendant erected, established, continued, or used a building, etc., for the purpose and with the intent of owning, keeping or selling intoxicating liquors therein, contrary to the law, he will be guilty, is erroneous, because the instruction makes punishable an unexecuted intention or an incomplete act. *State v. Harris*, 27 Iowa 429.

3. *Howard v. State*, 6 Ind. 444.

4. *State v. Hoxsie*, 15 R. I. 1; *In re Liquors of Youngs*, 15 R. I. 243.

5. *State v. Lincoln*, 50 Vt. 644.

6. *State v. Mullenhoff*, 74 Iowa 271.

7. See *Brown v. State*, 27 Ala. 47; *State v. Fertig*, 70 Iowa 272; *Com. v. Hersey*, 144 Mass. 297; *Com. v. Fraher*, 126 Mass. 56; *Com. v. Welsh*, 110 Mass. 359.

A tenement under the Massachusetts Gen. Stat., ch. 87, §§ 6, 7, may consist of two rooms used together and immediately connected together, and if the two are used alternately and interchangeably for the illegal sale or the illegal keeping of intoxicating liquors,

d. PROCEEDINGS TO RESTRAIN OR ABATE.—A statute authorizing any citizen of a county in a place where the unlawful sale of liquors is kept, to maintain an action to prohibit and abate it as a nuisance, is constitutional;¹ and on an application the court may grant a temporary injunction before the defendant is convicted generally of keeping a nuisance.² Persons engaged

they must be considered as parts of one and the same tenement, and the illegal use of either, while thus connected and used, is an illegal use of the tenement. *Com. v. Fraher*, 126 Mass. 56.

Where intoxicating liquors were discovered upon the ground under the floor of a tenement, held to be a "using of the tenement for the keeping of liquors," within the meaning of the statute. *Com. v. Welsh*, 110 Mass. 359.

Same—A part of a room may constitute a "tenement," and where one was charged with maintaining a tenement for the illegal keeping and sale of intoxicating liquors, the fact that the tenement included other premises not in the town in which the offence was alleged to have been committed, but in an adjoining town, does not make it any the less a tenement of such person where it appears that he occupied the entire premises. *Com. v. Hersey*, 144 Mass. 297.

Appendage.—On the trial of a prosecution for keeping a nuisance in the form of a liquor saloon, the evidence showed that on the ground floor of the building occupied by defendant, the front room was used as a saloon, and a back room as a kitchen and for storing liquors; that upon the officers appearing to search there was quite a commotion caused by the women moving boxes of different sizes out of the back room; that the officers found a jug containing a gallon and a half of whiskey in a box in that room. *Held*, that designating the back room, in the charge to the jury, as an "appendage" to the saloon, was not error. *State v. Fertig*, 70 Iowa 272.

"Public House."—A storehouse in the country is a "public house," within the meaning of § 3243 of the *Alabama* code. And where the house consists of two rooms, one over the other, and the owner controls both, and uses the lower room as his store, the upper room is within the prohibition of said section, unless it affirmatively appears that it is not used as an appendage to the store, but is occupied for some justifiable private purpose entirely disconnected from the

business of the store or the convenience of its customers. *Brown v. State*, 27 Ala. 47.

"Place of Public Resort."—And a public street or alley adjoining the place where beer is sold by the gallon may be so used by the public as to make them places of "public resort" within the meaning of a statute relating to dram shops, as where persons daily assemble there for amusement, drinking and conversation, and contribute money with which to buy beer by the gallon. *Bandalow v. People*, 90 Ill. 218.

1. *Littleton v. Fritz*, 65 Iowa 488; s. c., 54 Am. Rep. 19. In this case it is said that "courts constantly enjoin nuisances where no damage can be estimated in money and where the nuisance produces mere annoyance and discomfort to the complaining party; as a manufacture producing discomfort to individuals (*Catlin v. Valentine*, 9 Paige Ch. (N. Y.) 575; s. c., 38 Am. Dec. 567); a blacksmith shop near plaintiff's dwelling (*Faucher v. Grass*, 60 Iowa 505); a livery stable (*Shiras v. Olinger*, 50 Iowa 571; s. c., 32 Am. Rep. 138); a hog lot (*Richards v. Holt*, 61 Iowa 529). These and many other cases which might be cited show a great relaxation of the old rule that no action will lie to restrain and abate a public or common nuisance, unless the plaintiff, in the language of Blackstone, 'suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance, in which case he shall have private satisfaction by action; as if by means of a ditch dug in a public highway, which is a common nuisance, a man or his horse suffer any injury by falling therein, for this particular damage, which is not common to others, the party shall have his action.'"

2. *Littleton v. Fritz*, 65 Iowa 488; s. c., 54 Am. Rep. 19.

It is said by the supreme court of Indiana, in the case of *Howard v. State*, 6 Ind. 444, that upon a prosecution for the maintaining of a liquor nuisance, an order for the removal of such nuisance is not a necessary part of the judgment, and in case of such order, which must

in selling intoxicating liquors contrary to law, and maintaining a building for that purpose, and who gives up such business upon being advised of legal proceedings, may be enjoined from keeping and maintaining the nuisance in the future.¹

15. Permitting Disorderly Conduct and Unlawful Assemblage.—A person selling liquor and permitting it to be drunk in his store, is liable for the disorderly conduct of the one to whom he sells in and about his store, and for keeping a disorderly house;² but proof of disorder in a single instance is not sufficient to support a prosecution under a statute for keeping a place where liquors are sold in a disorderly manner.³

16. Sales to be Drunk on Premises Contrary to License.—*a. NATURE OF AND WHAT CONSTITUTES OFFENCE GENERALLY.*—Under statutes prohibiting the selling of liquor to be drunk on the place where sold, it is not necessary to prove that the liquor was actually drunk on the premises, the offence consisting in the sale for that purpose.⁴ It has been said that the liquor must be drunk in

always be based upon the testimony given at the trial, it is the duty of the court to make direction of its removal sufficiently explicit to guide the officer in the discharge of his duties.

In a suit in equity to enjoin a saloon from selling intoxicating liquors and to have his establishment abated as a nuisance, before it can be said that defendant has been unlawfully deprived of his property without compensation it must be made to appear that such property was owned by him or those under whom he claims power to the enactment of the Iowa statute of 1885, declaring such an establishment as a nuisance. *McLane v. Leicht*, 69 Ia. 401.

1. *Judge v. Kribs*, 71 Iowa 183. See *Rumford Chemical Works v. Vice*, 14 Blatchf. C. C. 179; *Goodyear v. Berry*, 2 Bond. C. C. 189; *White v. Heath*, 10 Fed. Rep. 291; *Jenkins v. Greenwald*, 2 Fish. Pat. Cas. 37.

2. *State v. Burchinal*, 4 Harr. (Del.) 572. See *Brockway v. State*, 36 Ark. 629; *Cable v. State*, 8 Blackf. (Ind.) 531; *State v. Thornton*, Busb. (N. Car.) L. 252; *Parker v. Green*, 2 B. & S. 299; *Patten v. Rhymmer*, 3 Ell. & El. 1.

The keeper of a shop for the sale of spirituous liquors, who permits the promiscuous assembling about his shop of persons who cause disturbance by loud noises, quarreling and swearing, and such disturbance being the probable consequences of his conduct, is indictable for keeping a disorderly house, *State v. Thornton*, Busb. (N. Car.) L. 259.

The offence, prohibited by the Indiana statute of 1843, of keeping a distillery house called a tippling house, where liquor is sold without a license, and where noisy, drunken people gather together, etc., to the great annoyance and disturbance of the people, is not limited to a case where the sale of liquor is by a less quantity than a quart. *Cable v. State*, 8 Blackf. (Ind.) 531.

Prostitutes are persons of "notoriously bad character," within the meaning of a license to sell excisable liquors by retail, which forbids the licensee from permitting such persons to assemble in his house. *Parker v. Green*, 2 B. & S. 299.

3. *Overman v. State*, 38 Ind. 6; *Dunnaway v. State*, 9 Yerg. (Tenn.) 351.

A person was indicted for keeping "a disorderly common tippling house." The jury found a special verdict "that the defendant, on one occasion, kept a house in which there was a collection of twenty or thirty negroes more than belonged to the place, who got drunk, danced, and disturbed the neighborhood with noise and uproar." *Held*, that the facts found by the special verdict did not constitute the offence of keeping a "disorderly common tippling house." *Dunnaway v. State*, 9 Yerg. (Tenn.) 350.

4. *Com. v. Luddy*, 143 Mass. 563. See *Pearce v. State*, 40 Ala. 720; *People v. Smith*, 69 N. Y. 175; *Moore v. State*, 12 Ohio St. 387.

The offence, specified in the first section of the liquor act (2 S. & C. St.

some place over which the seller has the legal right to exercise control.¹

b. APPURTENANCES; ADJOINING PREMISES, ETC.—A sale of intoxicating liquors is in violation of the law prohibiting such sale, for the purpose of being drunk on the premises where sold, where drunk on the appurtenances, or adjoining premises.²

431), consists, not in the mere act of selling intoxicating liquors, but in the selling of such liquors to be drunk in or about the building or premises where sold. The mere act of selling intoxicating liquors is not in its nature local, but it only becomes unlawful when its intended use is connected with some building or premises in their nature fixed and local; and the offence created by the above section would, therefore, seem to be partly local and partly transitory. [Per PECK, J.] Moore v. State, 12 Ohio St. 387.

In a trial for selling liquor without license, the defendant may be found guilty of selling it to be drunk on the premises, if he went to a public sale by an administrator, taking liquor with him in his buggy, and sold a quart of liquor to several persons. Pearce v. State, 40 Ala. 720.

A person licensed to sell beer by retail, "to be drunk or consumed off the premises," supplied a pint of beer to a traveller who sat upon a bench placed and fastened against the wall of the house, returning the mug in which he was served. *Held*, that the beer shop keeper was properly convicted of the offence of selling beer to be drunk on the premises, within the meaning of the statute. Cross v. Watts, 13 C. B. (N. S.) 239.

Belief as to intoxicating qualities.—It is said in Farrell v. State, 32 Ohio St. 456, that in an action under a statute prohibiting the selling of intoxicating liquors to be drunk on the premises, the defendant may show that he bought and sold the liquor (as here certain "biters") with the understanding and the belief that it was not intoxicating liquor.

Tippling House.—Selling liquor by the quart to be drunk in the house of the defendant, does not constitute the offence of keeping a tippling house, within the statute. Moore v. State, 9 Yerg. 353.

Where one kept a few goods for sale in his shop for the purpose of protecting himself against the statute against tippling shops, and it appeared that his principal business was selling liquor,

and that the liquor was drunk on his premises, it was *held* that he did not come within the proviso of the statute, which excepted merchants who sell liquor to be used off from their premises. The Commonwealth v. McGeorge, 9 B. Mon. (Ky.) 3.

1. Downman v. State, 14 Ala. 242.

But it is held in the case of Patterson v. State, 36 Ala. 297, that the fact that liquor retailed to a party was drunk across the state line or on land over which the vendor had no control is no defence on an indictment for selling liquor drunk on or about the premises.

It is said in the case of Wrocklege v. State, 1 Iowa 167, that if intoxicating liquor sold was actually drunk on the premises, whether or not it was intended by the seller to be there drunk is immaterial.

2. See Powell v. State, 63 Ala. 177; Christian v. State, 40 Ala. 376; Swan v. State, 11 Ala. 594; Bandalow v. People, 90 Ill. 218; Stockwell v. State, 85 Ind. 522; O'Connor v. State, 45 Ind. 351; Stone v. State, 30 Ind. 115.

Liquor handed through a window to be drunk on the seller's back steps, may be deemed to have been sold in contravention to a statute prohibiting its sale to be drunk in "house, outhouse, yard, or garden." Stockwell v. State, 85 Ind. 522.

A public street or alley fronting a place where beer is sold to be drunk in the street, is embraced within the statute prohibiting sales of liquor to be drunk upon premises adjoining to the place of sale. Bandalow v. People, 90 Ill. 218.

In a trial for selling liquor without a license, it was *held* that there was no error in the charge to the jury that it was the defendant's duty, if he sold the liquor to prevent its being drunk on or about his premises; and that if they believed from the evidence, beyond a reasonable doubt, that the defendant sold the liquor as stated, and that if it was drunk, as stated, in front of his store, then they should find him guilty. Christian v. State, 40 Ala. 376.

Drunk in Adjoining Shed.—Where, in

17. Prohibited Times and Hours.—Where a saloon is required to be closed at certain hours, it is not so closed within the meaning of the law, so long as it is possible for persons desiring liquor to get in peacefully, whether by the outside entrance or any other, or so long as any customer, who is inside at the time for closing, remains inside, and it is not important that there is no one attending the bar, if the liquor is accessible, neither is it important that any is sold.¹

18. Giving Away.—Under a law providing that no one shall sell or dispose of liquor without a license, the words disposing of include giving away liquor.² It seems that under a statute declaring it unlawful "to make, sell, give away or otherwise dispose of" intoxicating drinks, a person cannot be convicted for giving away liquor at his private residence, provided the giving away is done honestly and in good faith, and not as a shift or device to evade the provisions of the statute.³ And it has been said that it is no

a prosecution for selling intoxicating liquors without a permit, the evidence showed that the accused sold a bottle of beer, which was taken by the purchaser to a shed, from 15 to 20 feet distant from the seller's premises, and there drunk, and that there was no agreement or understanding between the buyer and the seller as to where the liquor was to be drunk, *held*, that there was no violation of law by the seller. *O'Connor v. State*, 45 Ind. 351.

Proof that a person having purchased liquor in the store room from one who stated that it must not be drunk there, opened a door and stepped into a shed attached to the store room building, placed the bottle of liquor and tumblers furnished by the seller on a box found there, and when the liquor had been drunk left the tumblers and the box and passed back through the store room to the street; the entire premises belonging to a third person, the store room but not the shed being rented by the seller, shows that the seller suffered the liquor to be drunk in his house within the intent of the statute. *Stone v. State*, 30 Ind. 115.

Sale from jug in field.—The supreme court of Alabama in *Powell v. State*, 63 Ala. 177, *held*, on the authority of *Pearce v. State*, 40 Ala. 720, that a defendant was properly convicted of selling liquor "drunk on or about his premises," on proof that the liquor was sold from a jug which he had in a field where he was working with others, more than a mile from his house, and in the plantation of another person, over which he had no control.

The term "premises," in the Alabama statutes authorizing merchants and shop keepers to retail spirituous liquors by the quart, so that the same be not drunk with their privy on the premises where they reside or have their stores, means something over which the individual has control; therefore a conviction is proper where the liquor furnished is drunk from glasses of the shop keeper on a bench used by him in a mill yard some fifteen or twenty steps from the house where the liquor was sold. *Swan v. State*, 11 Ala. 594.

1. *People v. Cummerford*, 58 Mich. 328.

Prohibited Hours.—As the court cannot enquire into the business and the manner of keeping licensed houses, except on complaint made and an opportunity for hearing given to the parties licensed, it cannot on petition order licensed houses to be closed at a certain hour of the night. *Petition of Bedford*, 2 Pa. County Ct. 85.

2. *State v. Deusting*, 33 Minn. 102; s. c., 53 Am. Rep. 12. See *State v. Adamson*, 14 Ind. 296; *State v. Reinhartz*, 69 Iowa 224; *Com. v. Kimball*, 41 Mass. (24 Pick.) 366; s. c., 35 Am. Dec. 326; *State v. Freeman*, 27 Vt. 520.

3. *Reynolds v. State*, 73 Ala. 3; *State v. Standish*, 37 Kan. 643; *State v. Jones*, 39 Vt. 370.

Thus a person cannot be convicted, under the Kansas Prohibitory act of 1881, § 16, for keeping in his house or store, or in a wareroom thereof, intoxicating liquor for his own use, or for

defence to give intoxicating liquors to an adult person, not intoxicated nor in the habit of becoming intoxicated, when such gift is without any consideration received or expected in return and without subterfuge or attempt to evade the provisions of the statute.¹

Evidence to prove a sale or from which a sale may be inferred will not sustain a conviction upon a charge of giving away intoxicating liquor.²

19. Sales to Informers.—Where for the purpose of apprehending an offender under the excise law and bringing him to justice, a board of excise commissioners employs and pays informers and witnesses to go upon the premises of the accused and purchase and drink spirituous liquor thereon, the seller violates and becomes liable to the penalty where he has no license from the board of excise to protect him.³

20. "Screen Law."—A statute relating to the use and management of premises for the sale of liquors which expressly intends that an unobstructed view of the premises shall at all times be obtained by persons outside and is addressed to the licensee only, forbidding him to do or to permit to be done the prohibited act, renders him liable whether the screen is interposed by himself in person or by an agent left by him in charge of his business.⁴ The prohibition against the licensee's maintaining upon the licensed premises used by him for the sale of intoxicating liquors, any

giving the same away, provided such giving away is not done as a shift or device to evade the provisions of the act. *State v. Standish*, 37 Kan. 643.

But the gratuitous furnishing of intoxicating liquor to musicians employed by the inn keeper on the occasion of a dance at his house, was held to be an offence under the statute. *State v. Jones*, 39 Vt. 70.

And an inn keeper gratuitously furnished whiskey three times at his bar to his domestic servant, who on each occasion had been sitting up late at night in performance of his duties. Held, that this was not a violation of the statute regulating traffic in intoxicating liquors (Gen. Sts., ch. 94). *State v. Jones*, 39 Vt. 370.

1. *State v. Hutchins*, 74 Iowa 20.

2. *Harvey v. State*, 80 Ind. 142.

3. *Onondaga Commissioners v. Backus*, 29 How. (N. Y.) Pr. 33.

4. *Com. v. Kelley*, 140 Mass. 441. See *Com. v. Ferden*, 141 Mass. 28; *Com. v. Rourke*, 141 Mass. 321.

Neglect to keep closed a door at the rear of a saloon, opening upon a driveway from the street, is a violation of a license requiring that all entrances other than those from the public street be per-

manently closed. *Com. v. Ferden*, 141 Mass. 28.

The words "no such license," in the Massachusetts Pub. Sts., ch. 100, § 12, prohibiting the maintenance of screens or other obstructions upon premises licensed for the sale of intoxicating liquors, refer to every licensee, and not merely to one who has been required by the licensing board to remove screens or other obstructions. *Commonwealth v. Rourke*, 141 Mass. 321.

A license for the sale of intoxicating liquors contained the following clause: "The licensee is required to close permanently all entrances to the licensed premises other than those from the public street or streets upon which such premises are located." The licensed premises were a saloon thirty feet deep, with a door fronting on the street upon which the premises were located, and opening into the saloon; and there was another door, which was put in at the time the building was constructed, at the rear of the saloon, opening upon a driveway from the street to the rear, and which was not kept closed. Held, that these facts constituted a violation of the license. *Commonwealth v. Ferden*, 141 Mass. 28.

screen or partition does not apply to leaving *in statu quo* the walls of the several premises contemplated by the license as remaining distinct.¹ The maintenance of curtains in windows or elsewhere so as to interfere with the view of the interior of a building is a violation of the license under a statute prohibiting the use of screens, and the like, irrespective of the purpose for which the curtains are maintained.²

21. Label.—A statute providing that "it is desired and required that all and every grower, manufacturer, trader, holder, or bottler when selling or putting up" a specified liquor "shall plainly stencil, brand, or have painted where it will be plainly seen, first, the quality of the liquor, and second, his name or the firm's name

1. *Com. v. McGrath*, 140 Mass. 296; *Com. v. Donahue*, 140 Mass. 450, *n.*; *Com. v. Flannery*, 140 Mass. 450, *n.*; *Com. v. Sansville*, 140 Mass. 450, *n.* See *Com. v. Kane*, 143 Mass. 92; *Com. v. Barnes*, 140 Mass. 447; *Shultz v. Cambridge*, 38 Ohio St. 659.

The screen law is not violated by maintaining a partition between a front and rear room where a license is to sell both in the front room and rear room, although such wall obstructs the view into the rear room. *Com. v. Barnes*, 140 Mass. 447.

In an ordinance prohibiting saloon keepers from permitting at, in or about the doors, windows, openings or in the interior of their saloons, "any blind, screen, painted or frosted glass, shade, curtain or other device," the words "other device" do not embrace a board partition between different rooms of a building, such partition extending from floor to ceiling, fastened in the usual manner, and intended by the owner, when he placed it in the building, as a permanent accession to the realty. *Shultz v. Cambridge*, 38 Ohio St. 659.

Upon a complaint charging the defendant with the violation of the screen law, where it appears that there was a door opening from a bar room to a room in front, the windows of which were covered by curtains cutting off a view of entrance to the bar room, in the absence of evidence that there was another entrance to the bar room from the outside, or that there was no door between the bar room and the room in front, it will be assumed that the entrance to the bar room was from the front room, and the maintenance of the curtains in the latter, cutting off a view of the usual entrance to the bar room constitutes a violation of the license, and renders it void. *Com. v. Kane*, 143 Mass. 92.

2. *Com. v. Moore*, 145 Mass. 244. See *Hussey v. State*, 69 Ga. 54; *Com. v. Kane*, 143 Mass. 92; *Com. v. Worcester*, 141 Mass. 58; *Com. v. Casey*, 134 Mass. 194; *Com. v. Auberton*, 133 Mass. 404.

A statute prohibiting the use of screens being so placed as to interfere with a view of the interior of the premises, is violated by the placing of a curtain which interferes with any part of the interior, whether such part is used for the sale of liquors or not. *Com. v. Worcester*, 141 Mass. 58.

Where a bar room was the middle of a building and the defendant does not show that there was any entrance to the front room from outside or that there was any door between the front room, which had an entrance upon the public street, and the bar room, it will be assumed that the entrance to the bar room was from the front room, and the maintenance of curtains or screens covering the windows of the front room, which was used as an office, cigar store and eating room, will render a license for keeping the bar room void. *Com. v. Kane*, 143 Mass. 92.

Closing Bar on Sunday by Canvas Curtain.—In the case of *Hussey v. State*, 69 Ga. 54, the defendant occupied one floor of a house. In the front room he had his office on one side and a bar on the other. In the rear room there was a restaurant and there was a door between the two rooms. The door on the street, which furnished access to the front room, was so kept that a visitor had only to push it in order to pass into the front room and through it into the restaurant; the counter where drinking was ordinarily done was covered and concealed on Sunday by a canvas reaching from the ceiling to the floor, on which appearing the announcement

as the case may be, on label of bottle or package," is said to be merely directory and no punishment can be inflicted for selling without such label or brand or the label furnished in lieu thereof by the State.¹

22. Seller Not Protected by United States License or Payment of Revenue Tax.—The payment of a United States revenue tax and the procurement of United States license by a retail liquor dealer is no defence to an indictment under a State statute for selling without a State license.²

23. Keeping Statement and Making Report of Manufacture and Sale.—Under a statute concerning the manufacture and sale of spirituous and intoxicating liquor, among other things, requiring a tabular statement of sales to be kept in which shall be entered the date of sale, name of purchaser, etc., although no tabular statement is kept as prescribed by such statute, yet if the manufacturer's or seller's books, kept in the usual course of business, contains

"Bar closed." Visitors passed into the restaurant and liquor was there furnished for them and drunk. The court *held* that it made no difference whether the bar was open or hid if liquor was retailed in the restaurant and the tipping was done there.

Screens Obstructing View on the Lord's Day.—A statute providing that no licensee shall maintain or permit to be maintained upon any premises used by him for the sale of spirituous or intoxicating liquors, under the provisions of his license, any screen, blind, shutter, or other obstruction, in such a way as to interfere with the business conducted upon the premises or with the view of the interior of the premises, applies to a licensee who maintains such shutter upon his premises on the Lord's day, although he is prohibited from and is not in fact carrying on business on that day. *Com. v. Casey*, 134 Mass. 194; *Com. v. Auberton*, 133 Mass. 404.

1. *Ex parte Kohler*, 74 Cal. 38.

2. *Pierson v. State*, 39 Ark. 219; *Block v. Jacksonville*, 36 Ill. 301; *State v. McCleary*, 17 Iowa 44; *State v. Carney*, 20 Iowa 82; *State v. Stutz*, 20 Iowa 488; *State v. Baughman*, 20 Iowa 497; *Com. v. Thornily*, 88 Mass. (6 Allen) 445; *Com. v. O'Donnell*, 90 Mass. (8 Allen) 548; *Com. v. Holbrook*, 92 Mass. (10 Allen) 200; *Com. v. Keenan*, 93 Mass. (11 Allen) 262; *Com. v. McNamee*, 113 Mass. 12; *Com. v. Owens*, 114 Mass. 252; *Com. v. Aaron*, 114 Mass. 255; *Com. v. Dowdican*, 114 Mass. 257; *Com. v. Dowling*, 114 Mass. 259; *Com. v. Burke*, 114 Mass. 261; *Com. v. Sanborn*, 116 Mass. 61; *State*

v. Funk, 27 Minn. 318; *Boyd v. State*, 12 Lea (Tenn.) 687; *Com. v. Sheckles*, 78 Va. 36; *McGuire v. Massachusetts*, 70 U. S. (3 Wall.) 382; bk. 18, L. ed. 164.

A license granted under the United States statute does not authorize the sale of intoxicating liquors in violation of the statutes of the state, although such sale is only incidental to the salesman's business. *State v. McCleary*, 17 Iowa 44; *Com. v. Thornily*, 88 Mass. (6 Allen) 445; *Com. v. O'Donnell*, 90 Mass. (8 Allen) 548.

Sale on Water.—A United States license to sell liquor is no excuse for the sale in violation of the state law on land or water. *Pierson v. State*, 39 Ark. 219.

It is said by the supreme court of Tennessee, in the case of *Boyd v. State*, 12 Lea (Tenn.) 687, that it is no defence to an indictment for selling liquor in less quantity than a quart without first having obtained a license under the laws of the State, or for selling an intoxicating beverage within four miles of an incorporated institution of learning, that the sale was made in a steamboat while under way in the Cumberland river, and that the defendant had paid the special tax and taken out a license as a retail liquor dealer as required by the laws of the United States. And it is said by the supreme court of Virginia in the case of *Com. v. Sheckles*, 78 Va. 36, that liquor cannot without license obtained in accordance with the laws of this State be lawfully sold therein, either on land or on board of a vessel, although the seller may have obtained from the United States gov-

the same entries as those required in the tabular statement, this will constitute a substantial compliance with the law and the sale will be valid.¹

A statute providing for monthly returns to be made of liquor bought and sold has been said to include liquors sold on prescription.²

VI. INDICTMENT, COMPLAINT, TRIAL, ETC.—1. Jurisdiction.—a. GENERALLY.—It has been said that proceedings under the liquor law for a violation of the provision against selling intoxicating liquor, are not criminal proceedings, and that the statutory provisions as to the general jurisdiction does not operate as a limit to their jurisdiction as expressly given under the liquor law; and the jurisdiction thus conferred is within constitutional limits.³

b. OF POLICE COURTS.—In some of the States police courts

ernment a special tax stamp therefor, it being expressly provided by section 3243 of the U. S. Revised Statutes that persons holding such stamps shall not be exempt from any penalty imposed by the laws of any State for carrying on the trade within its limits.

1. *Barnard v. Houghton*, 34 Vt. 264.

Where the form of the tabular statement, given in the statute, contained one entry, "purpose of sale," but the tenth section of the law providing for the sale by manufacturers did not even contain a provision requiring such an entry, it was held that the form given in the statute could not be considered as adding a new requirement to the statute. *Barnard v. Houghton*, 34 Vt. 264.

Return by Officers Mandatory.—A statute requiring returns of liquor manufacturers to be made to a designated officer at a designated time is mandatory and not directory. *State v. McEntee*, 68 Iowa 381. See *Abbott v. Sartori*, 57 Iowa 656.

However, it is said in *Abbott v. Sartori*, 57 Iowa 656, that the provisions of section 1537 of the Iowa Code, requiring every person having a permit to sell intoxicating liquors shall make a return of his sales on the last Saturday of each month, as to the time of filing the return, are not mandatory. The statute is so far directory as to authorize the return to be filed at any time before an action is commenced for the recovery of the statute penalty.

Same—"Retailer."—Under a statute requiring constables to make returns by retailers of liquors the word "retailer" cannot be construed with reference to druggists as such. *Com. v. Porter*, 10 Phila. (Pa.) 217; 31 Leg. Int. 398.

A city ordinance making it the duty

of the city marshal, on the first day of every month, to ascertain and report to the city council the names of all persons engaged in the liquor traffic, giving their place of business, whether licensed or unlicensed, and to make complaint against all persons selling liquor without license, apply to all persons engaged in the liquor traffic, and it is the duty of the marshal to comply with the requirements of the ordinance without reference to the quantity of the liquors sold at each sale by persons engaged in the traffic. *State v. Cummings*, 17 Neb. 311.

Erroneous Return.—A statute providing that any person holding a permit to sell liquors shall, on failure to make a true monthly return, forfeit a specified sum for the offence, it is no defence in an action to recover the forfeiture that the return was false through error and mistake. *State v. Chamberlin*, 74 Iowa 266.

2. *State v. Chamberlin*, 74 Iowa 266. Compare *Com. v. Porter*, 10 Phila. (Pa.) 217; 31 Leg. Int. 398.

Sale by Registered Pharmacists.—A sale of intoxicating liquors by a registered pharmacist holding a permit is not rendered criminal by the fact that he fails to make to the county auditor the report required by law, or by the fact that he sells at a greater profit than the law allows. *State v. Von Haltschuherr*, 72 Iowa 541, 34 N. W. 323.

3. *Matter of Buddington*, 29 Mich. 472.

It is said in the case of *State v. Arlen*, 71 Iowa 216, that under the Iowa code (sections 1544 to 1547), providing that the proceedings may be instituted before justices of the peace for the seizure, condemnation and destruction

have jurisdiction of offences against statutes regulating keeping a liquor nuisance.¹

c. OF JUSTICES' COURTS.—In many of the States a justice of the peace has jurisdiction of violations of laws regulating traffic in intoxicating liquors.²

d. OF COMMON PLEAS, MUNICIPAL AND SUPERIOR COURTS.—In some of the States the common pleas courts have jurisdiction of the offence of being a common retailer of intoxicating liquors without license, and of other offences prosecuted by indictment committed against the statutory provisions regulating traffic in intoxicating liquor,³ in others the superior courts,⁴ municipal courts,⁵ and mayor courts.⁶

e. OF CIRCUIT AND DISTRICT COURTS.—In other States the circuit and district courts have either exclusive or concurrent jurisdiction to try and punish all offences against laws regulating traffic in and sale of intoxicating liquors.⁷

2. Form and Nature of Proceedings and Prosecutions Generally.—In some cases a prosecution for violation of the liquor law may be by civil action or by complaint in criminal form,⁸ but in the majority of the States such prosecution is by indictment or criminal information.⁹

of intoxicating liquors kept for sale in violation of the law; such proceedings are a criminal action and the jurisdiction of the justices is not affected by the value of the liquors to be seized. *Citing State v. Intoxicating Liquors*, 40 Iowa 95; *Bryan v. State*, 4 Iowa 349; *Santo v. State*, 2 Iowa 165. Compare *Sullivan v. City of Oneida*, 61 Ill. 242.

1. *Com. v. Ring*, 111 Mass. 427. See *Com. v. Ballou*, 124 Mass. 26, 28; *Com. v. Lambert*, 94 Mass. (12 Allen) 177. Compare *Com. v. Griffin*, 105 Mass. 185; *Com. v. Carr*, 77 Mass. (11 Gray) 463.

2. See *Barnes v. State*, 19 Conn. 398; *Hamilton v. Carthage*, 24 Ill. 22; *State v. Arlen*, 71 Iowa 216; *State v. Knowles*, 57 Iowa 669; *Osborn v. Sargent*, 23 Me. 527; *Com. v. Golding*, 80 Mass. (14 Gray) 49; *Com. v. Rowe*, 80 Mass. (14 Gray) 47; *Com. v. Murphy*, 77 Mass. (11 Gray) 53; *Faulks v. People*, 39 Mich. 200; *State v. Passaic*, 42 N. J. L. (13 Vr.) 87; *State v. Nutt*, 28 Vt. 598; *Ex parte Tracy*, 25 Vt. 93. Compare *State v. Peck*, 32 Vt. 172.

Penalties and Costs May Exceed Limit of Jurisdiction.—In Michigan, justices of the peace have jurisdiction of the offence of selling intoxicating liquor to minors, although the sum of the penalty and the costs exceed the amount to which they are limited in ordinary cases. *Faulks v. People*, 39 Mich. 200. See *Barnes v. State*, 19 Conn. 398.

3. *State v. Stinson*, 17 Me. 154.

4. *State v. Hollingsworth*, 100 N. Car. 535.

5. See *Com. v. Murray*, 144 Mass. 170; *State v. Emery*, 98 N. Car. 768.

The offence of keeping intoxicating liquors with intent to sell the same unlawfully, being under the degree of felony, is within the jurisdiction of the municipal court of the city of Boston, which has by statute original criminal jurisdiction of all crimes under the degree of felony, except conspiracy and libels, and cases where a prosecution by indictment or information is required by law (*Mass. Pub. Stat.*, ch. 154, § 50); provisions of statute for the prosecution by indictment, unless otherwise especially provided by law, of all fines or forfeitures recovered in criminal prosecutions, having no application to the fine imposed as a punishment for the offence. *Com. v. Murray*, 144 Mass. 170.

6. *Santo v. State*, 2 Iowa 165.

7. See *Lichtenstein v. State*, 5 Ind. 162; *Com. v. Hersey*, 144 Mass. 297; *State v. Bach*, 36 Minn. 234; *State v. Kobe*, 26 Minn. 148; *Agin v. Heyward*, 6 Minn. 110 (*Gil.* 53); *Eckhart v. State*, 5 W. Va. 515.

8. *Ricker Petitioner*, 32 Me. 37.

9. See *Part of Lot 294 v. State*, 1 Iowa 507; *Overshiner v. Com.*, 2 B. Mon. (Ky.) 344; *State v. Hollin*, 12 La. An. 677; *Harper v. State*, 7 Ohio

3. Venue.¹4. Limitations.²5. Bar by Former Prosecution or Pendency.³

6. **Prosecutor.**—Prosecutions for violations of the liquor law are required to be in the name of the State in some jurisdictions,⁴ but in other jurisdictions the prosecution may be by the mayor or aldermen of the city,⁵ by special constable⁶, or agent,⁷ appointed to make complaints and prosecute for violations of the liquor laws,⁸ or by private persons.⁹

7. **Indictment or Complaint**¹⁰—*a.* **GENERAL MATTERS AS TO FORM AND REQUISITES.**—Where no form of complaint in prosecutions for the violation of the laws regulating the sale of intoxicating liquors is provided by statute, the common law form must be

St. 73; *Haines v. State*, 7 Tex. App. 30.

In *State v. Hollin*, 12 La. An. 677, it is said that the proceedings against a person for retailing spirituous liquors without previously obtaining a licence, should be by indictment and not by civil suit.

In some of the States the prosecution may be commenced by an indictment without a previous preliminary examination before the mayor or justice. *Harper v. State*, 7 Ohio St. 73.

Suit to Enforce Forfeiture.—It is said in *Com. v. Newell*, 71 Mass. (5 Gray) 76, that a complaint in which, under the statute, the forfeitures for single sales of intoxicating liquors may be recovered, is a complaint in a criminal process, and need not purport to be made in the name of any city or town, although the statute under which the suit is brought gives as a concurrent remedy an action by debt in the name of the city or town where the offence was committed, and provides that the forfeiture so recovered shall go to the town where the convicted party resides.

1. See **INDICTMENT**, vol. 10; as to **VENUE**, see **CRIMINAL PROCEDURE**, vol. 4, p. 736; as to **CHANGE OF VENUE**, see that title, vol. 3, p. 90, and **CRIMINAL PROCEDURE**, vol. 4, p. 818.

2. See **CRIMINAL PROCEDURE**, vol. 4, p. 784.

3. See, for a full discussion of this subject, **JEOPARDY**; see also **CRIMINAL PROCEDURE**, vol. 4, pp. 787 to 798.

4. *Rogers v. Alexander*, 2 Greene (Iowa) 443; *State v. Stinson*, 17 Me. 154.

Retailing liquors on Sunday is one of the offences for which an indictment may be sent in without a prosecutor in Tennessee. *Neideiser v. State*, 6 Baxt. (Tenn.) 499.

5. *Portland v. Rolfe*, 37 Me. 400; *Com. v. Murphy*, 140 Mass. 440, note.

A constable appointed by a justice of the peace to assist peace officers "to seize liquors," is not thereby authorized to select an attorney to prosecute a case under the prohibitory liquor law. *Foster v. Clinton County*, 51 Iowa 541.

It is said in *Com. v. Murphy*, 140 Mass. 440, note, that the provisions of most statutes requiring the mayor and aldermen of cities and selectmen of towns to prosecute for illegal sales of intoxicating liquors, is merely directory, and any other citizen may enter complaint for the violation of the law.

6. *State v. Carver*, 12 R. I. 285.

7. *State v. Wolfarth*, 42 Conn. 155.

8. In *State v. Wolfarth*, 42 Conn. 155, it is said that an agent appointed to prosecute for all violations of law relating to the sale of intoxicating liquors, has power to prosecute for offences committed before his appointment.

Appointment of Attorneys and Deputies to Prosecute.—In the case of the Board of Excise *v. Sackrider*, 35 N. Y. 104, it is said that the board of excise may employ an attorney to conduct in a prosecution commenced by such board, but cannot give general authority to commence any such prosecution at his discretion.

It is said that under statutes regulating the unlawful sale of intoxicating liquors, a prosecuting attorney is authorized to appoint a deputy, and such deputy is authorized to perform all the duties of his principal, including signing of the indictment. *Stout v. State*, 93 Ind. 150.

9. See *Com. v. Murphy*, 140 Mass. 440, note; *State v. Shortell*, 93 Mo. 123.

10. See **INDICTMENT**, vol. 10.

followed.¹ In such prosecutions, it seems that no very strict conformity between the information and the preliminary complaint is necessary, and that if the charge is substantially the same in both, the information will not be quashed on the ground of variance.²

b. ALLEGATIONS AS TO INFORMATION AND BELIEF.—In a prosecution for the illegal sale of intoxicating liquors under a statute regulating such sale, it seems that an allegation that the complainant is "credibly informed and verily believes" or "has good reason to believe" is sufficient.³

c. CLERICAL ERRORS AND OMISSIONS.—The general rules relating to clerical errors and omissions and indictments generally which have heretofore been set out fully⁴ are applicable, to indictments for violations of laws regulating traffic in intoxicating liquors.⁵

d. CONCLUSIONS.—An indictment under local option or general liquor laws is sufficient if it charges the offence as "contrary to the form of the statute in such case made and provided."⁶

e. RECORD.⁷—When in an indictment it is alleged that a person sold and offered and exposed for sale at retail, spirituous liquors and other drinks, and the record shows the presentment of an indictment for "unlawfully retailing," the record of the finding of the indictment is sufficient.⁸

f. SIGNATURE AND ENDORSEMENTS.—The signatures and endorsements upon indictments for violation of the liquor law are governed by the same rules as those upon indictments for any other offence.⁹

1. *State v. Miles*, 4 Ind. 577; *Com. v. Ferden*, 141 Mass. 28; *State v. Higgins*, 53 Vt. 191. See *Kern v. State*, 7 Ohio St. 411; *Miller v. State*, 3 Ohio St. 488.

The Michigan liquor law having gone very far in the form prescribed therein in removing the requirements of specific averments, the courts will not assume that the door was intended to be opened any wider than the statute allows; and a declaration which is neither a good common law declaration nor sufficient under either the general statute for the recovery of penalties or the specific provision of this particular act, cannot be sustained. *Benallick v. People*, 31 Mich. 200.

2. *Miller v. State*, 3 Ohio St. 475.

3. See *Byars v. City of Mt. Vernon*, 78 Ill. 11; *Deveny v. State*, 47 Ind. 208; *State v. Welch*, 79 Me. 79; *Mowery v. Camden*, 49 N. J. L. 106; *Robertson v. City of Lambertville*, 38 N. J. L. 69; *State v. Tall*, 56 Wis. 577; *State v. Bilby*, 21 Wis. 204; *State v.*

Dale, 3 Wis. 795. Compare *In re Morton*, 10 Mich. 208.

4. See INDICTMENT, vol. 10.

5. *Clerical Errors and Omissions*.—*Walter v. State*, 105 Ind. 589; *State v. Clark*, 3 Ind. 451; *Com. v. Burke*, 15 Gray (Mass.) 408; *State v. Whitney*, 15 Vt. 298; *State v. Rhodes*, 2 Ind. 321.

6. *Conclusions in Indictments*.—See *State v. Schilling*, 14 Iowa 455; *State v. Welch*, 79 Me. 99; *Slynur v. State*, 62 Md. 237; *Com. v. Hoyer*, 11 Gray (Mass.) 462; *Com. v. Keefe*, 7 Gray (Mass.) 332; *Trost v. State*, 64 Miss. 188; *State v. Muse*, 4 Dev. & Bat. (N. Car.) L. 319. See also *Com. v. Howe*, 13 Gray (Mass.) 26; *State v. Miller*, 24 Conn. 519.

7. See INDICTMENT, vol. 10.

8. *Tefft v. Com.*, 8 Leigh (Va.) 721; *State v. Chapman*, 25 W. Va. 408; *State v. Fitzpatrick*, 8 W. Va. 707.

Identification by Jurat.—See *Com. v. McIvor*, 117 Mass. 118.

9. *Signatures and Endorsements*.—See INDICTMENT, vol. 10. As relating to

g. VERIFICATION AND JURAT.—The jurat of a complaint for the violation of the law regulating traffic in intoxicating liquors, signed by the complainant and certified as subscribed and sworn to before the justice of the court issuing the warrant thereon, is properly subscribed and sworn to.¹

h. ALLEGATIONS AS TO PRIOR CONVICTIONS OR ACQUITTAL—(1) *Miscellaneous Matters.*—An indictment for the violation of the provision of a law, regulating the traffic in intoxicating liquors, need not aver that an action for the same penalties, has not been brought by any other complainant, that being a matter of defence;² and under a charge of a second selling, and a former conviction, the defendant may be convicted for a first selling.³ However the accused cannot be charged in separate counts of the information or indictment for a first and second offence, or a second and third; but any number of charges for the first, or the second, or the third offence, may be brought in as so many counts.⁴

(2) *Necessity of Alleging Number of Offences.*—An indictment for the violation of statutes regulating the traffic in intoxicating liquors, should state whether it is the first or subsequent offence, otherwise the imposition of the punishment provided for a second or subsequent offence will be erroneous.⁵ But in an indictment for maintaining a nuisance for keeping a place, and for selling therein unlawfully, intoxicating liquors, it is not necessary to allege that it is the second or subsequent offence.⁶

(3) *Setting Forth Record.*—In a complaint or indictment for a second or subsequent offence, for selling intoxicating liquors, technical accuracy is not required in setting forth the record of the former conviction for a similar offence.⁷

intoxicating liquor cases, see *Harrison v. Ely*, 120 Ill. 83; *State v. Cottle*, 15 Me. 473; *Com. v. Intoxicating Liquors*, 140 Mass. 287; *Benalleck v. People*, 31 Mich. 209; *State v. Glennon*, 3 R. I. 276; *State v. Perkins*, 58 Vt. 722; *State v. Paddock*, 24 Vt. 312.

1. *Verification and Jurat.*—*Com. v. Peto*, 136 Mass. 155; *Com. v. Intoxicating Liquors*, 122 Mass. 8; *Com. v. McGuire*, 11 Gray (Mass.) 459; *Com. v. Dillane*, 11 Gray (Mass.) 67; *Ferguson v. People*, 73 Ill. 559.

2. *Com. v. Murphy*, 68 Mass. (2 Gray) 510.

3. *State v. Ensley*, 10 Iowa 149; *State v. Conlin*, 27 Vt. 318.

State v. Conlin, 27 Vt. 318.

4. *State v. Lels*, 11 Iowa 416.

5. *Garvey v. Com.*, 74 Mass. (8 Gray) 382; *Tuttle v. Com.*, 68 Mass. (2 Gray) 305, 507; *Norton v. State*, 65 Miss. 297; *State v. Small*, 64 N. H. 491; *Com. v. Welsh*, 2 Va. Cas. 57.

This is on the principle that where a statute makes a second offence a felony,

subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; from whence it follows that if it be not so laid in the indictment, it shall be punished only as the first offence. *Freethy v. Freethy*, 42 Barb. (N. Y.) 641, 643; *People v. Butler*, 3 Cow. (N. Y.) 347; *Bish. Stat. Crimes* (2nd ed.), § 240; *Dwar. Stat.* (2nd ed.) 643; *Hawkins P. C.*, ch. 7, § 7.

Indictment Under Dram Shop Act.—It is said in *State v. Muntz*, 3 Kan. 386, that it is not necessary to allege in an indictment under the Dram Shop act of Kansas, that if the offence is a second offence in a case where the fine is less than one hundred dollars in order to give the court jurisdiction.

6. *State v. Howorth*, 70 Iowa 157.

7. *State v. Gorham*, 65 Me. 270; *State v. Wentworth*, 65 Me. 234; s. c., 20 Am. Rep. 688; *State v. Robinson*, 39 Me. 150; *State v. Small*, 64 N. H. 491.

(4) *Describing Time or Court.*—In an indictment for a second offence in violating the liquor laws, an averment of conviction without giving any information of the time, court, or county in which the judgment was rendered, is insufficient.¹

(5) *Description of Offence of Which Convicted, etc.*—An allegation of a former conviction in an indictment for a single sale of liquor, that at a specified term of court, the defendant was convicted of "selling a quantity of liquor," is sufficient.² In a complaint for search and seizure, an allegation of a former conviction averring that at a time specified the defendant was convicted of "unlawfully keeping, in said county, intoxicating liquors with intent to sell in violation of law," is sufficient.³

i. DESCRIBING SALES AND OFFENCES—(1) *Necessity*—(a) *Generally.*—An indictment or complaint, although in the form prescribed by statute, must define an offence punishable by law, or the prosecution cannot be maintained.⁴

(b) *Charging Unlawful Sales, etc.*—An indictment for a violation of a local statute prohibiting the sale of vinous or spirituous liquors within a specified territory without a license, is sufficient if it charges that the defendant "did sell vinous or spirituous liquors without a license and contrary to law."⁵ An indictment for the violation of the statute by selling intoxicating liquors, as agent for another person, or firm, travelling from place to place, the charge must be made positively and not inferentially;⁶ and removing intoxicating liquors, for which the tax is not paid, to a place other than a distillery warehouse, and concealing the same, is good.⁷

(c) *Sales Without License or Authority.*—Under a statute prohibiting the sale of intoxicating liquors without a license, an indictment for "unlawfully retailing," is good.⁸

1. *State v. Small*, 64 N. H. 491; *State v. Kennedy*, 36 Vt. 563; *State v. Conwell*, 80 Me. 80; *State v. Kennedy*, 56 Vt. 563; *State v. Adams*, 64 N. H. 440.

2. *State v. Wyman*, 80 Me. 117; *State v. Lashus*, 79 Me. 504.

3. *State v. Devine* (Me.), 13 Atl. Rep. 128; *State v. Hawley* (Me.), 9 Atl. Rep. 620; *State v. Welch*, 79 Me. 99; *State v. Longley*, 79 Me. 52.

In *State v. Longley*, 79 Me. 52, the court distinguish the cases of *State v. Miller*, 48 Me. 576; and *State v. Learned*, 47 Me. 426, where the allegation was that the respondent had the liquors, intended, it may be, not by him, but some other person, for unlawful sale, for which he would not be responsible.

4. *State v. Learned*, 47 Me. 426; *Murphy v. Montclair*, 49 N. J. L. (10 Vr.) 673.

5. *Boon v. State*, 69 Ala. 226; *Powell v. State*, 69 Ala. 10. See *Byars v. City of Mt. Vernon*, 78 Ill. 11; *State v. Cottle*, 15 Me. 473; *Com. v. Kendall*, 66 Mass. (12 Cush.) 414; *Bush v. Republic of Texas*, 1 Tex. 455.

6. *State v. Higgins*, 53 Vt. 191.

7. *United States v. Nunnemacher*, 7 Biss. C. C. 129.

8. *Ulmer v. State*, 61 Ala. 208; *Higgins v. People*, 69 Ill. 11; *Com. v. Turner*, 4 B. Mon. (Ky.) 4; *Woods v. Com.*, 1 B. Mon. (Ky.) 74; *Com. v. Kimball*, 48 Mass. (7 Metc.) 304; *Goodhue v. Com.*, 46 Mass. (5 Metc.) 553; *State v. Mooty*, 3 Hill (S. C.) 187; *State v. Young*, 5 Coldw. (Tenn.) 51; *White v. State*, 11 Tex. App. 476; *State v. Munger*, 15 Vt. 290; *Com. v. Hatcher*, 6 Gratt. (Va.) 667; *State v. Chapman*, 25 W. Va. 408. Compare *Hensley v. State*, 6 Ark. (1 Eng.) 252; *Merritt v. State*, 19 Tex. App. 435;

(d) *Keeping for Sale with Intent to Sell.*—A complaint alleging that the defendant did keep intoxicating liquors with intent to sell the same in the state, to be used as a beverage, against the statute, etc., is sufficient.¹

(e) *Keeping Place for Sale ; Nuisance.*—An indictment alleging that the defendant at a time and place named "did keep a drinking house and tippling shop contrary to the laws of the statute," is sufficient.² And an indictment charging one with keeping a building, "a house wherein spirituous liquors are sold, without license to be drunk in and about the same, and thereby maintained a common nuisance, to the great injury," etc., is sufficient.³

(f) *Selling on Prohibited Days and During Prohibited Hours.*—Where the defendant's license is conditioned that he should not sell on specified days, or during particular hours, an indictment which charges simply that he sold intoxicating liquors without any authority therefor, on a day or an hour named, will be sufficient if the evidence shows that the sale charged was made on a prohibited day, or during prohibited hours.⁴

(g) *Violation of Screen Laws.*—A complaint for obstructing the view of premises where liquor is sold, under license, is sufficient if it alleges that the defendant having a license maintained curtains and shutters in the room named, against the law.⁵

(2) *Certainty and Particularity*—(a) *General Rules.*—The same general rules as to certainty and particularity which govern indictments generally, apply in cases of indictment for illegal sale of intoxicating liquors.⁶ Under an indictment for the illegal sale of intoxicating liquors while the respondent is entitled to a specification of the offence, yet the character of the specification, in reference to extent and minuteness, is a matter of discretion of the trial court.⁷

(b) *Sale Without License or Authority.*—A general charge in an indictment of keeping a tippling house, or otherwise selling liquor without a license, is good;⁸ but if by any addition thereto the in-

Eppstein v. State, 11 Tex. App. 480; Munch v. State, 3 Tex. App. 552.

1. See State v. Hartwick, 49 Conn. 101; Com. v. Keefe, 143 Mass. 467; Com. v. Sprague, 128 Mass. 75; Com. v. Byrnes, 126 Mass. 248; Com. v. Intoxicating Liquors, 86 Mass. (4 Allen) 593; State v. Murphy, 15 R. I. 543.

2. Overshiner v. Com., 2 B. Mon. (Ky.) 344; State v. Collins, 48 Me. 217; State v. Casey, 45 Me. 435; State v. Crabtree, 27 Mo. 232. See Hintermeister v. State, 1 Iowa 101; Com. v. Wright, 94 Mass. (12 Allen) 190.

3. State v. Freeman, 27 Iowa 333; State v. Welch, 79 Me. 99. See Shilling v. State, 5 Ind. 443; Com. v. Clark, 145 Mass. 251; Com. v. Wright, 94 Mass. (12 Allen) 190; Com. v. Davenport, 84 Mass. (2 Allen) 299.

4. Com. v. Chadwick, 142 Mass. 595; People v. Baumann, 52 Mich. 584.

5. Com. v. Keefe, 143 Mass. 467. See Com. v. Gibbons, 134 Mass. 197.

6. See INDICTMENT, vol. 10.

7. State v. Wooley, 59 Vt. 357. See Boggus v. State, 78 Ala. 26; Devine v. State, 4 Iowa 443; State v. Bacon, 41 Vt. 526; s. c., 98 Am. Dec. 616; State v. Muntz, 3 Kan. 383; Com. v. Rowe, 14 Gray (Mass.) 47; Com. v. Burding, 12 Cush. (Mass.) 506.

8. Morrison v. Com., 7 Dana (Ky.) 218. See Anderson v. People, 63 Ill. 53; Frankfort v. Aughe, 114 Ind. 77. 600; Mullen v. State, 96 Ind. 304; State v. Graeter, 6 Blackf. (Ind.) 105; State v. Stinson, 17 Me. 154; Com. v. Leonard, 49 Mass. (8 Metc.) 530; State v. Cox, 29 Mo. 475; State v. Downer, 21 Wis. 274.

dictment specifies the facts and they do not amount to the offence charged, the indictment is bad.¹

(c) *As to Payment of Special Tax.*—An indictment for selling liquor without paying the special tax prescribed by statute, must state the particular tax, whether State or county, that has not been paid,² but need not allege a specific sale or sales, or giving away, it being sufficient if it alleges that the accused was engaged in the business of selling, or offering for sale.³

(d) *Sales on Prohibited Days and During Prohibited Hours.*—An indictment for keeping open a tippling house on the Sabbath day, need not allege and it need not be proved on the trial, that the defendant sold liquor, or that the keeping open of his shop was a nuisance or hurtful to the neighborhood, in respect to morals or otherwise.⁴ It is thought that an indictment for keeping open a bar room on an election day, need not allege what the election was for, but merely aver that the election was held.⁵

(e) *Sale to Minors.*—A complaint for selling intoxicating liquors to a minor contrary to law, need not allege that the defendant was licensed,⁶ had previous notice,⁷ or that the sale was made for the minor's own use, or the use of his parents, or for the use of any other person.⁸

(f) *Sale to Drunkards, etc.*—An indictment for selling intoxicating liquors to one who is in the habit of getting intoxicated, must allege that the habit existed at the time of the sale.⁹

(g) *Sale by Druggists.*—An information or indictment for the illegal sale of liquors, by a druggist need not aver whether the sale by the druggist was at retail or wholesale;¹⁰ but where, to constitute the offence the indictment attempts to charge the druggist

Thus it has been held that it is not necessary to aver that defendant received any compensation for the liquors sold (*State v. Downer*, 21 Wis. 274), or aver the existence of the corporation nor of an ordinance regulating the sale (*State v. Graeter*, 6 Blackf. (Ind.) 105), or that he had license under the laws of the state to sell liquor to be drunk on the premises (*Frankfort v. Aughe*, 114 Ind. 77, 600), or to state what penalty or forfeiture is incurred or to what uses it is applied (*State v. Stinson*, 17 Me. 154). But an indictment for selling spirituous liquors without a license should state at what house or establishment, or to whom the vending took place, or some other fact tending to identify the transaction, otherwise the objection will be fatal on demurrer. *Burch v. Republic*, 1 Tex. 608.

1. *Morrison v. Com.*, 7 Dana (Ky.) 218.

2. *State v. Martin*, 34 Ark. 340; *Mansfield v. State*, 17 Tex. App. 468.

3. *People v. Breidenstein*, 65 Mich. 65.

4. *Hall v. State*, 3 Ga. 18; *Fant v. People*, 45 Ill. 259.

5. *State v. Irvine*, 3 Heisk. (Tenn.) 155. *Compare Hoskey v. State*, 9 Tex. App. 202.

6. *Johnson v. State*, 74 Ind. 197; *Com. v. O'Brien*, 134 Mass. 198. A complaint for selling to a minor defines the act of the defendant with sufficient certainty by charging him, at a time and place named, with "selling unlawfully intoxicating liquors" a person named in the complaint, "who was then and there a minor." *Com. v. O'Brien*, 134 Mass. 198.

7. *State v. Hyde*, 27 Minn. 153.

8. *Com. v. O'Leary*, 143 Mass. 95.

9. *Wiedemann v. People*, 92 Ill. 314. See also *Barnes v. State*, 20 Conn. 232; *Miller v. State*, 106 Ind. 415.

10. *Luton v. Palmer* (Mich.), 37 N. W. Rep. 701; *Savage v. Com.*, 84 Va. 582, 619.

must have sold the liquor as a beverage, the indictment must specifically state that it was so sold.¹

(h) *Keeping for Sale or with Intent to Sell.*—In an indictment for keeping liquors for sale, or with intent to sell, the offence must be specifically set forth;² but under a statute making it an offence to keep liquor for sale, the indictment need not aver that it was sold in the State.³

(i) *Sale to be Drunk on Premises.*—The offence of selling intoxicating liquors without having any license, to be drunk on the premises, consists in selling the liquor for the purpose of being drunk on the premises, and it is not necessary to allege that the liquor thus sold, was subsequently drunk on the premises.⁴

(j) *Violation of City Ordinance.*—A complaint charging that the complainant has just cause to suspect, and does suspect that the defendant is guilty of violating a city ordinance against the sale of intoxicating liquors, without averring that he is guilty, is bad for uncertainty.⁵

(k) *Violation of Local Option Laws.*—It has been said that an indictment for the sale of intoxicating liquors in violation of the local statute need only aver that the "defendant sold vinous, or spirituous liquors without a license and contrary to law;"⁶ but the better opinion appears to be that where a liquor law is not to become operative until after an election has been held in accordance with the provisions of the law it must be alleged in the indictment and proved in the trial that such an election has been held.⁷

1. *State v. Buckner*, 20 Mo. App. 420.

2. *State v. Moran*, 40 Me. 129. See also *Com. v. Gallagher*, 145 Mass. 104; *Com. v. Kimball*, 7 Gray (Mass.) 328; *Com. v. Purdy*, 146 Mass. 138; *Com. v. Quinn*, 12 Gray (Mass.) 178.

Keeping Tippling House.—An indictment charging the defendant with "keeping a certain grog shop, and tippling shop," is not bad for uncertainty. *Com. v. Riley*, 14 Bush (Ky.) 44; *Our v. Com.*, 9 Dana (Ky.) 30; *State v. Tracey*, 12 R. I. 216.

Order of Information.—The defendant, embarrassed by not knowing which of several nuisances kept by him in a town, is covered by an indictment, may have an order of information. *State v. Tracey*, 12 R. I. 216.

3. *State v. Perkins*, 63 N. H. 368.

4. *State v. Freeman*, 6 Blackf. (Ind.) 248; *Com. v. Luddy*, 143 Mass. 563; *Com. v. Moulton*, 64 Mass. (10 Cush.) 404; *State v. Auberry*, 7 Mo. 304.

It is said in *State v. Smith*, 35 Tex. 132, that an indictment charging the

defendant with "unlawfully and wickedly selling spirituous, vinous and other intoxicating liquors in quantities of a quart, and did permit the same to be drunk at the establishment where sold," if sufficiently definite to charge the offence under the statute. But the supreme court of Indiana say, in *Vanderwood v. State*, 50 Ind. 26, that an indictment charging the sale of liquor and alleging that the defendant suffered and permitted it to be drunk in, etc., is bad.

In Wisconsin, it is not necessary to allege that the liquor was sold to be drunk on the premises. *Allen v. State*, 5 Wis. 329.

"By Retail."—An indictment for selling ardent spirits, to be drunk where sold, without license, is bad, without the words "by retail." *Boyle v. Com.*, 14 Gratt. (Va.) 674.

5. *Roberson v. Lambertville*, 38 N. J. L. (9 Vt.) 69. See also *Frankfort v. Aughe*, 114 Ind. 77, 600.

6. *Boon v. State*, 69 Ala. 226; *Powell v. State*, 69 Ala. 10.

7. *State v. Chambers*, 93 N. Car.

(3) *Statutory Language*.—The sufficiency of charging a crime in the language of the statute, or equivalent words has been fully treated heretofore.¹

(4) *Surplusage, joinder, duplicity, etc.*²

j. DESCRIPTION OF LIQUORS AND PLACE OF SALE.—It seems that an indictment for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors need not particularly describe the liquors,³ and some cases hold that an indictment for unlawfully keeping and selling intoxicating liquors need not specifically describe the liquors kept or sold;⁴ but the better opinion seems to be that an indictment or information for selling liquors contrary to statute should state the kind or quality of the liquors sold.⁵

600; Croon v. State, 25 Tex. App. 556; Nineger v. State, 25 Tex. App. 449; Smith v. State, 19 Tex. App. 444; McMillan v. State, 18 Tex. App. 375; Prather v. State, 12 Tex. App. 401.

1. See INDICTMENT, vol. 10.

Description by Reference to Statute.—

An indictment is bad which fails to show on which of two sections of the liquor law imposing different penalties it is founded. State v. Leavitt, 63 N. H. 381.

For cases applying specially to indictment for the violation of liquor laws see Camp v. State, 27 Ala. 53; State v. Cathey, 41 Ark. 308; State v. Orton, 41 Ark. 305; State v. Witt, 39 Ark. 216; State v. Cady, 47 Conn. 44; Barth v. State, 18 Conn. 432; Frankfort v. Aughe, 114 Ind. 77, 600; s. c., 6 Am. & Eng. Corp. Cas. 683; State v. Reyelts, 74 Iowa 499; Zumhoff v. State, 4 G. Greene (Iowa) 526; State v. Dodge, 78 Me. 439; Cearfoss v. State, 42 Md. 403; Jones v. State, 67 Md. 256; Higgins v. State, 64 Md. 419; Rawlings v. State, 2 Md. 201; Com. v. Bartley, 138 Mass. 181; Com. v. Kelly, 78 Mass. (12 Gray) 175; Com. v. Gilland, 75 Mass. (9 Gray) 3; Benalleck v. People, 31 Mich. 200; Mankato v. Arnold, 36 Minn. 62; State v. Hanley, 25 Minn. 429; State v. Walker, 24 Mo. App. 679; State v. Wallace, 94 N. Car. 827; Oshe v. State, 37 Ohio St. 494; State v. Duggan, 15 R. I. 403; State v. Kane, 15 R. I. 395; State v. McGough, 14 R. I. 63; State v. Campbell, 12 R. I. 147; Lantzner v. State, 19 Tex. App. 320; State v. Paddock, 24 Vt. 312.

2. For a full discussion of the subjects of surplusage, joinder, duplicity, the election of the prosecutor on which count or offence to proceed, conjunctive, disjunctive and alternative aver-

ments and the like, see INDICTMENT, vol. 10.

3. Com. v. Conneally, 108 Mass. 480. See Com. v. Bennett, 108 Mass. 27.

4. Com. v. Timothy, 74 Mass. (8 Gray) 480. See Barth v. State, 18 Conn. 432; Connell v. State, 46 Ind. 446; State v. Hannum, 53 Ind. 335; State v. Carpenter, 20 Ind. 219; Downey v. State, 20 Ind. 37; Simpson v. State, 17 Ind. 444; State v. Crowell, 30 Me. 115; Com. v. Bennett, 108 Mass. 27; Com. v. Clark, 80 Mass. (14 Gray) 367; Com. v. Edwards, 66 Mass. (12 Cush.) 187; Mankato v. Arnold, 36 Minn. 62; State v. McGinnis, 30 Minn. 52; State v. Odam, 2 Lea (Tenn.) 220; State v. Reynolds, 47 Vt. 297; State v. Boncher, 59 Wis. 477.

5. Neales v. State, 10 Mo. 498; Blasdel v. Hewit, 3 Cal. (N. Y.) 137. See Bogan v. State, 84 Ala. 449; State v. Witt, 39 Ark. 216; State v. Teahan, 50 Conn. 92; Dansey v. State, 23 Fla. 316; Plunkett v. State, 69 Ind. 68; Hooper v. State, 56 Ind. 153; Hammond v. State, 48 Ind. 393; Ward v. State, 48 Ind. 293; Leary v. State, 39 Ind. 360; State v. Mondy, 24 Ind. 268; Downey v. State, 20 Ind. 82; State v. Carpenter, 20 Ind. 219; Fetterer v. State, 18 Ind. 388; State v. Graeter, 6 Blackf. (Ind.) 105; State v. Mullinix, 6 Blackf. (Ind.) 554; State v. Brooks, 33 Kan. 708; State v. Sterns, 28 Kan. 154; Com. v. Grady, 108 Mass. 412; Com. v. Ryan, 75 Mass. (9 Gray) 137; Com. v. Timothy, 74 Mass. (8 Gray) 480; Com. v. Conant, 72 Mass. (6 Gray) 482; Com. v. Grey, 68 Mass. (2 Gray) 501; s. c., 61 Am. Dec. 476; Com. v. Wilcox, 55 Mass. (1 Cush.) 503; Com. v. Odlin, 40 Mass. (23 Pick.) 275; State v. Rogers, 39 Mo. 431; State v. Pischel, 16 Neb. 490; State v. Blaisdell, 33 N. H. 388; State v.

In an indictment for manufacturing intoxicating liquors for sale,¹ or for the keeping of intoxicating liquors with intent to sell them unlawfully² need not specify the quantity of liquor manufactured or kept, and some of the cases hold that in an indictment for illegally selling liquors or for selling without a license, that the quantity sold need not be alleged,³ other cases hold that the indictment should contain an averment of the quantity sold.⁴

k. DESCRIBING PLACE AND TIME OF SALE.—An indictment for selling liquors contrary to statute, should state the place where,⁵ and the time when,⁶ the sale was made.

American Forcite Powder Mfg. Co., 50 N. J. L. (21 Vr.) 75; *State v. Fox*, 16 N. J. L. (1 Harr.) 152; *State v. Packer*, 80 N. Car. 439; *Frisbie v. State*, 1 Oreg. 248; *Cochran v. State*, 26 Tex. 678.

It is said by the supreme judicial court of Massachusetts, in the case of *Com. v. Grey*, 68 Mass. (2 Gray) 501; s. c., 61 Am. Dec. 476, that a complaint or indictment which alleges an unlawful sale of "spirituous or intoxicating liquors" is bad for uncertainty, even after the plea of *nolo contendere*; and the supreme court of Nebraska, in *State v. Pischel*, 16 Neb. 490, say that an indictment charging the sale without a license of "malt, spirituous and vinous liquors and intoxicating drinks" under the statute punishing the sale without a license of "malt, spirituous or vinous or any intoxicating drinks" is too indefinite; and it is said by the supreme court of Indiana, in the case of *Ward v. State*, 48 Ind. 293, that an indictment founded upon a statute prohibiting the sale of intoxicating liquors which charges the selling of "liquor" without any averment that it was intoxicating should be quashed.

1. *Com. v. Clark*, 80 Mass. (14 Gray) 367.

2. *State v. Teahan*, 50 Conn. 92.

3. See *Block v. State*, 66 Ala. 493; *Kilbourn v. State*, 9 Conn. 560; *Brow v. State*, 103 Ind. 133; *Megowan v. Com.*, 2 Met. (Ky.) 3; *Mankato v. Arnold*, 36 Minn. 62; *White v. State*, 11 Tex. App. 476; *Allen v. State*, 5 Wis. 329. Compare *Eppstein v. State*, 11 Tex. App. 480; *State v. Lane*, 33 Me. 536.

4. See *State v. Chambless*, 45 Ark. 349; *State v. Clayton*, 32 Ark. 185; *Zarresseller v. People*, 17 Ill. 101; *State v. Corll*, 73 Ind. 535; *Arbintrobe v. State*, 67 Ind. 267; s. c., 33 Am. Rep. 84; *Grupe v. State*, 67 Ind. 327; *State v. Zeitler*, 63 Ind. 441; *Manville v. State*, 58 Ind. 63; *State v. Jacks*, 54 Ind.

412; *State v. Mondy*, 24 Ind. 268; *McCool v. State*, 23 Ind. 127; *Smith v. State*, 23 Ind. 132; *Reams v. State*, 23 Ind. 111; *Struckman v. State*, 21 Ind. 160; *Haver v. State*, 17 Ind. 455; *Cool v. State*, 16 Ind. 355; *Hamilton v. State*, 103 Ind. 96; s. c., 53 Am. Rep. 491; *Redding v. Com.*, 3 B. Mon. (Ky.) 339; *Haskill v. Com.*, 3 B. Mon. (Ky.) 342; *State v. Kuhn*, 24 La. An. 474; *Com. v. Dean*, 38 Mass. (21 Pick.) 334; *Neales v. State*, 10 Mo. 498; *Blasdel v. Hewit*, 3 Cal. (N. Y.) 137; *State v. Shaw*, 2 Dev. (N. Car.) 198.

5. See *Rawson v. State*, 19 Conn. 292; *Barth v. State*, 18 Conn. 432; *Murphy v. Monroe County Commissioners*, 73 Ind. 483; *State v. Zeitler*, 63 Ind. 441; *Howard v. State*, 6 Ind. 444; *State v. Hass*, 22 Iowa 193; *State v. Schilling*, 14 Iowa 455; *State v. Kreig*, 13 Iowa 462; *State v. Rohrer*, 34 Kan. 427; *State v. Nickerson*, 30 Kan. 545; *State v. Sterns*, 28 Kan. 154; *Young v. Com.*, 14 Bush (Ky.) 161; *Herine v. Com.*, 13 Bush (Ky.) 295; *Grimme v. Com.*, 5 B. Mon. (Ky.) 263; *State v. Dodge*, 78 Me. 439; *State v. Lang*, 63 Me. 215; *Com. v. Welsh*, 83 Mass. (1 Allen) 1; *Com. v. Dean*, 38 Mass. (21 Pick.) 334; *State v. Sannerud*, 38 Minn. 229; *State v. Olson*, 38 Minn. 150; *State v. Peterson*, 38 Minn. 143; *Boughridge v. State* (Miss.), 3 So. Rep. 667; *Blasdel v. Hewit*, 3 Cal. (N. Y.) 137; *Com. v. Head*, 11 Gratt. (Va.) 819; *State v. Church*, 4 W. Va. 745. Compare *Dansey v. State*, 23 Fla. 316; *Anderson v. People*, 63 Ill. 53; *Com. v. Clapp*, 71 Mass. (5 Gray) 97; *Com. v. Stowell*, 50 Mass. (9 Metc.) 569; *Cochran v. State*, 26 Tex. 678.

6. *State v. Zeitler*, 63 Ind. 441; *Clark v. State*, 34 Ind. 436; *Com. v. Adams*, 1 Gray (Mass.) 481; *Com. v. Thurlow*, 24 Pick. (Mass.) 374; *Com. v. Kingman*, 14 Gray (Mass.) 85; *Com. v. Donnelly*, 14 Gray 86, note; *Blasdel v. Hewit*, 3 Cal. (N. Y.) 137; *State v.*

1. ALLEGATIONS AS TO KNOWLEDGE, INTENT, ETC.—A prohibited sale of intoxicating liquors being *per se* a violation and not an evasion of the law, an indictment need not allege the sale to have been made with a purpose of evading the law.¹

m. NEGATION OF DEFENCES, EXCEPTIONS, ETC.—The negation of defences, exceptions, etc., in an indictment for the illegal sale of intoxicating liquors, is governed by the same rules as the negation of exceptions and defences in other cases.²

n. AVERMENTS AS TO OWNERSHIP.—An indictment or information against a defendant for selling intoxicating liquor without a license for that purpose "to be drunk on the premises where sold," should state that the premises were owned and controlled by the

Kennedy, 36 Vt. 563; *State v. O'Keefe*, 41 Vt. 691; *State v. Bruce*, 26 W. Va. 153.

Alleging Impossible Date.—*Murphy v. State*, 106 Ind. 96; *State v. Patterson*, 116 Ind. 45.

Averments as to Day or Hour.—*People v. Husted*, 52 Mich. 426; *Farrell v. State*, 45 Ind. 371.

Motion to Amend Allegation as to Year.—*State v. Kennedy*, 36 Vt. 563.

On or About.—*State v. Lavake*, 26 Minn. 526; s. c., 37 Am. Rep. 415. See *Rawson v. State*, 19 Conn. 292; *Com. v. Purdy*, 147 Mass. 29.

Sale on Sunday.—*Henry v. State*, 113 Ind. 304. See *Kroer v. People*, 78 Ill. 294; *Com. v. McKiernan*, 128 Mass. 414; *State v. Sannerud*, 38 Minn. 229; *State v. Olson*, 38 Minn. 150; *State v. Peterson*, 38 Minn. 143; *State v. Kock*, 61 Mo. 117; *State v. Roehm*, 61 Mo. 82; *Brown v. State*, 16 Neb. 658. See also *Gilbert v. State*, 81 Ind. 565; *Shepler v. State*, 114 Ind. 194; *Roy v. State*, 91 Ind. 417; *Lehritter v. State*, 42 Ind. 383; *State v. Fletcher*, 13 R. I. 522; *Megowan v. Com.*, 2 Met. (Ky.) 3.

Divers Other Days.—*Smith v. Com.*, 79 Ky. 493. See *Our House v. State*, 4 G. Greene (Iowa) 172; *State v. Cofren*, 48 Me. 364; *Mayor of N. Y. v. Mason*, 4 E. D. Smith (N. Y.) 142; *State v. Jones*, 39 Vt. 370; *State v. Munger*, 15 Vt. 290; *State v. Pillsbury*, 47 Me. 449.

Keeping for Sale.—*Com. v. Hersey*, 144 Mass. 297.

Blanks, Omissions, etc.—*State v. Brooks*, 33 Kan. 708; *State v. Buck*, 78 Me. 193; *Com. v. Butler*, 83 Mass. (1 Allen) 4; *Savage v. Com.*, 84 Va. 582, 619; 5 S. E. Rep. 563.

"Then and There"—Failure to Repeat.—In *State v. Buck*, 78 Me. 193, it is said that an indictment charging the

keeping and sale at a time and place stated is not bad for omission to repeat the time and further allegation that defendant thereby maintained a nuisance. *State v. Brady* (R. I.), 12 Atl. Rep. 238; *State v. Doyle*, 15 R. I. 527.

It seems that in an indictment for sale to a minor it is not necessary to repeat the words "then and there." *Shaffer v. State*, 106 Ind. 319; *Com. v. Hersey*, 144 Mass. 297; *State v. Hopkins*, 5 R. I. 53; *State v. Bruce*, 26 W. Va. 153.

1. McMillan v. State, 18 Tex. App. 375. See *Warwick v. State*, 48 Ark. 27; *State v. Mohr*, 53 Iowa 261; *Com. v. Intoxicating Liquors*, 122 Mass. 8; *Com. v. Sheehan*, 105 Mass. 174; *Com. v. Blanchard*, 105 Mass. 173; *State v. McGough*, 14 R. I. 63; *Bilbro v. State*, 7 Humph. (Tenn.) 534. *Contra*, *State v. Learned*, 47 Me. 426; *State v. Benjamin*, 49 Vt. 101.

2. Defences, Exceptions, etc., to Indictment.—For a full discussion of this subject see **INDICTMENT**, vol. 10.

For cases relating to "intoxicating liquors" see *Bogan v. State* 84 Ala. 449; *Tatum v. State*, 63 Ala. 147; *Koopman v. State*, 61 Ala. 70; *Weed v. State*, 55 Ala. 13; *Elam v. State*, 25 Ala. 53; *Mogler v. State*, 47 Ark. 109; *State v. Bailey*, 43 Ark. 150; *State v. Scarlett*, 38 Ark. 563; *State v. Devers*, 38 Ark. 517; *Thompson v. State*, 37 Ark. 408; *Blackwell v. State*, 36 Ark. 178; *Williams v. State*, 35 Ark. 430; *State v. Emerick*, 35 Ark. 324; *Volmer v. State*, 34 Ark. 487; *State v. Adams*, 16 Ark. 497; *Reich v. State*, 63 Ga. 616; *Newman v. State*, 63 Ga. 533; *Johnson v. State*, 60 Ga. 634; *Frankfort v. Aughe*, 114 Ind. 77, 600; *Brown v. State*, 103 Ind. 133; *Johnson v. State*, 74 Ind. 197; *Overdale v. State*, 63 Ind. 207; *Henderson v. State*, 60 Ind. 296; *Meier v. State*, 57

defendant, where this is required by the statute,¹ and in an infor-

- Ind. 386; *Lichtenfels v. State*, 53 Ind. 161; *Burke v. State*, 52 Ind. 461; *State v. Buckner*, 52 Ind. 278; *Stein v. State*, 50 Ind. 21; *Meyer v. State*, 50 Ind. 18; *Farrell v. State*, 45 Ind. 371; *O'Connor v. State*, 45 Ind. 347; *Lehritter v. State*, 42 Ind. 383; *State v. Carpenter*, 20 Ind. 219; *Thomasson v. State*, 15 Ind. 449; *Struble v. Nodwift*, 11 Ind. 64; *Howe v. State*, 10 Ind. 423; *Kinser v. State*, 9 Ind. 543; *Bruton v. State*, 4 Ind. 601; *State v. Watson*, 5 Blackf. (Ind.) 155; *State v. Collins*, 11 Iowa 141; *State v. Beneke*, 9 Iowa 203; *State v. Shackle*, 29 Kan. 341, 762; *Prohibitory Amendment Cases*, 24 Kan. 700; *State v. Pitzer*, 23 Kan. 250; *State v. Pittman*, 10 Kan. 593; *State v. Thompson*, 2 Kan. 432; *Webster v. Com.*, 7 Dana (Ky.) 215; *Com. v. Harvey*, 16 B. Mon. (Ky.) 1; *Com. v. Allen*, 15 B. Mon. (Ky.) 1; *State v. Lang*, 63 Me. 215; *State v. Brown*, 31 Me. 522; *Parkinson v. State*, 14 Md. 184; s. c., 74 Am. Dec. 522; *Bode v. State*, 7 Gill (Md.) 326; *Com. v. Brusie*, 145 Mass. 117; *Com. v. Luddy*, 143 Mass. 563; *Com. v. Keefe*, 143 Mass. 467; *Com. v. Chadwick*, 142 Mass. 595; *Com. v. McKiernan*, 128 Mass. 14; *Com. v. Hoyer*, 125 Mass. 209; *Com. v. Hanley*, 121 Mass. 377; *Com. v. Davis*, 121 Mass. 352; *Com. v. Fredericks*, 119 Mass. 199; *Com. v. Locke*, 114 Mass. 288; *Com. v. Dunn*, 111 Mass. 425; *Com. v. Conneally*, 108 Mass. 480; *Com. v. Grady*, 108 Mass. 412; *Com. v. Bennett*, 108 Mass. 27; *Com. v. Shea*, 115 Mass. 102; *Com. v. Chisholm*, 103 Mass. 213; *Com. v. Edds*, 80 Mass. (14 Gray) 406; *Com. v. Dunn*, 80 Mass. (14 Gray) 401; *Com. v. Clark*, 80 Mass. (14 Gray) 367; *Com. v. Boyle*, 80 Mass. (14 Gray) 3; *Com. v. Roland*, 78 Mass. (12 Gray) 132; *Com. v. Water*, 77 Mass. (11 Gray) 81; *Com. v. Keefe*, 73 Mass. (7 Gray) 332; *Com. v. Conant*, 72 Mass. (6 Gray) 482; *Com. v. Clapp*, 71 Mass. (5 Gray) 97; *Com. v. McSherry*, 69 Mass. (3 Gray) 481, n.; *Com. v. Lafontaine*, 69 Mass. (3 Gray) 479; *Com. v. Murphy*, 68 Mass. (2 Gray) 510; *Com. v. Burd- ing*, 66 Mass. (12 Cush.) 506; *Com. v. Tuttle*, 66 Mass. (12 Cush.) 502; *Com. v. Wilson*, 65 Mass. (11 Cush.) 412; *Com. v. Hart*, 65 Mass. (11 Cush.) 130; *Com. v. Baker*, 54 Mass. (10 Cush.) 405; *Com. v. Shaw*, 59 Mass. (5 Cush.) 522; *Com. v. Sloan*, 58 Mass. (4 Cush.) 52; *Com. v. Roberts*, 55 Mass. (1 Cush.) 505; *Com. v. Tower*, 49 Mass. (8 Metc.) 527; *Com. v. Thayer*, 46 Mass. (5 Metc.) 246; *Com. v. Thurlow*, 41 Mass. (24 Pick.) 374; *Com. v. Odlin*, 40 Mass. (23 Pick.) 275; *Com. v. Purtle*, 77 Mass. (11 Gray) 78; *People v. Robbins* (Mich.), 37 N. W. Rep. 924; *Lutton v. Palmer* (Mich.), 37 N. W. Rep. 701; *People v. Richmond*, 59 Mich. 570; *State v. Nerbovig*, 33 Minn. 480; *Norton v. State*, 65 Miss. 297; *Trost v. State*, 64 Miss. 188; *Surratt v. State*, 45 Miss. 601; *State v. McAdoo*, 80 Mo. 216; *State v. Taylor*, 73 Mo. 52; *State v. Jaques*, 68 Mo. 260; *State v. McBride*, 64 Mo. 364; *State v. Fanning*, 38 Mo. 359; *State v. Sutton*, 25 Mo. 300; *State v. Williamson*, 19 Mo. 384; *State v. Owen*, 15 Mo. 506, 514; *State v. Wish- on*, 15 Mo. 503; *State v. Hornbeak*, 15 Mo. 478; *State v. Haden*, 15 Mo. 447; *State v. Buford*, 10 Mo. 703; *State v. Perkins*, 63 N. H. 368; *State v. Sav- age*, 48 N. H. 484; *State v. Blaisdell*, 33 N. H. 388; *State v. Shaw*, 35 N. H. 217; *State v. Wade*, 34 N. H. 495; *State v. Fuller*, 33 N. H. 259; *State v. McGlynn*, 34 N. H. 422; *State v. Ab- bott*, 31 N. H. 434; *State v. Burns*, 20 N. H. 550; *State v. Adams*, 6 N. H. 532; *State v. Passaic*, 42 N. J. L. (13 Vr.) 87; *Roberson v. Lambertville*, 38 N. J. L. (9 Vr.) 69; *Townley v. State*, 18 N. J. L. (3 Harr.) 311; *State v. Webster*, 18 N. J. L. (5 Halst.) 293; *Jefferson v. People*, 101 N. Y. 19; *People v. McIntosh*, 5 N. Y. Cr. Rep. 38; *Blaisdell v. Hewit*, 3 Cai. (N. Y.) 137; *People v. Gilkinson*, 4 Park. Cr. Cas. (N. Y.) 26; *State v. Stamey*, 71 N. C. 202; *Becker v. State*, 8 Ohio St. 391; *Hirn v. State*, 1 Ohio St. 15; *State v. Duggan*, 15 R. I. 403; *State v. O'Don- nell*, 10 R. I. 477; *State v. Barker*, 3 R. I. 280; *State v. Johnson*, 3 R. I. 94; *State v. Staley*, 3 Lea (Tenn.) 505; *State v. Horan*, 25 Tex. (Supp.) 271; *State v. Freeman*, 27 Vt. 523; *State v. Clark*, 23 Vt. 293; *State v. Munger*, 15 Vt. 290; *Com. v. Young's Case*, 15 Gratt. (Va.) 664; *Com. v. Hill*, 5 Gratt. (Va.) 682; *Peer's Case*, 5 Gratt. (Va.) 674; *Com. v. Hampton's Case*, 3 Gratt. (Va.) 590; *Sires v. State*, 73 Wis. 251; *State v. Tall*, 36 Wis. 577; *Nelson v. United States*, 30 Fed. Rep. 112; aff'g s. c., 29 Fed. Rep. 202.

1. *State v. Woolsey*, 92 Ind. 131.

mation for a search warrant for liquors "owned or kept by any person named or described as particularly as may be," must allege ownership in some specific person;¹ but an indictment against a house as a dram shop and public nuisance, where no lien is sought upon it, need not aver the owners name.²

o. ALLEGATION AS TO PRICE, VALUE, ETC.—In an indictment for selling or bartering liquor without a license, no allegation of the price for which the liquor was sold is necessary.³

p. DESCRIPTION OF PERSONS, ETC.—It is a general rule that in an indictment for the unlawful sale of intoxicating liquor, it is essential to allege the names of the persons selling the liquor, if known or the fact that they were unknown,⁴ particularly is this true where an indictment is found for selling intoxicating liquor

1. *State v. Intoxicating Liquors*, 64 Iowa 300.

2. *Our House v. State*, 4 G. Greene (Iowa) 172.

3. *Forkner v. State*, 95 Ind. 406; *Schlicht v. State*, 56 Ind. 173; *Farrell v. State*, 45 Ind. 371; *O'Connor v. State*, 45 Ind. 347; *State v. Muntz*, 3 Kan. 386; *State v. Rogers*, 39 Mo. 431; *State v. Fanning*, 38 Mo. 359; *State v. Ladd*, 15 Mo. 430; *State v. Pischel*, 16 Neb. 608; *State v. Hines*, 13 R. I. 10. *Compare State v. Zietler*, 63 Ind. 441; *Seegur v. State*, 6 Ind. 451; *Snvder v. State*, 5 Ind. 194; *Divine v. State*, 4 Ind. 240; *Neales v. State*, 10 Mo. 498.

4. *Unlawful Sales Generally*.—*Dorman v. State*, 34 Ala. 216; *State v. Walker*, 3 Harr. (Del.) 547; *Blodget v. State*, 3 Ind. 403; *State v. Allen*, 32 Iowa 491; *Capritz v. State*, 1 Md. 569; *Com. v. Dean*, 38 Mass. (21 Pick.) 334; *State v. Pischel*, 16 Neb. 608; *State v. Plainfield*, 44 N. J. L. (15 Vr.) 118; *State v. Faucett*, 4 Dev. & B. (N. C.) 107; *State v. Doyle*, 11 R. I. 574; *State v. Pendergast*, 20 W. Va. 672.

Sales Without License.—*State v. Jacks*, 54 Ind. 412; *State v. Stucky*, 2 Blackf. (Ind.) 289; *Wilson v. Com.*, 14 Bush (Ky.) 159; *Com. v. Thurlow*, 41 Mass. (24 Pick.) 374; *State v. Schmail*, 25 Minn. 368; *Roberson v. Lambertville*, 38 N. J. L. (9 Vr.) 69; *State v. Steedman*, 8 Rich. (S. C.) 312; *Dixon v. State*, 21 Tex. App. 517; *Mansfield v. State*, 17 Tex. App. 468; *Eppstein v. State*, 11 Tex. App. 480; *Nelson v. U. S.*, 30 Fed. Rep. 112; *U. S. v. Nelson*, 29 Fed. Rep. 202.

Describing Person to Whom Sold.—However, there are a number of well considered cases which hold that in an indictment or complaint for the unlawful sale of intoxicating liquors, it is

not necessary to allege the names of the persons to whom the liquors were sold or that their names are unknown.

Unlawful Sales Generally.—*State v. Bailey*, 43 Ark. 150; *McCuen v. State*, 19 Ark. 630; *Myers v. People*, 67 Ill. 503; *Rice v. People*, 38 Ill. 435; *State v. Howorth*, 70 Iowa 157; *State v. Brooks*, 33 Kan. 708; *State v. Lang*, 63 Me. 215; *Com. v. Davis*, 77 Mass. (11 Gray) 457; *Com. v. Wilcox*, 55 Mass. (1 Cush.) 503; *Lea v. State*, 64 Miss. 201; *Riley v. State*, 43 Miss. 397; *State v. Rogers*, 39 Mo. 431; *State v. Elam*, 21 Mo. App. 290; *Osgood v. People*, 39 N. Y. 449; *State v. Muse*, 4 Dev. & B. (N. C.) 319; *State v. Hines*, 13 R. I. 10; *State v. Carter*, 7 Humph. (Tenn.) 158; *State v. Heldt*, 41 Tex. 220; *State v. Higgins*, 53 Vt. 191.

Sales Without License or Authority.—*State v. Bailey*, 43 Ark. 150; *Johnson v. State*, 40 Ark. 453; *Dansey v. State*, 23 Fla. 316; s.c., 2 So. Rep. 692; *Hill v. Dalton*, 72 Ga. 314; *Cannady v. People*, 17 Ill. 158; *State v. Baughman*, 20 Iowa 497; *State v. Becker*, 20 Iowa 438; *State v. Schweiter*, 27 Kan. 499; *State v. Kuhn*, 24 La. An. 474; *State v. Fanning*, 38 Mo. 359; *State v. Spain*, 29 Mo. 415; *State v. Ladd*, 15 Mo. 430; *People v. Adams*, 17 Wend. (N. Y.) 475; *State v. Staley*, 3 Lea (Tenn.) 565; *Cochran v. State*, 26 Tex. 678; *Mansfield v. State*, 17 Tex. App. 468; *State v. Munger*, 15 Vt. 290; *Com. v. Dove*, 2 Va. Cas. 26; *State v. Ferrell*, 30 W. Va. 683; *State v. Pendergast*, 20 W. Va. 672; *State v. Gummer*, 22 Wis. 441; *State v. Bielby*, 21 Wis. 204.

Sales on Sunday or Election Days.—*State v. Parnell*, 16 Ark. 506; *State v. Stamey*, 71 N. C. 202; *State v. Hickerson*, 3 Heisk. (Tenn.) 375.

after notice¹ or where a part of the penalty is a forfeiture of the license on conviction, a second time, for the same offence.² Any description of the person is good which is sufficient for identification;³ and if the name of the person described is unknown, it will be sufficient to aver that the liquors were sold or kept "by a person unknown."⁴

8. Trial, Practice.⁵

9. Bill of Particulars.—The rules of law governing the granting or withholding of a bill of particulars on the trial of an indictment for a violation of the liquor law are the same as those governing the trial of indictments for other offences; the granting or refusing of such bill is within the discretion of the presiding judge, and his refusal to require one is not subject to exception.⁶

10. Evidence.⁷

11. Verdict, Judgment, etc.—Upon a complaint in a form prescribed by statute, alleging that intoxicating liquors were kept by the defendant for unlawful sale in a shop which is particularly described, a general verdict of guilty is sufficient.⁸

1. *State v. Heltsch*, 29 Minn. 134.

2. *Bode v. State*, 7 Gill (Md.) 326.

However, a complaint under the Massachusetts statutes alleging that at a time and place named the defendant "did knowingly permit a certain tenement there situate, which was then and there under the control of said defendant, to be unlawfully used for the illegal sale and keeping of intoxicating liquors therein," is sufficient without averring that the tenement was used by any person named or by any person unknown and other than the defendant. *Com. v. Bartley*, 138 Mass. 181.

3. *Com. v. Intoxicating Liquors*, 140 Mass. 287.

To an indictment of "Zachariah Lawrence," for selling liquor without a license, a plea in abatement by "Zachary Taylor Lawrence" sustained. *Lawrence v. State*, 59 Ala. 61.

4. *Com. v. Intoxicating Liquors*, 116 Mass. 21.

Amendment of Indictment or Information.—In the case of *State v. Murphy*, 55 Vt. 547, the state's attorney filed an information under the liquor law against the respondent as "Thomas J." for maintaining a nuisance. The respondent pleaded in abatement that his name was "Timothy J.," and the court held that the information was amendable.

Occupation of Defendant Need Not be Specified.—*State v. Butcher*, 40 Ark. 362; *Johnson v. People*, 83 Ill. 431; *State v. Mercer*, 58 Iowa 182; *Com. v. Rucker*, 14 B. Mon. (Ky.) 228; *Com. v. Intoxicating Liquors*, 116 Mass. 21; *Com. v.*

Leonard, 8 Metc. (Mass.) 529; *Com. v. Pearson*, 3 Metc. (Mass.) 449; *Austin v. State*, 10 Mo. 591; *Day v. State*, 21 Tex. App. 213. Compare *Blackwell v. State*, 45 Ark. 90; *State v. Martin*, 34 Ark. 340; *State v. Andrews*, 26 Mo. 169; *State v. Runyan*, 26 Mo. 167.

Indictment of Tavern Keeper.—*Hérine v. Com.*, 13 Bush (Ky.) 295.

Indictment of Distiller.—*State v. Kennedy*, 1 Ala. 31.

Sunday Sales.—*Archer v. State*, 10 Tex. App. 482. See *Bode v. State*, 7 Gill (Md.) 326; *State v. Lislés*, 58 Mo. 359; *People v. Page*, 3 Park. Cr. Cas. (N. Y.) 600; *Day v. State*, 21 Tex. App. 213.

Sales to Minors.—*Com. v. O'Leary*, 143 Mass. 95; *Com. v. Fowler*, 145 Mass. 398; *Shaffer v. State*, 106 Ind. 319.

5. For a full discussion of the question of the conduct and practice in the trial of an indictment for the violation of a liquor law, see *CRIMINAL PROCEDURE*, vol. 4, p. 729, and *lit. TRIAL*, in the same series.

6. *Com. v. Wood*, 70 Mass. (4 Gray) 11.

7. See *EVIDENCE*, vol. 7, p. 42, etc., and various subtitles relating thereto.

8. *State v. Newlan*, 69 Me. 531; *State v. McCann*, 61 Me. 116; *State v. Wiesenhunst* (N. C.), 4 S. E. Rep. 533.

For cases relating to the form of verdict on trial for indictment under intoxicating liquor laws, see *Com. v. Intoxicating Liquors*, 86 Mass. (4 Allen) 601; *Com. v. Munn*, 80 Mass. (14 Gray) 364; *Com. v. Dooly*, 72 Mass.

Where the defendant is found guilty upon two or more counts of an indictment, for violating the liquor laws a separate judgment should be rendered on each count;¹ and on conviction of partners jointly indicted for selling liquors without a license, the judgment must be severally against each for the whole penalty.²

12. Sentence, Punishment, etc.—Where there is a conviction under several counts for liquor selling, there should be a separate sentence as to each.³ Upon a conviction for the violation of the provision of the liquor law in selling intoxicating liquors without a license the court has no discretion in regard to punishment, but must impose that provided by the statute.⁴

a. NUMBER OF FINES; JOINT AND SEPARATE.—Where a person is convicted on two or more counts, he is subject to a fine on each count.⁵ And where two persons who have been jointly indicted for carrying on the business of retailing intoxicating liquors without a license, a general fine may be assessed against them if they acted as a firm in carrying on the business, or a separate fine against each if they act individually.⁶

b. AMOUNT OF FINE.—On conviction for violating the revenue law by engaging in the business of a wholesale liquor dealer without license, the amount of the fine is fixed by statute.⁷

c. IMPRISONMENT OR COMMITMENT.—Where the penalty pro-

(6 Gray) 360; *State v. McGrath*, 73 Mo. 181; *Rhoads v. Com. (Pa.)* 6 Atl. Rep. 245; *State v. Wright*, 5 R. I. 287.

1. *Kroer v. People*, 78 Ill. 294; *State v. Leis*, 11 Iowa 416; *Wrocklege State*, 1 Iowa 167.

After a general verdict of guilty on an indictment containing a count charging the defendant with being a common seller of intoxicating liquors during a certain period, and counts for single sales within the time covered by the first count, a *nolle prosequi* may be entered on all the counts except the first, and judgment rendered upon that for the commonwealth. *The Com. v. Jenks*, 67 Mass. (1 Gray) 490.

2. *People v. Walbaum*, 1 Dak. 295.

3. *Fletcher v. People*, 81 Ill. 116.

4. *People v. Gilkinson*, 4 Park. Cr. Cas. (N. Y.) 26; *Morris v. People*, 2 T. & C. (N. Y.) 219. See *Wightman v. State*, 10 Ohio 452; *Lincoln v. Smith*, 27 Vt. 328.

Alabama Doctrine.—In *McPherson v. State*, 54 Ala. 222, it is said that a conviction under the Ala. Rev. Code (§ 3618) for the retailing of vinous or spirituous liquors less than a quart without license, or selling the same to a person of known intemperate habits, the

jury must assess the fine and the court in its discretion may add imprisonment and hard labor.

Massachusetts Doctrine.—The supreme judicial court of Massachusetts in *Com. v. Fountain*, 127 Mass. 452, say that an offence under the Massachusetts statute of illegally keeping intoxicating liquors for sale is not a "similar offence" to that of keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors as provided by the statute of that state, within the meaning of that phrase, giving a judge, where the punishment provided is fine and imprisonment, the discretion to impose either without the other, if it appears that the offender has not before been convicted of a "similar offence."

5. *State v. Amba*, 20 Mo. 214.

6. *Lemons v. State*, 50 Ala. 130.

7. *McPherson v. State*, 54 Ala. 221. See *Johnson v. People*, 1 Ill. (Breese) 276.

For cases passing upon the amount of fines which can be imposed for a conviction of the violation of the liquor law see *State v. Little*, 42 Iowa 51; *State v. Malling*, 11 Iowa 239; *Walters v. State*, 5 Iowa 507; *Richford v. City of Lexington*, 7 B. Mon. (Ky.) 147; *Hoyt*

vided for a violation of the liquor law is a fine merely, imprisonment cannot be inflicted upon conviction.¹

The term of imprisonment of one convicted of selling intoxicating liquors, is, in each instance controlled by the statute.² And where the sentence is imprisonment and fine, the judgment may provide that in default of payment of the fine, the defendant shall stand committed for an additional term.³

Where the judgment provides that in default of payment of a certain fine the defendant be committed for a certain length of time, it is not defective for failing to provide that he may be released at any time from committal upon payment of the fine, although that right is secured to him.⁴

13. Appeal.⁵

14. Search, Seizure, etc.⁶

15. Civil Damages, Remedies and Proceedings.⁷

v. State, 11 Tex. App. 476; *Reg. v. Grannis*, 5 Mal. L. Rep. 153.

1. *Van Noy v. State*, 14 Tex. App. 69. See *Ritcher v. State*, 63 Miss. 304; *People v. Cowles*, 16 Hun (N. Y.) 577; *Akin v. State*, 14 Tex. App. 142; *Marxhausen v. Com.*, 29 Gratt. (Va.) 853.

2. *Ex parte Tuicher*, 69 Iowa 393; *State v. Shaw*, 23 Iowa 316; *Reg. v. Coulter*, 4 Man. L. Rep. 309.

Where a defendant is convicted under several counts of an indictment for selling intoxicating liquors, it is erroneous in the judgment to fix a day and hour when the imprisonment shall commence, under each count; but the sentence to imprisonment should be for a specified number of days, under each count, upon which a conviction is had; the imprisonment under each succeeding count to commence when it ends under the preceding one, without fixing the day and hour of any. *Johnson v. People*, 83 Ill. 431.

Where a defendant was convicted on two counts of an indictment for selling liquor to one in the habit of getting intoxicated, the punishment being ten days' imprisonment for each offence, it was held to be error to render judgment of imprisonment for twenty days in gross. The imprisonment awarded should be for a specified time under each count, the time under the second to commence when the first ends. *Mullinix v. People*, 76 Ill. 211.

3. *Harris v. Com.*, 40 Mass. (23 Pick.) 280; *State v. Sannerud*, 38 Minn. 229; *State v. Olson*, 38 Minn. 150; *State v. Peterson*, 38 Minn. 143.

4. *State v. Plainfield*, 44 N. J. L. (15 Vr.) 118.

One convicted of selling spirituous liquors cannot be discharged by the court with directions that execution for the fine and costs issue against his property. *State v. Robinson*, 17 N.H. 263.

A common seller of intoxicating liquors, sentenced to imprisonment and payment of fine and costs under St. 1855, ch. 215, § 17, is not entitled to be discharged as a poor convict under Rev. St., ch. 145, § 3, until after three months from the expiration of the time for which he was sentenced to be imprisoned. *Gannon v. Adams*, 74 Mass. (8 Gray) 395.

Where one has been fined for violating an injunction issued under the prohibitory liquor law, he may, upon default in paying the fine, be imprisoned, under the general provision of Code, § 4509 and under the laws of 1884, ch. 143, § 12, such person cannot avail himself of the benefits of Code, § 4611, which permits a poor person, after having been imprisoned thirty days for failure to pay a fine in a criminal case, to be released upon giving his note for the amount of the fine, together with a written schedule of his property. *Hanks v. Workman*, 69 Iowa 600.

5. For a full discussion of the subject of "appeal from a judgment" of conviction for a violation of liquor laws, see *APPEAL*, vol. 1, p. 616, and *CRIMINAL PROCEDURE*, vol. 4, pp. 882-886.

6. See *tit. SEARCHES AND SEIZURES*.

7. See *CIVIL DAMAGE ACTS*, vol. 3, p. 257.

INTOXICATION AS A DEFENCE TO CONTRACTS.

INTOXICATION AS A DEFENCE TO CONTRACTS—(See also EQUITY; CONTRACTS; RESCISSION).

1. Express Contracts, 773.
2. Implied Contracts, 777.
3. When Equity Will Give Relief, 778.

1. To an Express Contract.—An express contract entered into when the obligor is in a state of intoxication so as to deprive him of the exercise of his understanding, is voidable; and the party may, for that cause, avoid it, although the intoxication was voluntary, and not procured through the circumvention of the other party.¹

1. Barrett v. Buxton, 2 Aikens (Vt.) 167; s. c., 16 Am. Dec. 691; Ewell's Leading Cas. 728. According to Beverley's Case, 4 Co. 123 b, a party cannot set up intoxication in avoidance of his contract under any circumstance. Although LORD COKE admits that a drunkard, for the time of his drunkenness, is *non compos mentis*, yet he says, "his drunkenness shall not extenuate his act or offence, but doth aggravate his offence; and doth not derogate from his act, as well touching his life, lands and goods, as anything that concerns him." He makes no distinction between civil and criminal cases, nor intimates any qualification of his doctrine, on the ground of the drunkenness being procured by the contrivance of another who would profit by it. His doctrine is general and without any qualification whatever; and, connected with it, he holds that a party shall not be allowed to stultify himself, or disable himself, on the ground of idiocy or lunacy. The latter proposition is supported, it is true, by two or three cases in the Year Books, during the reign of Edward III and Henry VI, by Littleton, § 405, who lived in the time of Henry VI, and by Stroud v. Marshall, Cro. Eliz. 398, and Cross v. Andrews, Cro. Eliz. 622. Sir William Blackstone, however, who traces the progress of this notion, as he calls it, considers it contrary to reason, and shows that such was not the ancient common law. The register, it appears, contains a writ for the alienor himself, to recover lands aliened by him during his insanity; and Britton states that insanity is a sufficient plea for a man to avoid his own bond. Fitzherbert also contends "that it stands with reason that a man should show how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time." Blackstone considers the rule as having

been handed down from the loose cases in the times of Edward III and Henry VI, founded upon the absurd reason that a man cannot know, in his sanity, what he did when he was *non compos mentis*, and he says, latter opinions, feeling the inconvenience of the rule, have in many points endeavored to restrain it. 2 Bl. Com. 291. In Thompson v. Leach, 3 Mad. 391, it was held that the deed of a man *non compos mentis* was not merely voidable, but was void *ab initio*, for want of capacity to bind himself or his property. In Yates v. Boen, 2 Stra. 1104, the defendant pleaded *non est factum* to debt on articles, and, upon the trial, offered to give lunacy in evidence. The chief justice at first thought it ought not to be admitted, upon the rule in Beverley's case, that a man shall not stultify himself; but on the authority of Smith v. Carr, in 1728, where CHIEF BARON PENGELLEY, in a like case, admitted it; and, on considering the case of Thompson v. Leach, the chief justice suffered it to be given in evidence, and the plaintiff became nonsuit. The most approved elementary writers and compilers of the law refer to this case, and lay it down as settled law that lunacy may be given in evidence on the plea of *non est factum* by the party himself; and it is said to have been so ruled by LORD MANSFIELD in Chamberlain of London v. Evans, mentioned in note to 1 Chitt. Pl. 470.

In this country, it has been decided in many instances that a party may take advantage of his own disability, and avoid his contract, by showing that he was insane and incapable of contracting. Rice v. Peet, 15 Johns. 503; Webster v. Woodford, 3 Day 90. These decisions are founded in the law of nature and of justice, and go upon the plain and true ground that the contract of a party *non compos*

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mentis is absolutely void, and not binding upon him. The rule in *Beverley's* case as to lunacy, therefore, is not only opposed to the ancient common law and numerous authorities of great weight, but to the principles of natural right and justice, and cannot be recognized as law; and it is apprehended that the case is to be as little regarded as authority in respect to intoxication, which rests essentially upon the same principle.

It is laid down in *Buller's N. P.* 172, and appears to have been decided by LORD HOLT in *Cole v. Robbins*, there cited, that the defendant may give in evidence, under the plea of *non est factum* to a bond, that he was made to sign it when he was so drunk that he did not know what he did; and in *Pitt v. Smith*, 3 Camp. Cas. 33, where an objection was made to an attesting witness being asked whether the defendant was not in a complete state of intoxication when he executed the agreement, LORD ELLENBOROUGH says: "You have alleged that there was an agreement between the parties; but there was no agreement if the defendant was intoxicated in the manner supposed. He had not an agreeing mind. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise." Chitty, Selwyn and Phillips lay down the same doctrine; and JUDGE SWIFT, in his digest, says that an agreement signed by a man in a complete state of intoxication is void. 1 Chitty Pl. 470; Selw. N. P. 563; 1 Phil. Ev. 128; 1 Swift's Dig. 173. In these various authorities it is laid down generally, and without any qualification, that drunkenness is a defence, and no intimation is made of any distinction, founded on the intoxication being procured by the party claiming the benefit of the contract. It is true that in *Johnson v. Medlicott*, 3 P. Wms. 130, that circumstance was considered essential to entitle the party to relief in equity against his contract. In *Gore v. Gibson*, 13 M. & W. 623, to an action by an endorsee against the endorser of a bill of exchange, the defendant pleaded that when he endorsed the bill he was so intoxicated, and thereby so entirely deprived of sense, understanding and the use of his reason, as to be unable to comprehend the meaning, nature or effect of the endorsement, or to contract thereby; of which the plaintiff at the time of the endorsement had notice. *Held*, to be a good answer to the

action, and not to amount to an argumentative traverse of the endorsement.

To the same effect see 1 Para. on Cont. 384; 1 Chitty on Cont. (11th Am. ed.) 192; Wald's Pollock on Cont. 49, 87; Kent's Com. (13th ed.) 451; Wade v. Calvert, 2 Mill. Const. (S. Car.) 27; Ring v. Huntington, 1 Mill. Const. (S. Car.) 162; Molton v. Camroux, 4 Exch. 17; Yates v. Boen, 5 Str. 1104; Fenton v. Holloway, 1 Stark. 126; Burroughs v. Richman, 1 Green (N. J.) 233; Remicker v. Smith, 2 Har. & J. (Md.) 421; Foot v. Tewksbury, 2 Vt. 97; Reynolds v. Waller, 1 Wash. (Va.) 164; Jenners v. Howard, 6 Blackf. (Ind.) 240; Harbison v. Lemon, 3 Blackf. (Ind.) 51; Reinskopf v. Ragge, 37 Ind. 207; Curtis v. Hall, 1 Southard (N. J.) 361; State Bank v. McCoy, 69 Pa. St. 204; Duncan v. McCullough, 4 S. & R. (Pa.) 484; Clark v. Caldwell, 6 Watts (Pa.) 130; Taylor v. Patrick, 1 Bibb (Ky.) 168; Prentice v. Achorn, 2 Paige (N. Y.) 30; Rice v. Peet, 15 Johns. (N. Y.) 503; Rutherford v. Ruff, 4 Dessaus. (S. Car.) 364; Williams v. Inabnet, 1 Bailey (S. Car.) 343; Foss v. Hildreth, 10 Allen (Mass.) 76; Walker v. Davis, 1 Gray (Mass.) 506; Drummond v. Hopper, 4 Harr. (Del.) 327; Wigglesworth v. Steers, Hen. & Munf. (Va.) 70; Dorr v. Munsell, 13 Johns. (N. Y.) 430; Seymour v. Delancy, 3 Cow. (N. Y.) 445; Hutchinson v. Brown, 1 Clarke (N. Y.) 408; French's Heirs v. French, 8 Ohio 214; Broadwater v. Darne, 10 Mo. 277; White v. Cox, 3 Hayw. (N. Car.) 79; Lazell v. Pinnick, 1 Tyler (Vt.) 247; Newell v. Fisher, 19 Miss. 431; Pickett v. Sutter, 5 Cal. 412; Phelan v. Gardner, 43 Cal. 306; Mansfield v. Watson, 2 Iowa 111; Holland v. Barnes, 53 Ala. 83; Donnelson v. Posey, 13 Ala. 752; Freeman v. Staats, 8 N. J. Eq. 814.

If one bids at a public sale of real estate and has the property struck down to him, and he afterwards, when in such a state of drunkenness as to suspend the use of reason and understanding, and not to know what he is doing, executes a written contract complying with the terms of the sale and pays a portion of the purchase money, he may avoid the contract and in an action of *assumpsit* recover the portion of the purchase money paid. *Bush v. Breinig*, 113 Pa. St. 310.

But the fact that a man possessed of reason and the power of reflection is frequently and even daily intoxicated is not sufficient to invalidate a clear and explicit contract, deliberately made by

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him on the best terms, and obtained after some effort, with a person who is not proved to have taken advantage of a period of intoxication, which he subsequently declares to be satisfactory, and which is fully executed by the other party. *Reinicker v. Smith*, 2 Harr. & J. (Md.) 421.

An assignor of insurance policies may maintain an action to recover the policies or their value on the ground that he was incapacitated by drunkenness to make the assignments, without first having the assignments set aside by a suit in equity. *Bursinger v. Bank of Watertown*, 67 Wis. 75.

It is a defence in a suit upon a mortgage that the defendant was so intoxicated at the time of signing the same as to be incapable of executing it; and it is not controverted by an allegation in reply that defendant kept and used the goods for which the instrument was given, the claim being upon the written instrument and not for goods sold. It is necessary to show a ratification of the instrument by defendant when sober and in his right mind. *Reinskopf v. Ragge*, 39 Ind. 207.

Contract Voidable, Not Void.—Although in some of the English cases it is implied that where a party enters into a contract in such a state of drunkenness as not to know what he is doing, his contract is wholly void, in the United States the contract is held to be *voidable* merely at his option, and capable of ratification by the intoxicated party on becoming sober. See note to *Gore v. Gibson*, *Ewell's Leading Cases*, 738; *Chitty on Contracts* (11th Am. ed.), 192; *Wald's Pollock on Contracts*, note, 92; 2 *Kent's Com.* 452; *Story on Cont.*, § 87; *Joest v. Williams*, 42 Ind. 565; *Broadwater v. Darne*, 10 Mo. 277; *Carpenter v. Rogers*, 28 N. W. Rep. (Mich.) 156; *Eaton v. Perry*, 29 Mo. 96; *Mansfield v. Watson*, 2 Iowa 111; *Allen v. Berryhill*, 27 Iowa 534; *Musselman v. Cravens*, 47 Ind. 1; *Mathews v. Baxter*, L. R., 8 Exch. 132; *Bates v. Ball*, 72 Ill. 108. But see 1 *Parsons on Cont.* 385, note, where after citing authorities the author says: "Some of the above authorities certainly seem to be inconsistent with the principle that a person in a state of intoxication has no agreeing mind, and therefore there never was a contract between the parties. We think this principle, however, the true one." So it cannot be impeached by third persons so long as the party who was intoxicated

acquiesces, but it may be avoided by his legal representatives. *Wigglesworth v. Steers*, 1 Hen. & Munf. (Va.) 70.

Rescission and Ratification of Contracts.—A contract voidable by reason of the incapacity of one of the parties on account of intoxication, may be rescinded by him within a reasonable time after becoming sufficiently sober to know the character of his contract. *Cummings v. Henry*, 10 Ind. 109; and if he defends against the contract on such a ground, he must show that he has rescinded it by restoring whatever was received as the consideration thereof. *Joest v. Williams*, 42 Ind. 565; *Williams v. Inabnet*, 1 Bailey (S. Car.) 343; *Mathews v. Baxter*, L. R., 8 Exch. 132.

The defence in a suit upon a mortgage that the defendant was so intoxicated at the time of signing his name as to be incapable of executing it, is not controverted by an allegation in reply that defendant kept and used the goods for which the instrument was given, the claim being upon the written instrument, and not for goods sold. It is necessary to show a ratification of the instrument by defendant when sober and in his sound mind. *Reinskopf v. Ragge*, 37 Ind. 207.

Degree of Drunkenness.—To render the transaction voidable, he who sets up intoxication as a defence should have been so drunk as to have drowned reason, memory and judgment, and impaired his mental faculties to an extent that would render him *non compos mentis* for the time being, especially where there is no pretence that any person connected with the transaction aided in or procured his drunkenness. *Bates v. Ball*, 72 Ill. 108; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289. It is not alone the influence of liquor which avoids a contract, but it must be shown to exist to such extent as to seriously impair the reasoning faculties. *Pickett v. Sutter*, 5 Cal. 412; *Cavender v. Wadingham*, 5 Mo. App. 457. At the time of making the contract the party seeking to avoid it must have been in such a state of drunkenness as not to know what he was doing. *Johns v. Fretchey*, 39 Md. 258. The proof must show insanity. *Schramm v. O'Connor*, 98 Ill. 541. Evidence of a party's condition several hours after the settlement sought to be set aside on the ground of intoxication is admissible as tending to show his condition at the time the settlement was made. *Phelan v. Gard-*

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According to this rule the maker of a promissory note, as between himself and the payee, may avoid it if he can show total intoxication at the time of its execution.¹ This defence may also be set up against those taking the note with a knowledge of the circumstances under which it was made;² but on grounds of public policy and the necessities of commerce, the defence of drunkenness in the maker cannot be set up against the innocent holder of a negotiable note.³

If the party made himself drunk for the purpose of entering

ner, 43 Cal. 306. Where a party to a contract is intoxicated at the time of making a contract to the extent only that he does not clearly understand the business, this does not render his contract void or voidable, where no advantage has been gained by dealing with him. *Henry v. Ritenour*, 31 Ind. 136. See also *Belcher v. Belcher*, 10 Yerg. (Tenn.) 121; *Wright v. Fisher*, 32 N. W. Rep. 605; and where the maker of a promissory note was not so intoxicated at the time he made the note but that he remembered the act and accompanying circumstances the next morning, *held*, that he could not set up as a defence, in the action upon the note by a *bona fide* holder, the plea of intoxication. *Caulkins v. Fry*, 35 Conn. 170.

Where a note is signed by a person who if intoxicated, was yet aware of what he was doing, and not deceived as to the identity of the paper signed, it is not void, and any defence to it must rest on fraud and not on absolute incapacity. *Miller v. Finley*, 26 Mich. 248. But even if the party was not wholly intoxicated, drunkenness can be set up as a defence only where it was brought about by the other party. *Burroughs v. Richman*, 1 Green (N. J. L.) 233; 23 Am. Dec. 717.

In some of the English cases there appears to be a distinction between the effect of an extreme state of intoxication that deprives a man of his reason, and the mere inability to form a free and rational judgment of the effect of the contract. In the former case the contract would be wholly void, and in the latter only voidable if known to the other party. See *Cooke v. Clayworth*, 18 Ves. 12; *Wald's Pollock on Cont.* 91.

One reduced to such extreme debility by intoxication as to be unable to rise, or sit up in bed unless supported, or to hold a pen and make a mark unless the pen and hand are held for him, can no more execute a conveyance of his prop-

erty than if intoxicated. *Wilson v. Bigger*, 7 Watts & S. (Pa.) 111. The same rule applies to parties whose minds are enfeebled by habitual intoxication. *Birdsong v. Birdsong*, 2 Head (Tenn.) 289.

A Question for the Jury.—It is a question for the jury to decide whether the party entering to the contract was incompetent on account of his intoxication. *Cummings v. Henry*, 10 Ind. 109; *Prentice v. Achorn*, 2 Paige (N. Y.) 30; *Berkley v. Cannon*, 4 Rich. (S. Car.) 136.

1. *Gore v. Gibson*, 13 Mees. & W. 623.

2. *Gore v. Gibson*, 13 Mees. & W. 623; *Pitt v. Smith*, 3 Camp. 33; *Molton v. Camrony*, 2 Exch. 487; *Wigglesworth v. Steers*, 1 Hen. & Mun. (Va.) 70; *Jenners v. Howard*, 6 Blackf. (Ind.) 240; *Clark v. Caldwell*, 6 Watts (Pa.) 139; *Miller v. Finley*, 26 Mich. 248; *Daniels on Neg. Inst.*, § 214.

3. *State Bank v. McCoy*, 69 Pa. St. 204. In this case the court say: "The note of an insane person or of one perfectly imbecile, which he has been induced to sign by fraud and imposition, is void in the hands of an innocent endorsee; it does not follow that a note given by a person in a state of intoxication is void in the hands of a holder for value without notice of the maker's condition when it was given." There is this difference between the cases. Insanity or total imbecility is a permanent state or condition of the mind, disabling one from taking care of himself. Drunkenness is a temporary disability voluntarily produced, and when men thus temporarily deprive themselves of the use of their reason, and voluntarily expose themselves to fraud and imposition, the law may wisely refuse to treat them with the same tenderness as it does those unfortunate beings who are deprived of their understanding by some providential dispensation; and it may properly hold them to a different

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into agreements and then avoiding them, the fraudulent intent antedating his drunkenness would render it incompetent for him to avail of the defence.¹

2. Implied Contracts.—With regard to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between express and implied contracts. In many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessities may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail.² The action should not be brought upon the security for goods sold unless it has been ratified.³

measure of responsibility for the consequences of their acts. If a man voluntarily deprives himself of the use of his reason by strong drink, why should he not be responsible to an innocent party for the acts which he performs when in that condition? It seems to me that he ought, on the principle that when a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. But there is another and controlling reason for holding the maker liable to the endorsee in such a case, founded on principles of public policy and the necessities of commerce. The exigencies of trade require that there should be no unnecessary impediments to the ready circulation and currency of negotiable paper, but that it should be left free to pass from hand to hand like bank notes, and perform the functions of money untrammelled by any equities or defences between the original parties. If, then, it should be held that the drunkenness of the maker avoids his note in the hands of the endorsee, it is obvious that such a rule would greatly clog and embarrass the circulation of commercial paper, for no man could safely take it without ascertaining the condition of the maker or drawer when it was given, although there might be nothing suspicious in its appearance or unusual in the character of the signature. It is evident that it would be a less evil to exclude the defence of drunkenness, though it might occasionally work individual hardship, than to clog the circulation of commercial paper, to the great

inconvenience of the public, by admitting such a defence. If fraud and imposition in obtaining a note will not avoid it in the hands of an innocent endorsee, because such a rule would render commercial paper less valuable and convenient as a medium of exchange, why should the drunkenness of the maker? Why should drunkenness be a defence if there has been no fraud or imposition? And if there has, and this is the ground of defence, why should it not avoid the note in the one case as well as in the other?" See also *McSparran v. Neelev*, 91 Pa. St. 17; *Miller v. Finley*, 26 Mich. 248.

But see *Daniels on Neg. Inst.* (3rd ed.), § 214, where it is said that, "if the drunkenness were so complete as to suspend all rational thought, the better opinion is that any instrument signed by the party would be utterly void even in the hands of a *bona fide* holder without notice, for, although it may have been the party's own fault, that such an aberration of mind was produced, when produced, it suspended for the time being his capacity to consent, which is the first essential to a contract." Citing *Parsons N. & B.* 151.

1. 1 *Daniels on Neg. Inst.*, § 215.

2. *Gore v. Gibson*, 13 Mees. & W. 623; *Richardson v. Strong*, 13 Ired. L. (N. Car.) 106; 1 *Parsons on Contracts* (7th ed.), 385; 1 *Story on Cont.* (5th ed.), § 86.

3. A publican cannot recover for beer furnished to third persons, by the order of an individual who has previously become intoxicated by drinking in his

INTOXICATION AS A DEFENCE TO CONTRACTS.

3. When Equity Will Give Relief.—In general courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication, and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practiced.¹

house. *Brandon v. Ord*, 3 C. & P. 440. *Reinskopf v. Ragge*, 37 Ind. 207.

1. Story's Eq. Jur. (13th ed.), § 231. In *Cooke v. Clayworth*, 18 Ves. Jur. 12, SIR WILLIAM GRANT states the rule in substantially the same language, and says further: "I say merely upon that ground [intoxication]; as, if there was, as LORD HARDWICKE expresses it in *Cory v. Cory*, 1 Ves. 19, any unfair advantage made of his situation, or, as SIR JOSEPH JEKYLL says in *Johnson v. Medlicott*, 3 P. Will. 130, note a, any contrivance or management to draw him into drink, he might be a proper object of relief in a court of equity."

In 2 Kent's Com. (13th ed.) 452, note c, it is said that the rule in equity is, that the court will not interfere to assist a person merely on the ground of intoxication; but if any unfair advantage has been taken of the person's intoxication, it will render all proper aid.

In *Newland on Contracts*, p. 635, it is said: "Though a man was in a state of drunkenness when he entered into an agreement, equity will not set it aside on that ground alone, especially if it be reasonable; as, for instance, to settle family disputes."

In *Hotchkiss v. Fortson*, 7 Yerg. (Tenn.) 67, it was held that where one takes advantage of another to induce him to purchase land at an exorbitant price, the contract will not be set aside. Followed in *Belcher v. Belcher*, 10 Yerg. (Tenn.) 121.

To the same effect, see *Cory v. Cory*, 1 Ves. Sen. 19; *Johnson v. Medlicott*, 3 P. Wms. 130, n.; *Stockley v. Stockley*, 1 Ves. & B. 23; *Crane v. Conklin*, *Saxton* (N. J.) 346; *Rich v. Sydenham*, 1 Ch. Cas. 202; *Hutchinson v. Tindall*, 2 Green (N. J.) 357; *Shaw v. Thackery*, 1 Sm. & G. 540; *Hutchinson v. Tindall* 3 N. J. Eq. 357 (where a deed of conveyance, made without consideration, the grantor being intoxicated at the time, was relieved against in equity); *Campbell v. Ketcham*, 1 Pibb (Ky.)

406; *Mansfield v. Watson*, 2 Iowa 115; *White v. Cox*, 3 Hayw. (Tenn.) 79. In *Spiers v. Higgins*, decided at the rolls in 1814, and cited in *Barrett v. Buxton*, 2 Aiken (Conn.) 164, a bill filed for specific performance of an agreement which was entered into with the defendant when drunk, was dismissed with costs, although the defendant did not contribute to make the defendant drunk. See also *O'Connor v. Rempt*, 29 N. J. Eq. 156; *Storrs v. Scangale*, 48 Mich. 387; *Lavette v. Sage*, 29 Conn. 577; *Morris v. Nixon*, 7 Humph. (Tenn.) 579.

On the other hand there are authorities which support the proposition that equity will give relief where the drunkenness is so excessive as to deprive a man of his reason, without considering whether he was drawn into drink or unfair advantage taken.

In 1 Maddock's Ch. Prac. the author says: "It never can be said that a person absolutely drunk has that freedom of mind generally esteemed necessary to a deliberate consent to a contract. The reasoning faculty is for a time deposited. At law it has been held that upon a plea of *non est factum* the defendant may give in evidence that they made him sign the bond when he was so drunk that he did not know what he did. So a will made by a drunken man is invalid. And will a court of equity be less indulgent to human frailty? It seems to be a fraud to make a contract with a man who is so drunk as to be incapable of deliberation."

Nor is the language of JUSTICE STORY altogether favorable to the former position. He says: "But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense

INTRINSIC—INTROMISSION—INTRUDE—INTRUSION.

INTRINSIC.—See note 1.

INTROMISSION.—A term signifying dealings in stocks, goods or cash of a principal coming into the hands of his agent, to be accounted for by the agent to his principal.²

INTRUDE.—See note 3.

INTRUSION.—The entry of a stranger after a particular estate of freehold is determined before him in remainder or reversion.⁴

be said to be a serious and deliberate consent on his part, and without this no contract or other act can or ought to be binding by the law of nature. If there be not that degree of excessive drunkenness, then courts of equity will not interfere at all unless there has been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication to obtain an unreasonable bargain or benefit from him." And in a note: "SIR JOSEPH JEKYLL is said to have intimated an opinion that the having been in drink, is not any reason to relieve a man against any deed or agreement gained from him to encourage drunkenness. *Secus*, if, through the management or contrivance of him who gained the deed, etc., the party from whom the deed has been gained was drawn into drink. *Johnson v. Medlicott*, 1734, cited, 3 P. Will. 130, note a. But this distinction seems wholly unsatisfactory; for in each case it is the fraud of the party who obtained the deed or agreement which constitutes the ground of declaring it invalid; and the fraud is in morals and common sense the same, whether the drunken party has been enticed into the drunkenness, or becomes the victim of the cunning of another, who takes advantage of his mental incapacity. The case of *Cook v. Clayworth*, 18 Ves. 12, requires no such distinction where the circumstances indicate fraud. In this last case, SIR WILLIAM GRANT said: 'At to that extreme state of intoxication that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained from him while in that condition.' See also *Cole v. Robins*, Buller, N.P. 172; *Wigglesworth v. Steers*, 1 Hen. & Munf. (Va.) 70." Story's Eq. Jur., § 231, and note.

In *Hutchinson v. Brown*, 1 Clark (N. Y.) 408, it was held that the intoxication of a contracting party is no ground for setting aside the contract, where it was not induced by the other party, unless it is habitual, so as to derange the

mind or subject it to frequent fits of derangement, or is so great as to deprive the party of his reason.

In *French v. French*, 8 Ohio 214, it was held directly that a contract made in such a state of intoxication as to deprive a party of his discretion and ordinary judgment, will be set aside in equity, although the other party had no agency in producing the intoxication; and in *Willcox v. Jackson*, 1 N. W. Rep. (Iowa) 518, the rule is laid down that to justify the setting aside of an act or the cancellation of a contract on the ground of drunkenness, the intoxication must be such as to deprive the party of his reason and understanding; but where one party procures the intoxication of another, in order to take an undue advantage of him, a much less degree of intoxication will warrant a court in declaring a contract fraudulent and void.

1. "The 'intrinsic value' of a thing is its true, inherent and essential value, not depending upon accident, place or person, but the same everywhere and to everyone. Bank notes have, indeed, no intrinsic value." *Bank of the State v. Ford*, 5 Ired. L. (N. Car.) 698; and see *L. R. Junc. Ry. v. Woodruff*, 5 S. W. Rep. 793.

2. *Stewart v. McKean*, 29 Eng. L. & Eq. 391.

3. This word as applied to paupers who have come into a parish and become chargeable, may apply to casual poor, and does not show that they remain there. *Reg. v. Willarts*, 7 S. B. 516.

4. 3 Bl. Com. 196; Co. Litt. 277 a; *Challis* on R. P. 182; *Hulick v. Scovill*, 9 Ill. 170; *Birthingright v. Hall*, 3 Munf. (Va.) 540. "This entry and interposition of the stranger differs from an abatement in this: that an abatement is always to the prejudice of the heir or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion." 3 Bl. Com. 169. After an intrusion the remainderman or reversioner has no longer a seisin in law, but only a right of entry. *Challis*

INVALID—INVASION—INVEIGLE—INVENTION.

INVALID.—Having no force, effect or efficacy; void; null.¹

INVASION.—A hostile force coming upon a state from without,² but a state may be said to be invaded when it is beset by a domestic rebellion.³

INVEIGLE—(See ABDUCTION; KIDNAPPING).—To persuade to something bad; to wheedle; to entice; to seduce; to beguile.⁴

INVENTION—(In the Patent Law).

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on R. P. 182. He may, accordingly, purge the intrusion by a formal and peaceable entry, thus making himself complete owner and capable of conveying from himself either by descent or purchase. *Birbright v. Hall*, 3 Munf. (Va.) 540.

1. State *v. Casteel* (Ind.), 110 Ind. 174.

2. 1 Bish. on Cr. L. 161 n; Const. U. S., art. 4, § 4.

3. 1 Bish. on Cr. L. 49; and see Insurance Co. *v. Boon*, 95 U. S. 117.

4. Worcester, quoted in United States *v. Ancarola*, 17 Blatchf. (U. S.) 423; s. c., 1 Fed. Rep. 676, and People *v. De Leon*, 13 N. Y. St. Rep. 588.

As used in an act against kidnapping,

or abduction, "to inveigle involves no physical force, but such mental control over the person inveigled as to induce him to do it, and if this be accomplished by falsehood, by deceit, misrepresentation, or device, whatever it may be which captivates the mind, the crime is committed. The act of the appellant may be briefly stated as follows: with an intent to induce the complainant to leave this State for a wicked purpose, he made false representations which were believed to be true and relied upon, and being relied upon resulted in her departure. She was thus enticed, thus inveigled." The word involves consent. People *v. DeLeon*, 13 N. Y. St. Rep. 588; s. c., 11 Cent. Rep. 883.

I. DEFINITION.¹—Invention, in the sense of the patent law, is the finding out, contriving or creating of something not existing and not known before² by the action of the intellect.³ It is defined as the work of the head as distinguished from the work of the hands,⁴ and to be the intuitive faculty of the mind put forth in search for new results or new methods,⁵ the indication of genius and the production of a new idea.⁶

II. MECHANICAL SKILL—DEFINITION.—Is the suggestion of common experience which arises spontaneously and by necessity of common reasoning in the minds of those who have become acquainted with the circumstances with which they have to deal,⁷ and consists in the modification of an inventive idea and making it more practical,⁸ and doing what would suggest itself to the common mind.⁹

III. TESTS TO DISTINGUISH INVENTION FROM MECHANICAL SKILL.—The true test whether a device is the result of invention or

Under an act "to protect persons of foreign birth against forcible constraint or involuntary servitude," influence brought to bear on parents of children in Italy to induce them to consent that their children should come to this country with a man to earn money for him on the street, is inveiglement. "To inveigle, or persuade, or entice necessarily implies that the person is persuaded or enticed, and yields assent as the result of the persuading or enticing." *United States v. Ancarola*, 17 Blatchf. 423; s. c., 1 Fed. Rep. 676.

1. Invention and discovery denote sometimes the mental process of the inventor or discoverer, sometimes the thing in which the mental process results; sometimes, moreover, in the same argument or opinion, if not in the same sentence, the word "invention" is used; first, to signify the act of inventing, and then to signify the thing invented." *Merwin Patentability of Inventions* (1st ed. 1883), p. 1.

Distinction Between Form and Idea.—The distinction between the form and the idea is, however, not entirely neglected, these phrases are used as describing the thing invented "embodied conception." *Bischoff v. Wethered*, 9 Wall. (U. S.) 812; and the phrase "material reflex and embodiment." *Smith v. Nichols*, 21 Wall. (U. S.) 118.

2. *Ransom v. The Mayor of N. Y.*, 1 Fisher Pat. Cas. 252; *Conover v. Roach*, 4 Fisher Pat. Cas. 12.

3. *Ransom v. The Mayor of N. Y.*, 1 Fisher Pat. Cas. 252.

"**Mechanical Operation.**"—Invention consists primarily in finding out what

mechanical operation is necessary to produce the practical result aimed at; and when such operation is hit upon, the mechanical work is easy.

In looking at the completed thing, the mechanical operation is there, but the inventor did not have in advance before him the coacted mechanical operation. *Wooster v. Blake*, 8 Fed. Rep. 429. Invention is something more than mere improvement; it must involve something more than what is obvious to persons skilled in the art to which the device relates. *Pearce v. Mulford*, 102 U. S. 112; s. c., 18 Pat. Office Gaz. 1223.

4. *Blandy v. Griffith*, 3 Fisher Pat. Cas., U. S.

5. *Hollister v. Benedict*, 113 U. S. 659. "Creating what had not existed before, or bringing to light what lay hidden from vision." *Hollister v. Benedict*, 113 U. S. 59.

6. *N. Y. Belting & Packing Co. v. Magowan*, 27 Fed. Rep. 362. An invention is a mental result. *New York B. & P. Co. v. Magowan*, 27 Fed. Rep. 362.

7. *Hollister v. Benedict*, 113 U. S. 59.

8. *N. Y. Belting & Packing Co. v. Magowan*, 27 Fed. Rep. 312.

9. *Lorrillard v. Ridgeway*, 16 Pat. Office Gaz. 1237; s. c., 4 Bann. & Ard. Pat. Cas. 564.

Instances of What Is Not Invention.—Merely applying better workmanship, *Beatty v. Hodges*, 19 Blatchf. (U. S.) 381; making an arrangement which simply economizes space and gives cheapness to the construction, *Knox v. Murtha*, 9 Blatchf. (U. S.) 205; or doing what would suggest itself to any

mechanical skill is whether an ordinary mechanic would make it without other suggestion than his knowledge of his art.¹

IV. MECHANICAL SKILL NOT PATENTABLE.—The product of mechanical skill is never patentable.²

skilled mechanic who had the devices before him, *Larabee v. Cantlin*, Taney Dec. 180, is mere mechanical skill.

1. True Test of Invention.—The true test of an invention is not whether an ordinary mechanic can make the machine, if it is suggested, but whether he would make the machine without suggestion, by means of an ordinary knowledge. *Woodman v. Stimpson*, 3 Fisher Pat. Cas. 98.

Mechanic Chargeable with Knowledge of His Art.—An intelligent mechanic is chargeable with a knowledge of the state of the art in relation to the subject upon which he is called to exercise his skill. *Treadwell v. Parrott*, 3 Fisher Pat. Cas. 124; s. c., 5 Blatchf. (U. S.) 364.

Standard of Mechanical Skill Constantly Rising.—The standard of skill is being constantly raised. The standard of invention is, as a necessary consequence, correspondingly raised. The standard of the date of the invention is that by which the test is to be made. *Wilcox v. Bookwalter*, 39 Pat. Office Gaz. 1200; s. c., 31 Fed. Rep. 224.

2. Perfection Window Cleaner Co. v. Bosley, 2 Fed. Rep. 574.

If, with the knowledge that the public then had, it required no invention, but simply the ordinary skill and ingenuity of the mechanic, to produce these results; in other words, if the inventive faculty was not at work at all, and was not needed to produce this alleged invention, then the patent would be void, because there would be no invention to be secured to these patentees. *Ransom v. Mayor of New York*, 1 Fish. 252. There is a limit beyond which mere changes cannot and ought not to receive the protection of letters patent. *Kirby v. Beardsley*, 3 Fisher Pat. Cas. 268.

Study Does Not Necessarily Show Invention.—Although the production of a patented device may have required study, effort and experiment, yet, if only mechanical skill was required to produce it, there is no invention. *Butler v. Steckel*, 27 Fed. Rep. 219.

The patentee claimed the combination of a jet bath and a movable reservoir, and both were old, and a jet bath had formerly been combined with a

fixed reservoir. *Held*, that if the movable reservoir was combined with a jet bath in substantially the same manner as the fixed reservoir, or with no more changes than a mechanic of ordinary skill, with the old improvement, would adopt, the patent could not be sustained. *Larabee v. Cortlain*, 3 Fisher Pat. Cas. 5; s. c., 1 Taney Dec. 180. If the article might have been produced by mere mechanical skill only, the patent for it is void. *Haselden v. Ogden*, 3 Fisher Pat. Cas. 378. The thing patented, that the patent be valid, must be the product of original thought or inventive skill, and not a mere formal and mechanical change of what was old and well known. *Stanley Works v. Sargent*, 4 Fisher Pat. Cas. 443; s. c., 8 Blatchf. 545.

Examples of Noninvention.—Door knobs had formerly been made of metal fastened to a metallic shank and spindle by means of making a cavity larger at the bottom than at the top of the knob, and fastening in the shank by a screw formed in the knob by pouring in metal in a fused state; and clay knobs having been used previously, *held*, unless more ingenuity and skill in applying the old method of fastening the shank and the knob therein were required than were possessed by an ordinary mechanic acquainted with his business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. *Hotchkiss v. Greenwood*, 10 How. (U. S.) 509.

The mere turning down and cementing the edges of celluloid collars and cuffs in the form of a hem. *Celluloid Mfg. Co. v. Zylonite Novelty Co.*, 30 Fed. Rep. 617.

A strip of flexible material coated upon its outer face with abrasive material, and having said face made convex longitudinally and transversely, to be applied to the peripheries of wheels for finishing the heels and edges of boots and shoes. *Buzzell v. Fifield*, 7 Fed. Rep. 465.

A piece of flat wire pierced with holes through which spurs made of pieces of wire, with the ends cut diagonally, so as to leave them pointed, without further manipulation, were thrust. *Washburn*

V. MEANS OF DISTINGUISHING "INVENTIVE" FROM "MECHANICAL SKILL"—Means of Distinction.—The distinction between mechanical skill and "inventive genius" is recognized in all cases.¹ Which of them is employed in the production of a device is a question of fact² to be determined (1) by an examination of the device itself, or (2) by the history of the alleged invention.³

1. **By Examination of the Device Itself**—*a. Change in Form.*—Changes in the form of a machine which remains substantially the same,⁴ even such as produce a mechanical improve-

& Moen Mfg. Co. v. Haish, 4 Fed. Rep. 900. This case contains also decisions of the validity of several barbed wire fence patents.

An apparatus for heating water, circulating through coils of pipes, to be connected by two readily detachable tubes, with the boiler of a steam fire engine, and also with a tank, so that when the engine is not on duty the hot water will circulate through the boiler and keep the engine ready for immediate use, and through the tank keeping the apparatus in order when the engine was away, *held* involved invention. *Brickhill v. Mayor etc. of City of N. Y.*, 7 Fed. Rep. 479.

Particular Cases in Which a Lack of Invention Is Considered to be Shown.—*Knox v. Murtha*, 5 Fisher Pat. Cas. (C. C.) 174. *Backus Water Motor Co. v. Tuerk*, 17 Fed. Rep. 350. *Griffith v. Holmes*, 8 Fed. Rep. 154; s. c., 20 Pat. Office Gaz. 449; *New York Bunging Co. v. Hoffman*, 9 Fed. Rep. 199.

Cases in Which Invention Is Held Shown. *Tuck v. Bramhill*, 3 Fisher Pat. Cas. 400; *Whipple v. Middlesex Co.*, 14 Fisher Pat. Cas. 41; *Smith v. Nichols*, 6 Fisher Pat. Cas. 61; *Boston Electric Co. v. Fuller*, 39 Pat. Office Gaz. 710; s. c., 29 Fed. Rep. 515; *Blackman v. Hibbler*, 17 Pat. Office Gaz. 107; s. c., 17 Blatchf. (U. S.) 333; s. c., 4 Bann. & Ard. Pat. Cas. 641; *Double Point Tack Co. v. Two Rivers Mfg. Co.*, 18 Pat. Office Gaz. 683; s. c., 9 Bin (U. S.) 258; s. c., 5 Bann. & Ard. Pat. Cas. 465.

1. *Reckendorfer v. Faber*, 92 U. S. 347. Mechanical skill is one thing; invention is a different thing. Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable. *Reckendorfer v. Faber*, 92 U. S. 347 (see page 357); *Rubber Tip Pencil Co. v. Howard*, 20 Wall. (U. S.) 498.

2. It is for the jury to say whether the patent is for such an article as re-

quires and demands for its production the genius of an inventor as distinguished from the ordinary skill of a mechanic. *Haselden v. Ogden*, 3 Fisher Pat. Cas. 378. Suits for infringement of patent right in which the validity of a patent is generally on account of non-invention are almost entirely in equity, and an issue for a trial of facts is practically never called for. "As a matter of practice, courts of equity rarely, if ever, require a suit at law to be brought to establish the validity of a patent, preferring usually to hear and determine for themselves all questions that may arise affecting the validity of the same." *Wise v. Grand Ave. Ry. Co.*, 33 Fed. Rep. 277.

3. *Hull v. Wiles*, 2 Blatch. (U. S.) 194; *Enterprise Mfg. Co. v. Sargent*, 28 Fed. Rep. 185.

4. Under our law a patent cannot be granted for merely a change in form. The act of February 21st, 1793, § 2, so declared in express terms; and though this declaratory law was not re-enacted in the Patent act of 1836, it is a principle which necessarily makes a part of every system of laws granting patents for new inventions. Merely to change the form of a machine is the work of a constructor, not an inventor. Such a change cannot be deemed an invention. *Winans v. Denmead*, 15 How. U. S. 330.

"Formal Change and Change of Form."—The reader is cautioned that "formal change" and "change of form" are sometimes used synonymously for any change which does not amount to a patentable change and that the latter is sometimes used for change of *shapes*, strictly, as opposed to change of material, etc.

A slight variation in form is not sufficient to make a thing a patentable new article of manufacture. *Hatch v. Moffit*, 15 Fed. Rep. 252.

Improvement Must Embody Some Originality.—A formal change, such as

ment¹ or make the device more useful² are the mere product of mechanical skill, and not of invention. But where the change of form introduces and employs other mechanical principles or natural powers or a new "*mode of operation*," and thus obtains a new and useful result;³ or where it works a successful result not before accomplished in a similar way in the art to which it is applied or in any other;⁴ or where form is the substance of the invention, and change of form *is* the invention,⁵ the changes are held to constitute invention.

a change in proportions, a mere change of form, or a different shape, is not, within the meaning of the patent law, a change sufficient to support a patent; the improvement upon the old contrivance must embody some originality, and something substantial in the change producing a more useful effect and operation. *Hall v. Wiles*, 2 Blatch. (U. S.) 194. *Burdett v. Estey*, 15 Blatch. (U. S.) 349; s. c., 15 Pat. Office Gaz. 877.

1. *Smith v. Pierce*, 2 Robb Pat. Cas. 13; s. c., 2 McLean (U. S.) 176.

2. If two machines be substantially the same, and operate in the same manner to produce the same result, though they differ in form, proportions and utility, they are the same in principle, and the one last discovered can have no other merit than to be an improvement of the other, but for which the inventor can have no patent. If the improvement be in principle, a patent may be obtained for the improvement. *Evans v. Eaton*, 1 Robb Pat. Cas. 193.

Mere Difference in Application of an Invention.—A mere difference in the manner and form of applying an invention, which is the same in principle with one previously used, will not justify a new patent. *Delano v. Scott*, 1 Gilp. 489; s. c., 1 Robb Pat. Cas. 700. Nor a mere change in form, the instrument remaining the same in substance and in its mode of operation. *Dennis v. Eddy*, 4 Fisher Pat. Cas. 423.

Reason for This Rule as Given by the Courts.—While it is perfectly just that every real genuine invention should be protected, it is not just that mere changes of form be protected by law. *Hood v. Hicks*, 4 Fisher Pat. Cas. 156; s. c., 2 Bin. (U. S.) 169.

3. *Winans v. Denmead*, 15 How. (U. S.) 330.

Its substance is a new mode of operation, by means of which a new result is obtained. It is this new mode of operation which gives it the character of an

invention and entitles the inventor to a patent. *Winans v. Denmead*, 15 How. (U. S.) 330.

4. *Isaacs v. Abrams*, 95. This is so even if the change is slight. *Isaacs v. Abrams*, 13 Bann. & Ard. Pat. Cas. 616.

Advantageous Change Produced in Result.—In all prior patents for *boiler injectors*, the water was allowed to circulate about the nozzle with the double effect of cooling the steam and heating the water, and thereby diminishing its condensing power when it came in actual contact with the steam. The patentee substituted for the conical nozzle a plate or plug with an orifice, so that the steam and water approached each other from opposite directions up to one-sixteenth of an inch from the point of actual contact without affecting each other. *Held*, invention. *Hancock Inspirator Co. v. Jenks*, 21 Fed. Rep. 911.

5. *Dennis v. Eddy*, 4 Fisher Pat. Cas. 423. Where form is the very essence of an invention it is not to be disregarded. *New York B. & B. Co. v. Hoffman*, 20 Pat. Office Gaz. 1451; s. c., 20 Blatch. (U. S.) 3; s. c., 9 Fed. Rep. 191.

Where Change of Form Not Simply Change of Form.—Where the *change of form produces a new effect*, of which the jury must judge, it is not *simply* a change of form and does not come within the inhibition of the statute. *Davis v. Palmer*, 2 Brock. (U. S.) 298; s. c., 1 Robb Pat. Cas. 518. An invention, though depending upon a change of form, may be, in purpose or effect, a change in a material part of a process of manufacture, and patentable. *Aiken v. Dolan*, 3 Fisher Pat. Cas. 197.

Where Form Essence of Invention—Example.—The complainant was the inventor of a shuttle carrier, which by its *form* acted in the desired manner, "first, to furnish a bearing surface upon which the shuttle is to be supported and carried along with it in its flight; and second, to keep the shuttle in proper

b. Change of Material.—The mere change of one material into another in an instrument or machine, the purpose and means of accomplishment and form and mode of operation being the same is not invention,¹ and invention cannot be inferred because the new device is cheaper and better, or made of material better adapted for its purpose.²

But this rule is not applicable where the substituted material produces a new and useful result, an increase of efficiency, or a decided saving in the operation of the machine where the superiority amounts to a difference in kind.³

proximity to the face plate. These functions being performed by the mechanical form and construction of the carrier, the mechanical form and construction are patentable." *Parhard v. Am. Button-hole, Overseaming and Sewing Machine Co.*, 4 Fisher Pat. Cas. 468.

Change in Form Held Not Invention.—Where a patent claimed a curved or bent reach, resting on a sway bar, and so curved that the fore wheels could pass beneath the arch, and it appeared that a wagon had been constructed with a curved reach resting on a sway bar, but under which the fore wheels could not wholly pass, *held*, that the greater curvature of the reach, to enable the wheels to pass beneath it, did not constitute invention. *Flood v. Hicks*, 4 Fisher Pat. Cas. 156; s. c., 2 Binn. (U. S.) 169. An improvement in nail carrier of nailing machine, which consisted in making the edge of the carrier smooth instead of corrugated, cannot be held an invention. *Cross v. Union Metallic Fastening Co.*, 39 Pat. Office Gaz. 364; s. c., 29 Fed. Rep. 293.

1. No one will pretend that a machine, made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one; or that, in the sense of the patent law, can entitle the manufacturer to a patent. *Hotchkiss v. Greenwood*, 11 How. (U. S.) 248; *Putnam v. Weatherby*, 1 Holmes (U. S.) 497.

2. *Hicks v. Kelsey*, 18 Wall. (U. S.) 670; s. c., 5 Pat. Office Gaz. 94; *Hotchkiss v. Greenwood*, 11 How. (U. S.) 248; *Brown v. Dist. of Columbia*, 127 (U. S.) 579; s. c., 47 Pat. Office Gaz. 399.

A patentright cannot be sustained for making an article of a new material according to a known mode. *Hotchkiss v. Greenwood*, 2 Robb Pat. Cas. 730.

Change of Material Only Mechanical Skill.—*Mere change* in material used in

the construction of a device is not invention, it is only the exercise of mechanical judgment. *Putnam v. Ferring-ton*, 9 Pat. Office Gaz. 689; s. c., 2 Bann. & Ard. Pat. Cas. 237.

English Example of Rule.—The use of a new material to produce a known article is not the subject of a patent. *Rushton v. Crowley*, L. R., 10 Eq. 522.

Substitution of Material Held Not Invention.—Substitution of wood for iron, in the "means of connecting the ends of the vertical and horizontal members of a show case frame, consisting of metallic corner piece provided to receive the ends of the different members." *Terhune v. Phillips*, 99 U. S. 592. Of iron in a frame work formerly made of wood. *Holbrook v. Smalls*, 10 Pat. Office Gaz. 508; s. c., 2 Bann. & Ard. Pat. Cas. (C. C.) 396. Of wood blocks for stone blocks both shaped alike. *Brown v. Dist. of Columbia*, 127 U. S. 579; s. c., 47 Pat. Office Gaz. 397.

Substitution of papier maché for wire in "dummies," the former material having been used to make lay figures, many of which were draped in suitable clothing, *held* not invention. *Palmenbing v. Buchholz*, 13 Fed. Rep. 673.

A metallic slide in place of a wooden slide, with peculiar characteristics possessed by the metallic slide. *Carter v. Messenger*, 11 Blatchf. (U. S.) 34.

A double "T" slide being old, and a wooden double edged or dove tailed slide, being old, it is not patentable invention to make either of metal instead of wood. *Carter v. Messenger*, 11 Blatchf. (U. S.) 34.

No Invention Although Superior Article Produced.—The substitution of metal for India rubber springs in manufacture of corsets not invention. *Florsheim v. Schilling*, 26 Fed. Rep. 256.

Change of Material in a Process.—Changing the kind of ink used to print on rubber cloth is not invention. *Brigham v. Coffin*, 37 Fed. Rep. 689.

3. *Goodyear D. V. Co. v. Willis*, 7

In a manufacture, the change of one material into another well known material, where no results beyond increase of cheapness or durability is produced, is not invention;¹ but a change which produces new properties of the articles manufactured is invention.² Change of material used in a process is considered under equivalents.

Pat. Office Gaz. 41; s. c., 1 Flippin (U. S.) 388; s. c., 1 Bann. & Ard. Pat. Cas. (C. C.) 568.

Examples.—The substitution of metal for china in cuspidors, *held*, "invention, because thereby the fragility of the first material was avoided and the method of manufacturing the metal device being one inappropriate for manufacturing china, a cheaper article equally good was produced. U. S. Stamping Co. v. King, 17 Pat. Office Gaz. 1399; s. c., 17 Blatchf. (U. S.) 55; s. c., 4 Bann. & Ard. Pat. Cas. 469; s. c., 7 Fed. Rep. 866. Compare Ingersoll v. Turner, 4 Bann. & Ard. Pat. Cas. (C. C.) 89.

Difference of "Kind" Rather than of "Degree."—The substitution of vulcanized rubber in steam gauge cocks for the facing of leather or lead formerly placed on one of the surfaces, which materials were soon destroyed by the steam, leaving the cocks to become worn and leaky by the action of the grit in the water, *held* to produce a new result, differing from the former one so materially as to produce a difference of kind rather than of degree, and therefore to be an "invention." Dalton v. Nelson, 13 Blatchf. (U. S.) 357; s. c., 9 Pat. Office Gaz. 1112; s. c., 2 Bann. & Ard. Pat. Cas. 225.

The substitution of an India rubber for a cloth covering may be an invention if it is important and valuable. Washing Machine Co. v. Lincoln, 4 Fisher Pat. Cas. 379.

The substitution of *gutta percha* for *indiarubber*, in insulating telegraph submarine cables involves "invention." Colgate v. Western Union Tel. Co., 15 Blatchf. (C. C.) 365; s. c., 4 Bann. & Ard. Pat. Cas. 36; s. c., 14 Pat. Office Gaz. 943.

An improvement in bottle fasteners, consisting of a substitution of a movable U shaped *wire* extending over the top of the cork and connected with another wire surrounding the neck of the bottle for a movable U shaped *sheet metal* fastener extending over the top of the cork, and connected with a *sheet metal* strap around the neck of the bottle is

an *invention*, because the wire fastening accomplished a different result, by becoming embedded in the cork by pressure from within the bottle, and yet could be pushed from over the cork with bursting the thumb or the cork. Putnam v. Weatherbee, 2 Bann. & Ard. Pat. Cas. 78; s. c., 8 Pat. Office Gaz. 320; s. c., 1 Holmes (C. C.) 497; Putnam v. Yerrington, 9 Pat. Office Gaz. 689; s. c., 2 Bann. & Ard. Pat. Cas. 237. This example verges on the question of change of form, and could have been placed under it; illustrating how these rulings run into each other.

1. Hotchkiss v. Greenwood, 11 How. (U. S.) 248.

2. The substitution of a new material for an old, whereby new properties of the article manufactured are developed, as, for instance, the substitution of a rubber for a metal gum plate in artificial teeth, whereby the teeth are held closely, and no crevices left as in the previous metal plates for lodgment of food and elasticity of the plate developed, is "invention." Smith v. Goodyear D. V. Co., 93 U. S. 486; Goodyear D. V. Co. v. Root, 6 Pat. Office Gaz. 154; s. c., 1 Bann. & Ard. Pat. Cas. 384.

Discussion of Hotchkiss v. Greenwood—Limitation of This Doctrine.—Hotchkiss v. Greenwood, 11 How. (U. S.) decides that employing one known material in place of another is not invention, if the result be only greater cheapness and durability of product. It does not decide that the use of one material in the place of another in the formation of a manufacture can in no case amount to an invention or be the subject of a patent. Smith v. Goodyear D. V. Co., 93 U. S. 486.

Examples of Change of Material Where New Properties of the Product Are Developed.—The result of the use of hard rubber in lieu of materials previously used for a plate for holding artificial teeth, or such teeth and gums, is a superior product, having capabilities and performing functions which differ from anything preceding it, and which cannot be ascribed to mere mechanical skill.

c. Changes in Size.—The mere enlargement of a machine, of a part of a machine,¹ or of the mechanism of a combination,² a reduction of the size of an old device so as to make it small enough for a new use;³ or the decrease in the size of an old manufacture;⁴ a change in the proportions of a mechanically combined composition,⁵ is not invention; but where, by these changes, new and improved results are produced, there is invention,⁶ especially in the case of small articles.⁷

but are to be justly regarded as the results of inventive effort, as making the manufacture of which they are attributes a novel thing in kind and patentable as such. *Smith v. Goodyear D. V. Co.*, 93 U. S. 486. The substitution of mushin stiffened with shellac for vulcanized rubber, with or without an intermixture of fibrous or suitable material capable of being shaped into molds, for the tips for the insoles of boots and shoes, whereby the bevelling of the tips formerly necessary was dispensed with, is invention. *Shuter v. Davis*, 16 Fed. Rep. 564.

Where a Substance in a Weaker Form Is Used.—Hydrated alcohol combined with camphor being a known solvent of pyroxyline, the use of alcohol of less strength, but of strength sufficient for the purpose, is an invention. *Spill v. Celluloid Mfg. Co.*, 21 Fed. Rep. 631.

1. *Phillips v. Page*, 24 How. (U. S.) 164; *Planing Machine Co. v. Keith*, 101 U. S. 479; s. c., 17 Pat. Office Gaz. 1031.

2. Where an arrangement of mechanism the same as that subsequently patented existed previously, although of a small size and producing a feeble result, the absolute parts, their relative arrangement and their action being the same, it is not invention to *increase* the size of the parts, or some of them, to adopt them for a more practical purpose. *Day v. Bankers and Brokers' Telegraph*, 5 Fisher Pat. Cas. 268; s. c., 9 Blatchf. (U. S.) 345; s. c., 1 Pat. Office Gaz. 648.

3. *Double Pointed Tack Co. v. Two Rivers Mfg. Co.*, 5 Bann. & Ard. Pat. Cas. 465; s. c., 3 Fed. Rep. 26; s. c., 18 Pat. Office Gaz. 863.

4. *Glue Co. v. Upton*, 95 U. S. 3.

Part of Machine.—Placing a large register in a stove oven door where a small register had been used previously is not invention. *Filley v. Littlefield Stove Co.*, 39 Pat. Office Gaz. 1203; s. c., 25 Fed. Rep. 282. Making the flange on one side of a connecting slide of an extension table thicker than the other,

not invention. *Carter v. Messinger*, 11 Blatchf. (U. S.) 34.

Where a Merely Obvious New Result Is Obtained.—The fact that water will flow through a hose wound on a reel if the diameter is large enough, and the curves or angles are not too abrupt, is a matter of common knowledge which no one can appropriate to himself. *Preston v. Maynard*, 116 U. S. 661; s. c., 34 Pat. Office Gaz. 1507.

Example of Changing Size of Part.—Contracting the lower end of the fire pot in a stove for the purpose of lessening the area of the grate, to enlarge the outside space, not invention. *Perry v. Co-operative Foundry Co.*, 12 Fed. Rep. 436.

5. Analogously change in proportion of manufacture when a mechanically combined material composed of particular ingredients is old, a person who has merely altered the proportions of ingredients or the process of combining them has not invented a new composition of matter. *Van Camp v. Maryland Pavement Co.*, 43 Pat. Office Gaz. 884; s. c., 34 Fed. Rep. 740. To be a new composition of matter the product of the composition must have some distinctly new property or be applicable to some new use. *Van Camp v. Maryland Pavement Co.*, 43 Pat. Office Gaz. 884; s. c., 34 Fed. Rep. 740.

6. The enlargement of the "clinker cleaning passage" from the fire pot to the stove front, if productive of new and useful results, is invention and patentable. *Thatcher Heating Co. v. Carbon Stove Co.*, 15 Pat. Office Gaz. 1051; s. c., 4 Bann. & Ard. Pat. Cas. 68.

Example of Change of Size Held Invention.—Letters patent are not void for want of patent ability as being merely for increasing the size of type for figures. *Bruce v. Marder*, 10 Fed. Rep. 750; s. c., 20 Blatchf. (U. S.) 355; s. c., 22 Pat. Office Gaz. 1039.

7. In patents for *small articles* slight differences are often important, and, if such things are patentable at all, it

d. Change of Location of Parts.—A change in the location of the parts of a mechanism so long as no different or additional function is performed,¹ does not make the change an invention;

must always be in consequence of a more useful adaptation to the needs of commerce, by small changes which in a great machine might be merely alternative ways of reaching a general result. *Emerson v. Howe*, 8 Fed. Rep. 327.

1. *Dederick v. Whitman Agricultural Co.*, 36 Pat. Office Gaz. 571; s. c., 26 Fed. Rep. 763; *Dane v. Ill. Mfg. Co.*, 6 Fisher Pat. Cas. 124; s. c., 3 Biss. (U. S.) 374; s. c., 2 Pat. Office Gaz. 680.

Transfer of one of the parts whereby it performs double function, even though one of the parts transferred performs a double function, if the same part had been used before to perform the same function, in separate mechanism, its transfer is not invention. *Adams v. Bellaire Stamping Co.*, 36 Pat. Office Gaz. 567; s. c., 28 Fed. Rep. 300.

To authorize a patent the law requires a new thing. It is not satisfied by inventing a new place for an old thing, without change of result. *Clark Pomace Holder Co. v. Furguson*, 17 Fed. Rep. 79; s. c., 21 Blatchf. (U. S.) 376; s. c., 24 Pat. Office Gaz. 1090.

Examples of Transfer of Parts Held Not Invention.—An improvement in casting steel tire car wheels, by which the molten iron was poured in by openings or spouts at the edge of the mold, instead of as formerly by openings at the center, for the purpose of preventing any foreign matter settling beside the tire and preventing junction. *Needham v. Washburn, 1 Bann. & Ard. Pat. Cas. 537*; s. c., 7 Pat. Office Gaz. 649. Putting the perforations in an annular outlet in a gas stove (the part where the flame was applied to the gas) closer together and making them more numerous, not invention. *Tift v. Sharp*, 17 Pat. Office Gaz. 1284; s. c., 18 Blatchf. (U. S.) 138; s. c., 5 Bann. & Ard. Pat. Cas. 416; s. c., 10 Fed. Rep. 673. Ordinary corrugated iron when applied to the roof or sides of a building not giving sufficient air space between the metal sheets and the building, making the air spaces larger and diminishing the surface of iron to be attached to the building, is mechanical skill and not invention. *Belt v. Crittenden*, 5 Bann. & Ard. Pat. Cas. 131; s. c., 18 Pat. Office Gaz. 191. Arranging a blank book to contain bonds

and coupons, the bonds on successive pages and the coupons of each bond on the same page with it, a book having previously been made to contain the coupons without the bonds, grouped together according to the time when they had been paid, is not an invention. *Munson v. City of N. Y.*, 42 Pat. Office Gaz. 1061; s. c., 124 U. S. 601. Two bell cords in a street car passing along the lower margin of the roof of the car on opposite sides, connecting directly with a bell or gong attached to a bell on the driver's platform, held no invention, there being no new result obtained by placing the cord at the edge of the roof instead of the top of the roof. *Stephenson v. Brooklyn Crosstown R. R. Co.*, 14 Fed. Rep. 457. See also *Royer v. King*, 36 Fed. Rep. 899; *Schmid v. Schoville Mfg. Co.*, 37 Fed. Rep. 345.

Change of Place of Useless Part Not Invention.—To change the position of a useless appendage of a quadrant shaped platform from the side to the rear required neither ingenuity nor invention. *Seymour v. Osborne*, 3 Fisher Pat. Cas. 555.

Change from an Axial Line to Side by Side.—Lifters and forces had been arranged in an axial line for injecting water into boilers, the arrangement of them side by side without any advantage gained thereby is not invention. *Hancock Inspirator Co. v. Lalby*, 27 Fed. Rep. 88.

Transfer of a Peculiar Shape from One Part to Another.—The change in the method of combining the body and rim of wheels, by transferring the groove or recess to the rim and embracing the body of the wheel, instead of having the groove or recess in the body and embracing the rim, does not involve invention. *Sax v. Taylor Iron Works*, 39 Fed. Rep. 835; s. c., 40 Pat. Office Gaz. 118; *Hollister v. Burnham etc. Co.*, 113 U. S. 59.

Extreme Case of Change of Place Held Not Invention.—A dredging vessel constructed with a screw, similar to a screw propeller, set in the bow for the purpose of dredging; screw propellers had previously been used to dredge by turning the stern of the vessel towards the sand bar; held, not invention to change the place of the screw from the stern to the

but where the change may have required the employment of new devices or of inventive skill to enable the parts of the devices to operate in their new position or location, invention may be inferred;¹ and where the change of location, which produces a new and useful result, requires new devices, then the location, in combination with the other devices, is patentable.²

e. Changing the Number of Parts of a Device.—Multiplying parts where one had been used before,³ and the use of one being analogous to the others, or leaving out a part which is useless,⁴ or leaving out a part and its function from a machine, is not invention. But where a new and useful result is produced, the device thereby, the multiplication, becomes an invention.

f. Substituting for a Device Its Equivalent.—The mere substitution for a device of its equivalent is not invention.⁵

bow. *Atlantic Works v. Brady*, 107 U. S. 192; s. c., 33 Pat. Office Gaz. 1330.

1. *Moffit v. Cavanagh*, 17 Fed. Rep. 336.

New Result Obtained.—Changing the location of a thumbscrew governing a tension device in a sewing machine from a position where it was readily accessible only to the left hand of the operator to the top of the face plate, where it was readily accessible to both hands of the operator, it appearing that new mechanism had to be devised to operate the discs from the new position, is invention. *Singer Mfg. Co. v. Stewart Mfg. Co.*, 20 Pat. Office Gaz. 524; s. c., 8 Fed. Rep. 920.

2. New Devices.—If a change of location of a device requires *new devices*, and a new and useful result is produced, then the location in combination with the other devices—the means by which the result is obtained, not the result itself—is patentable. *Marsh v. Dodge and Stephenson Mfg. Co.*, 6 Fisher Pat. Cas. (C. C.) 562; s. c., 5 Pat. Office Gaz. 398.

Examples of Changes in Location of Parts Held Invention.—Wooden horse troughs had been made with a covered float and valve both situated at one end and iron trough with supply pipes and overflow. A trough made with a supply pipe valve and float in the interior covered by a case with open water all around, by which contrivance access to all sides of the trough, which was impossible in previous devices, was secured, involved invention. *North American Iron Works v. Fiske*, 39 Pat. Office Gaz. 1086; s. c., 30 Fed. Rep. 622. See *Adams v. Howard*, 19 Fed. Rep. 317.

3. *Moore v. Thomas*, 3 Bann. & Ard.

Pat. Cas. 13; *Wilbur v. Beecher*, 2 Blatchf. (U. S.) 132.

The mere duplication of a device for opening a gate for the platforms of railway cars, whereby the gates of two adjoining platforms may be operated simultaneously, does not require invention. *Aron v. Manhattan R. R. Co.*, 34 Pat. Office Gaz. 1508; s. c., 26 Fed. Rep. 314.

The use of two deflecting plates, one on each side of a circular saw, the arc of one deflecting plate being old and the function of the second deflecting plate being analogous to the first, their combination with a saw is not an invention. *Dunbar v. Myers*, 94 U. S. 187. Putting two locks on a single bolt work is not invention. *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 17 Fed. Rep. 537.

4. Where a device is made double, and experience shows that one half of it is superfluous, no invention is necessary to dispense with superfluous portion, and a patent for part retained will be held void. *McClain v. Ortmyer*, 42 Pat. Office Gaz. 724; *Seymour v. Osborne*, 3 Fisher Pat. Cas. 555.

"Duplication producing a new and useful result may be patentable. It is often the material part of a discovery, because it may be that which renders useful what was before useless." *Parker v. Holme*, 1 Fisher Pat. Cas.

Examples of Multiplication of Parts Held Invention.—A number of rollers acting in pairs to do a certain class of work is patentable. *Parker v. Holme*, 1 Fisher Pat. Cas. 44. The substitution of a double for a single bar in a spring bed is patentable if the change is not obvious. *Ladd v. Tucker Mfg. Co.*, 4 Bann. & Ard. Pat. Cas. 344.

5. *Cockrane v. Waterman*, 1 Cranch

g. Double Use—Machine or Device.—The application of an old machine to a similar or analogous subject without change in the manner of applying it and with no result substantially distinct in its nature,¹ the application of an old device to an analogous use in a manner before known,² even if greater utility is produced,³ or making a thing of a shape analogous to the shape

Pat. Dec. 121; s. c., vol. 2 Pat. Office Rep. of 1847, p. 829.

Examples of Parts Held Equivalents.

—A metallic joint being old, and it having been long in use for the purposes required in the machine in question, it is but a known mechanical substitute in the combination for the flexible joint in the prior machine and for the purposes required in the machine in question must be regarded as a mere equivalent. *Fisher v. Craig*, 1 Bann. & Ard. Pat. Cas. 365.

Substituting Machine for Hand Power.

—There is no invention in stirring a solution by a screw which had formerly been stirred by hand, the screw being a well known device for stirring liquids. *Marchand v. Emkin*, 34 Pat. Office Rep. 1275. There is no invention in substituting a compound lever for a simple one in order to gain power. *Puetz v. Beansford*, 31 Fed. Rep. 458; s. c., 39 Pat. Office Gaz. 1083. Substitution for two catches a hinge and a catch, the several parts being old, is not invention. *Adams v. Bellaire Stamping Co.*, 28 Fed. Rep. 360, for a T lever an eccentric lever. *Rodebaugh v. Jackson*, 47 Pat. Office Gaz. 658; s. c., 37 Fed. Rep. 882.

Chemical Equivalents.—If a process consists of a chemical combination by which the particular result is produced it does not prevent another inventor from making a mechanical combination which produces the same result. *New Process Fermentation Co. v. Maus*, 20 Fed. Rep. 725.

1. *Penna. R. R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490; *Blake v. San Francisco*, 113 U. S. 679; *Miller v. Force*, 116 U. S. 22; *Stephenson v. Brooklyn Railroad Co.*, 114 U. S. 149; *Morris v. McMillin*, 112 U. S. 244.

The mere application of an old apparatus to a new use is not patentable. *Bean v. Smallwood*, 2 Story (U. S.) 408.

English Cases.—"The law on this subject (double use) is this: you cannot have a patent for applying a well known thing which might be employed for 50,000 different purposes to an oper-

ation which is exactly analogous to what was done before." *Losh v. Hague*, 7 Web. Pat. Cas. (Eng.) 207.

2. *Royer v. Chicago Manf. Co.*, 20 Fed. Rep. 853.

Slight Modifications of the Rule.—The application of an old *organism* to an analogous use not patentable. *Phillips v. Page*, 24 How. (U. S.) 164. The mere application of an *old device* to a new use is not, by itself alone, the subject of a patent. *Blatchf. (U. S.)* 336. A mere application of the *old machinery, in the old manner*, to an analogous substance is not invention. *Brook v. Aston*, 8 E. & B. (2 B. R.) 478. Putting an *old thing* to a new use is not patentable. *Cliff. (U. S.)* 538. "The court, in rejecting the patent of Newton, seems to have been mainly governed by the use which was claimed for it, and also that no mention is made of its adaptability as a saw, but if what it actually did was in its nature the same as sawing and its structure and action suggested to the mind of an ordinary skillful mechanic this *double use* to which it could be adapted without material change, then such adaption to a new use is *not* a new invention and not patentable." *Tucker v. Spaulding*, 13 Wall. (U. S.) 453. "The application of old mechanical devices without material change to a use in which they were not before employed but which was known, and had been practiced, does not constitute a patentable invention." *Conse v. Johnson*, 4 Bann. & Ard. Pat. Cas. 501. A patentee combined a double leather cover (which was well known on certain kinds of balls) and applied it to an equally well known ball of a harder kind; *held*, double use and no invention. *Malin v. Harwood*, 3 Bann. & Ard. Pat. Cas. 515.

Northrup v. Adams, 4 Bann. & Ard. Pat. Cas. 567. A composition having been described in a former patent, one who applied it to a new use cannot claim it as his invention. *U. S. and Foreign Salamander Co. v. Haven*, 2 Bann. & Ard. Pat. Cas. 164.

3. **Application of an Old Device to a**

an analogous thing had been made before,¹ and the like,² is not invention...

New Thing Not Invention.—Invention or discovery are required as the foundation of a patent; therefore, where the claim rests merely on the application of an old machine to a new use, or an old process to a new result, the patent cannot be sustained, because the patentee has not invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereon. *Bray v. Hartshorn*, 1 Cliff. (U. S.) 538; *Conover v. Roach*, 4 Fisher Pat. Cas. 12.

Examples of the Application of This Doctrine to Machines.—The discovery that a particular advantage was obtained by the use of a wheel before known, in a manner before known, cannot be called an invention. *Losh v. Hague*, 1 Webster Pat. Cas. (Eng.) 202.

The patent being for the application of bearings for the purpose of transferring friction from the shoulders to the ends of the axles of wheels of railway carriages; *held*, that the prior public use of such end bearings on the end of axles in cotton mills or other *stationary* machinery, would not, but that public use of the same in ordinary carriages upon common roads, would destroy the patent unless the patent contained something new and material, either in principle or in mode of operation, to adapt it to its new use. *Knight v. B* etc. R. Co., 3 Fisher Pat. Cas. 1.

Examples Where a Mechanism Is Transferred from One Machine to Another of an Analogous Kind.—The introduction of a wire into the top of paint cans to prevent collapse of the walls, a similar wire having been formerly used in the head of ice cream freezers, is not invention. *Brown v. Hall*, 6 Blatchf. (U. S.) 401; s. c., 3 Fisher Pat. Cas. 531.

A bearing surface of vulcanized rubber had been applied to a horse collar to prevent absorption of sweat and formation of wrinkles and to assist in curing skin galls, an application of some material to a new and analogous use as a part of a harness pad not invention. *American Saddle Co. v. Hogg*, 5 Fisher Pat. Cas. (C. C.) 353. Claim of patent was for an improvement in construction of axles for cars and other wheeled carriages. It appeared that the improvement, though it never had been applied to railroad carriages,

was well known as applied to other carriages. *Held*, patent void. *Winnans v. Boston & Providence R. Co.*, 2 Story (U. S.) 412; *Hall v. Boot* (or *Jarvis*), Web. 100. A machine to be used under water, substantially like one used on land, is not invention. *Bush v. Fox*, 5 H. L. Cas. 707; s. c., 2 Jur. N. S. 1029.

The use of a mandrel, shaped like a bottle, in making envelopes for bottles, various shaped articles having been made out of pliable materials by means of mandrels, which were the regular tools therefor, not invention. *Patent Bottle Envelope Co. v. Seymer*, 5 C. B., N. S. 164; s. c., 5 Jur. U. S. 174. Combination of a device with an exhaust pipe, it having been formerly used with a supply pipe, not invention. *Willis v. Davidson*, 1 N. R. (Eng.) 234. A fish plate, grooved in the centre and used for holding rails together, is a double use of a fish plate used for strengthening timbers having a like groove. *Harwood v. The Great Northern R. R. Co.*, 29 L. J., Q. B. 193; 11 H. L. Cas. 654.

A Change of a Device from One Manufacture to Another.—A claim for a "circular stove," having a perforated fire pot with a grate bottom, having provision for admission of air below the point of suspension of said fire pot, all the elements of the claim being old, and old in that combination, except the circular cylinder, *held*, "It is true that the device of Russell" (anticipating device) "was not placed in a circular or 'cannon' stove, consisting of a single cylinder, the Russell stove being composed of two cylinders, but we fail to see that any inventive power was required to apply the same fire pot to a different kind of circular stove." *Harles v. Albany Stove Works*, 42 Pat. Office Gaz. 95; s. c., 123 U. S. 582.

1. It being old to put a flanged bottom into an iron shell, or into an iron shell washed with tin, or into an iron shell with a lining of sheet tin adhering thereto; and old, also, to provide a soda water fountain with a separable sheet tin lining, it did not involve invention to place a flanged bottom covered with a separable sheet tin lining into a shell lined in a similar manner. *Mathews v. Ironclad Mfg. Co.*, 42 Pat. Office Gaz. 382; s. c., 124 U. S. 347.

2. A roller frame for casters in trunks

h. Process—Application Doctrine, Double Use to.—The application of an old process to a new subject without the exercise of the inventive faculty or the development of any new idea,¹ where no new or useful device is produced thereby,² the application of an old process to produce a new result,³ or the application of

must be regarded as a second use of roller frames for other purposes. *Session v. Gould*, 33 Pat. Office Gaz. 1139. The application of an old and well known form of blade, from a hand tool for trimming side edges, to an old gear cutter for trimming such edges, is merely a case of double use, and therefore not patentable. *Bussell Trimmer Co. v. Stephens*, 37 Pat. Office Gaz. 1249; s. c., 28 Fed. Rep. 535; *Slawson v. Grand St., Prospect Park and Flatbush R. R. Co.*, 5 Bann. & Ard. Pat. Cas. 210; *Pickering v. McCollough*, 104 U. S. 310; s. c., 21 Pat. Office Gaz. 73; *Hake v. Brown*, 37 Fed. Rep. 783.

Changing from One Kind Steam Engine to Another.—Nothing patentable in the application to horizontal steam engine boilers of old devices in the precise combinations in which they had existed in vertical boiler steam engines, no new result being obtained. *Scheidler v. Tustin*, 23 Fed. Rep. 887. The adaption of a wooden lathe to iron, mere mechanical skill. *Howe Machine Co. v. National Needle Co.*, 21 Fed. Rep. 630.

"Fire Extinguisher and Soda Water Fountain."—An apparatus in which the alkaline solutions for forming carbonic acid gas were kept separate until required to extinguish a fire, when they could be readily mingled, *held*, no invention, since a similar apparatus had been employed in a soda water fountain for the supply of beverages. *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.*, 1 Bann. & Ard. Pat. Cas. 177; s. c., 6 Pat. Office Gaz. 34; 1 Bann. & Ard. Pat. Cas. 177; s. c., 6 Pat. Office Gaz. 64.

A sheath grooved so as to enclose the sheet metal moulding used on the tops of carriage dash boards, the same mechanism having been used to apply the moulding to the tops of combs, is not an invention. *Peters v. Active Mfg. Co.* 21 Fed. Rep. 319.

Changing the Subject of a Device.—Fastening one piece of wood to another, or one piece of metal to another, or a piece of metal to a piece of wood, by the use of screws or nails, being old, it is not a patentable invention to fasten a

metallic slide in the groove of a slide bar by passing a nail or bolt through both. *Carter v. Messinger*, 11 Blatchf. (U. S.) 34.

Putting a Cut in a Different Place.—It was commonly known that the effect of a diagonal cut on a penetrating point was to force the point, in being driven away from the cut. Double pointed staples, with a diagonal cut on each point, but the diagonal cut on one point on the upper and outer side, and on the other point on the lower and outer side, were old, the effect in driving being to bring the points nearer together; there was nothing but mechanical skill in putting the diagonal cuts on the same side of each leg so as to incline both points in driving in the same direction. *Double Pointed Tack Co. v. Two Rivers Manufacturing Co.*, 109 U. S. 117; s. c., 25 Pat. Office Gaz. 1075.

1. *Brown v. Piper*, 91 U. S. 37, nor is its application to a similar or analogous subject, with no change in manner of application and no result substantially distinct, even if the new form had not been contemplated. *Howe Machine Co. v. National Needle Co.*, 21 Fed. Rep. 630.

2. A device or process previously patented and used for one purpose, cannot be patented and used for a similar purpose unless a new and useful device is produced thereby. *Byerly v. Cleveland Linseed Oil Works*, 31 Fed. Rep. 73.

Example of Double Use of Old Device.—Making dash boards of two pieces of iron which were welded together by pressure from dies when hot, and making the dies of a suitable shape, *held*, only a double use, there being no invention in adapting dies to the shape desired, nor in using them to swage the pieces of iron and weld them together. *Peters v. Mfg. Co.*, 47 Pat. Office Gaz. 1219.

3. The application of an old process to produce a new result is not a patentable invention; there must also be some new process or mode, but the production of an old result by a new process is patentable. *Howe v. Abbott*, 2 Story (U. S.) 190.

an old process to a new stage of manufacture,¹ is not invention or the subject of a patent.

Product of Old Process.—The product of an old process applied to a new material is not an invention.²

i. Composition of Matter—Application—Doctrine of Double Use.—A new use of a material or composition previously known,³ or the application of articles existing in a given form and applied to a certain use in substantially the same form to a new use,⁴ or the use of a well known substance in a generally

Example of Old Process to New Devices.—A mode of connecting ships' anchors to the shank by making a cervical opening in the piece of iron forming the flukes (arm piece), through which the shank was passed, the curved end of the shank being welded to the arm piece, is thus commented on: "If the union (of the fluke and arm piece) had been effected in a mode unknown before, as applied in any degree to a similar purpose I should have thought it a good ground for a patent, but unfortunately the mode was well known and long practiced," it being "precisely the mode in which the shank of the mushroom anchor is united to the mushroom top; 'the way in which the different parts of the hammer and pickaxe are united together.'" *Brewster v. Hawkes*, 4 B. and Ald. (Ex. Rep.) 541. Placing nearer two machines formerly used at a greater distance, similar machines used for a similar purpose upon a similar material, *held* not invention. *Kay v. Marshall*, 8 Cl. & Fin. 245.

Application of Process to Another Part of Device.—The application of artificial heat to ripen wine being old, and the application of artificial heat to the outside of casks to ripen wine being old, it is not invention to apply heat to interior of casks to ripen the wine within them. *Dreyfus v. Searle*, 42 Pat. Office Gaz. 491; s. c., 124 U. S. 60.

Double Use Consisting of the Application of a Process to a Use Analogous to the Original One.—The application of the process of baling hay to short cut hay not invention, short cut hay and the process of baling being previously well known. *Faulks v. Kamp*, 17 Pat. Office Gaz. 851; s. c., 17 Blatchf. (U. S.) 432; s. c., 5 Bann. & Ard. Pat. Cas. 73. A mere transfer of a mode of constructing wooden slides to metallic slides not invention. *Carter v. Messinger*, 11 Blatchf. (U. S.) 34. The application to palm leaves to curl them of

the process used to curl hair for matresses not patentable. *Howe v. Abbott*, 2 Story (U. S.) 190.

Extreme Case in Supreme Court.—The application of a freezing mixture in a vessel enclosing another vessel that contained articles to be preserved from spoiling is a double use of a process of preserving corpses similarly made. *Crown v. Piper*, 91 U. S. 27.

The application of the process of doing plasterers' hair up in small packages, placing these packages in larger packages, then comprising the whole, the same process having been applied to other articles, is not invention. *King v. Gallun*, 109 U. S. 99.

1. Applying the Same Process to a Later Stage.—A patent construed as being at the most the application of "a process of stamping tobacco which was already known to the same tobacco at a later stage in the process of manufacture, *held* invalid as the application of an old process to a similar or analogous use. *Miller v. Foree*, 116 U. S. 22.

2. King v. Gallun, 109 U. S. 99.

Plasterers' hair done up in small packages inside larger one and then compressed, such process having previously been used for other articles, it is not an invention. *King v. Gallun*, 109 U. S. 99.

A new manufacture produced by an old process machine and without the development of any new idea which can be deemed new or original is not an invention. *Brown v. Piper*, 91 U. S. 37; *Piper v. Moon*, 6 Fisher Pat. Cas. (U. S.) 180, for examples see *Meyer v. Pritchard*, 12 Blatchf. (U. S.) 101; s. c., 7 Pat. Office Gaz. 1012; s. c., Bann. & Arder Pat. Cas. 261.

3. Mathews v. Skates, 1 Fisher Pat. Cas. 602.

4. Crandal v. Walters, 9 Fed. Rep. 659.

well known form, but one in which it had not previously been used,¹ is not invention.

k. Limitations of Doctrine of Double Use.—But it is always a question of fact whether the purpose to which a contrivance was before applied and the new purpose are so analogous that there is no invention involved in the change;² a previous and a new

1. *Tarr v. Webb*, 5 Fisher Pat. Cas. 593; s. c., 10 Blatchf. (U. S.) 96; s. c., 2 Pat. Office Gaz. 568.

The Application of This Doctrine to a Material Used in a Manufacture.—

The application of an article to produce a certain result, the party having no claim either to the mode of producing the article or applying it, for obtaining the result, forms no ground for a patent. *Regina v. Cutler*, 3 C. & K. 215; s. c., 14 Q. B. 372, note.

The use of an old material in an old way to accomplish an old result is not invention. *Celluloid Mfg. Co. v. Tower*, 26 Fed. Rep. 451.

Examples of Application of "Double Use to Materials."—There is no invention in producing upon an old fabric an effect that has been produced on similar fabrics, therefore a paper collar ornamented with devices printed with old machinery is not an invention. *Union Paper Collar Co. v. Van Dusen*, 10 Blatchf. (U. S.) 109; s. c., 5 Fisher Pat. Cas. 597.

A dickey having previously been made of two or more thicknesses of linen bound together at the edges by a binding and intended to hang by a tab attached to the collar button, it is not invention to fasten a shirt bosom made precisely like that dickey to the shirt body by means of a row of stitches through the binding. *Cluett v. Claffin*, 41 Pat. Office Gaz. 1042; s. c., 30 Fed. Rep. 921.

2. *Harwood v. Gt. N. Ry. Co.*, 2 B. & S. (Eng.) 208.

Glass having been formerly engraved by sand by use of a brush with which sand and water were applied, sand thrown against the glass to engrave it by a jet of water or steam while it revolved is invention. *Tilghman v. Morse*, 9 Blatchf. (U. S.) 421.

Extension of Applicability.—A valve peculiarly constructed, having opening above only along part of the line of motion, and which, therefore, applicable only to one kind of engine, another valve having holes all its length and therefore being applicable to all engines, is not a double use. *Judson v.*

Moore, 1 Fisher Pat. Cas. 544 (but see p. 555). The use of hoops upon a cast iron cannon not a double use from the use of same on wrought iron cannon. *Treadwell v. Parrott*, 3 Fish. 124. Application of a suitable fabric to a whip handle *held* invention. *Strong v. Noble*, 6 Blatchf. (U. S.) 477.

Change of Material from One Use to Another Held Invention.—A new and improved roller for wringing machines had been made by surrounding the shaft with a fabric made of fibrous cloth and rubber. This material had been made before in tubes and cut into sections (rings) for stuffing boxes. *Held*, not double use but inventive genius. *Forsyter v. Clapp*, 6 Fisher Pat. Cas. 528. Linen faced with paper used for collars, same material having been used for maps, *held*, invention, not double use. *Union Paper Collar Co. v. White*, 7 Pat. Office Gaz. 608; s. c., 2 Bann. & Ard. Pat. Cas. 60. The patentee made a barrel of a common bolt of one piece of sheet metal, with prongs passing through a hole in the plate, by which it was riveted to the plate itself. Prior to his invention, bolts had been made with a barrel in several pieces and riveted with prongs; with the barrel in one piece, but attached to the flanges; and with the barrel cast in one piece, with flanges which formed the plate. *Held*, that there was a patentable difference between the devices of the patentee and these prior contrivances. *Stanly Works v. Sargent*, 4 Fisher Pat. Cas. 443; s. c., 8 Blatchf. (U. S.) 345.

The Suggestiveness of Prior Device.—

No use to which an elongated opening, such as is used for fastening parts of chains together, could naturally be applied, would suggest, in an open slotted metallic band tie, the use of the open slot in a rectangular flat buckle for the introduction of a flat band sidewise. *Cook v. McComb*, 5 Fisher Pat. Cas. 397; s. c., 1 Woods (U. S.) 195; s. c., 2 Pat. Office Gaz. 89.

Wooden pipe was made impervious to water or gas by coating it inside and out with a composition of coal tar and

effect and new mode of operation produced,¹ or a new principle² applied, presume invention. An application of an old machine to a new subject may be patentable where a new process is thereby produced,³ and the improvements or particular changes which an inventor makes in adapting a machine to a new use are patentable.⁴

1. Combination and "Aggregation."—A combination⁵ of old

sawdust. Tarred pipes rolled in sand were old and sawdust was a known absorbent of sticky substances. *Held*, not a double use but invention. *Hobbie v. Smith*, 27 Fed. 656

1. Grosjean v. Peck, 11 Blatchf. (U. S.) 54. Where adaptations are necessary, work invention. *West E. Dy. Mch. Co. v. Arnoux*, 20 Fed. Rep. 112.

New Purpose and Different Results.—An article produced by a process which was previously known but used for a somewhat different purpose with *different results* is patentable. *Lockwood v. Cutter Tower Co.*, 11 Fed. Rep. 724.

2. A mere discovery of a new principle embodied in a new machine is patentable, but a mere discovery of a new principle of operation in an old machine is not patentable. *Newton v. Vancher*, 6 Ex. Rep. 859; 21 L. J. Ex. 305.

New Principle in New Substance.—Where a new principle, which it required experiment to discover, in a new substance, is used, in connection with an old device, to do a thing not analogous with the thing done originally by it, is an invention of a process. *Poillon v. Schmidt*, 6 Blatchf. (U. S.) 299; 3 Fisher Pat. Cas. 476.

A person who not merely supplies the public with a new article, but demonstrates unknown susceptibilities of the material out of which it is made, does something more than merely apply an old thing to a new purpose. He produces a new device by giving a new form to an old substance and by suitable manipulation makes its peculiar properties available for a use to which it had not been before applied, thereby distinguishing between it and all other fabrics of the class to which it belongs. *Union Paper Collar Co. v. White*, 7 Pat. Office Gaz. 698; 2 Bann. & Ard. Pat. Cas. 60.

A new composition of matter to which an old contrivance has been applied, and which results in a new and useful article is the proper subject for a patent. The novelty consists in the

new composition made practically useful for the purposes of life by the means and contrivances mentioned. It would be a new manufacture and none the less so because the means employed to adapt the new composition to a useful purpose was old and well known. *Hotchkiss v. Greenwood*, 11 How. (U. S.) 248.

Where it has been stated that a special agent of boneblack can be used to remove a discoloring agent and it has been discovered by the patentee that coal oil can be purified by filtering through it, can it be said that the latter is a double use of the former? *National Filtering Oil Co. v. Arctic Oil Co.*, 8 Blatchf. (U. S.) 416; s. c., 4 Fish. Pat. Cas. 514.

Material.—Patenting a material for one purpose does not necessarily invalidate patenting it for another and not analogous purpose. *Newton v. Vancher*, 6 Exch 859.

An invention of sheeting metal so compounded of zinc and copper that it would, when placed in water, rust just sufficiently to prevent accumulation of barnacles on it is an invention, even though a plate had been made previously of a similar proportion of the same metals, it being *held* that unless some application of them could be shown to that same purpose it was not a double use of the first plate. *Muntz v. Foster*, 2 Web. Pat. Cas. (Eng.) 96.

3. It cannot be doubted that a novel process, or method, the operation that amounts to a successful application of known things to a practical use, is patentable as an art. *Roberts v. Dickey*, 1 Pat. Office Gaz. 4; s. c., 4 Brew. (U. S.) 260; s. c., 4 Fish. Pat. Cas. 532.

4. If a man claims the improvements or particular changes which he makes in the construction of an old machine in adapting it to a new use, which the old machine could not be applied to without such changes, his patent may be sustained. *Phillips v. Page*, 24 How. (U. S.) 164.

5. New and Useful Combination, Though Elements Old.—Each and all of

devices must produce a new and useful result, the *joint* product of the elements of the combination. These results must be a result of the combination, and not a mere "*aggregate*" of several results, each the complete product of one of the combined elements brought together and allowed to work out its own effect,¹ in order to be an invention.

Tests.—The tests to distinguish a combination from an "*aggregation*" are that the result in the former is produced by the union of the several elements;² that the elements co-operate with³

the separate elements of a combination may be well known and old. Nevertheless if the combination is new and useful and requires more than mere mechanical skill to produce it, it is patentable. *May v. County of Fond du Lac*, 27 Fed. Rep. 691. Almost all mechanical inventions at this day are the embodiment and adaption of mechanical appliances that are old. *Crandall v. Watters*, 9 Fed. Rep. 659. The connection or combination of a patented device with other devices may be the subject of a valid subsequent patent. *McMillan v. Rees*, 1 Fed. Rep. 722.

1. *Hailes v. Van Wormer*, 20 Wall. (U. S.) 353; *Double Pointed Tack Co. v. Mann*, 5 Bann. & Ard. Pat. Cas. 468; *Niles Tool Co. Works v. Betts Machine Co.*, 27 Fed. Rep. 301. A mere aggregation of parts whereof the patentee has not the exclusive right to either and in which the parts have no new principle and produce no new result which is due to the combination itself is not patentable. *Sarven v. Hall*, 5 Fisher Pat. Cas. 415; *Wood v. Packer*, 17 Fed. Rep. 650. A combination is patentable only when a new and useful result is produced by the combined elements. *Railway Registering Co. v. North Hudson Co. R. Co.*, 26 Fed. Rep. 411. The parts must be so "united" as to produce such result. *Wood v. Packer*, 17 Fed. Rep. 650.

2. **General Test of Patentable Combination.**—A combination must embrace (1) a novel assemblage of parts involving invention; (2) a co-operation of those parts to produce a common result. *Hoffman v. Young*, 5 Bann. & Ard. Pat. Cas. 316; s. c., 2 Fed. Rep. 74.

The patentability of a combination is not affected by the circumstance that the elements combined produce distinct subsidiary results, if, while producing these results, they also co-operate to produce an ultimate result which is either different from or resultant of the

several particular results produced by the subordinate combinations. *Waring v. Wilkinson*, 15 Pat. Office Gaz. 246; 18 Pat. Office Gaz. 794.

Waring v. Wilkinson, 15 Pat. Office Gaz. 246.

Separate Patents for Severable Parts.—Where by the omission of some of the elements of such former machine and the addition of other elements not useful in the old machine an improvement results, such improvement may be patentable. *Coupe v. Weatherhead*, 16 Fed. Rep. 673.

Production New Force or Effect.—If it produce a different force, effect, or result in the combined forces or processes from that given by the different parts and a new result is produced by their union. *Niles Tool Co. v. Betts Machine Co.*, 27 Fed. Rep. 301.

If it forms a new machine of distinct character or formation, or produces a result which is not a mere aggregate of separate contributions, but is due to the joint and co-operative action of all the elements. *Niles Tool Works v. Betts Machine Co.*, 27 Fed. Rep. 301; *Shipman Engine Co. v. Rochester Tool Works*, 44 Pat. Office Gaz. 1067; s. c., 34 Fed. Rep. 747.

Others' Wordings of These Tests.—If a new result is produced by the union of the several elements, it is invention; if not, a mere aggregation and not invention. *Reckendorfer v. Faber*, 92 U. S. 347; s. c., 12 Blatchf. (U. S.) 68; s. c., 5 Pat. Office Gaz. 697; s. c., 10 Pat. Office Gaz. 71; s. c., 1 Bann. & Ard. Pat. Cas. (C. C.) 229.

3. If one part does not co-operate with the others but each works out its own separate result, it is not invention. *Swift v. Whisen*, 3 Fisher Pat. Cas. 343; s. c., 2 Bond (U. S.) 115; *Hoffman v. Young*, 18 Pat. Office Gaz. 794; *Stephenson v. Brooklyn*, C. T. R. R. Co., 16 Blatchf. (U. S.) 473; s. c., 14 Fed. Rep. 457.

Co-operation means that every part

or coact¹ upon each other to produce it. But they need not act simultaneously.²

must have its subfunction to perform, and each must have a certain relation to, and dependence upon, the others. *Hoffman v. Young*, 18 Pat. Office Gaz. 794; s. c., 2 Fed. Rep. 74; s. c., 5 Bann. & Ard. Pat. Cas. 316.

The parts must *dependently* co-operate. *Wood v. Packer*, 17 Fed. Rep. 650. All the elements must enter into the combination so that each qualifies the others and a new result is obtained produced by the combined action of *all* the component parts. *Clark Pomace Co. v. Ferguson*, 17 Fed. Rep. 79.

1. **Another Word Used Synonymously Is "Coaction."**—There must be *coaction* among the elements of a combination of old devices to take it out of the category of mere aggregation of parts; some new and peculiar function produced by such combination must be developed, in order that the combination may be an invention and not a mere exhibition of mechanical skill. *Scott Mfg. Co. v. Sayre*, 35 Pat. Office Gaz. 255, s. c., 26 Fed. Rep. 153; *Brinkerhoff v. Aloe*, 37 Fed. Rep. 92.

A More Useful Result or Old Result in Cheaper Way Sufficient.—A combination that produces by its joint action a new and useful result or an old result in a cheaper or otherwise more advantageous way. *Niles Tool Works v. Betts Machine Co.*, 27 Fed. Rep. 301; *Railway Register Mfg. Co. v. North Hudson Co. R. Co.*, 24 Fed. Rep. 411; *Railway Register Mfg. Co. v. North Hudson Mfg. Co.*, 26 Fed. Rep. 411.

Elements Need Not Coact on Each Other if They Co-operate.—There is no patentable combination in a mere aggregation of old devices which produce no new effect or result due to their concurrent or successive joint and co-operating action; it is by no means essential to a patentable combination that the several devices or elements thereof should coact upon each other. It is sufficient if all the devices co-operate with respect to the work to be done and in furtherance thereof, although each device may perform its own particular function only. *Stutz v. Armstrong*, 20 Fed. Rep. 843.

2. *Hoffman v. Young*, 2 Fed. Rep. 74.

A claim is not invalid upon the ground that the several elementary parts of a combination have no conjoint action, and no active connection to produce a joint result, where there was in-

vention in the combination. *Hoe v. Cottrell*, 1 Fed. Rep. 597. They must be united for a common end—a unitary result. *Hoffman v. Young*, 5 Bann. & Ard. Pat. Cas. 316; s. c., 2 Fed. Rep. 74.

Examples of Aggregation.—Putting a mirror on the roof of the front platform of a street car, and a glass panel in the front end of the car over the door, is a mere aggregation of separate devices. "Neither of these three elements . . . performs any new office or imparts any new power to the others, and combined they do not produce any new result, or any old result more cheaply or otherwise more advantageously." *Stephenson v. Brooklyn R. Co.*, 114 U. S. 149.

A washer put on a bucket and held by a staple, into which the eye of the staple is placed, its purpose being to keep the bail from rubbing the paint of the bucket, is an aggregation, neither the washer modifying the action of the staple or the staple the action of the washer. *Double Pointed Tack Co. v. Two River Mfg. Co.*, 109 U. S. 117.

Combinations Held to Produce No New Results and Therefore to be Not Patentable.—The combination of a cracker machine and an automatic stopping device. *Duesh v. A. J. Medlar Co.*, 30 Fed. Rep. 619. Attaching a device for holding books to the bottom of a desk lid. *Peard v. Johnson*, 23 Fed. Rep. 507. In stoppers for glass jars, putting together the screw plate of one device and the lining of another. *Consolidated Fruit Jar Co. v. Bellaire Stamping Co.*, 28 Fed. Rep. 91. Device composed of parts which are old, excepting the precise lines of the cuts and shape of the openings (which are not material, and as they produce a result which is the mere aggregate of separate contributions, not patentable. *Mosler Safe & Lock Co. v. Mosler*, 22 Fed. Rep. 901; *Husselman v. Gaar*, 29 Fed. Rep. 318. Combining a reticulated covering and slats in a cover. *Hayes v. Bickelhaupt*, 21 Fed. Rep. 566; *Waterclosets Novel Iron Works v. Skirm*.

"Aggregation"—Each Part Producing Only Its Well Known Effect.—A small cylindrical box, perforated at the ends with holes, and having the perforations closed by wax or wafer or paper pasted on, to retain the contents while the box is being transported, the wax or wafer

Omission of Part.—The omission of a part where the function performed by it is omitted is not invention.¹

being removed or the paper punctured when it is desired to permit the contents to pass through the holes. The box was old, the closing of the packages with wax, wafer or pasted paper is also old. Each of these devices produces its obvious well known result, and each produces in combination no other effect than each produced separately. This is aggregation, not legitimate combination. *Sawyer v. Bixby*, 5 Fisher Pat. Cas. 283.

A pavement was formed of blocks of wood cut from the trunks and branches of trees, set with their fibers vertical upon a bed of broken stone, the space within filled with sand or gravel; all the elements were old and the improvement simply consisted in taking a known material (wooden blocks) and constructing a pavement in a well known manner. *Held*, not invention, but mechanical skill. *Phillips v. Detroit*, 111 U. S. 604.

The combination of an old rawhide fulling machine with an automatic reverser, *held*, aggregation. *Royer v. Coupe*, 38 Fed. Rep. 115. See also *Schlict & Field v. Sherwood Letter File Co.*, 36 Fed. Rep. 587.

Where a Device Is Superior in Appearance, or Utility.—Patentee took a lantern top, such as could have then been found in use, and secured it by a hinge and catch substantially as lanterns had previously been fastened; *held*, although no former lantern was equal to it in form and convenience, it was aggregation and not invention. *Adams v. Bellaire Stamping Works*, 36 Pat. Office Gaz. 567; s. c., 28 Fed. Rep. 360. Putting an additional window, which does nothing but allow light to traverse a part previously dark, in a fare box, and accomplishing this result without aid from the other parts, is an aggregation, not an invention. *Slawson v. Grand St., Prospect Park and Flatbush R. Co.*, 17 Blatchf. (U. S.) 512; s. c., 5 Bann. & Ard. Pat. Cas. 21c. A patent for a combination of a fire lighter and a bundle of kindling wood is void. *Alcott v. Young*, 21 Pat. Office Gaz. 251; s. c., 9 Fed. Rep. 450. A piece of rubber fastened to one end of a piece of wood which forms a pencil is not invention, for a handle in common does not create a new or combined operation. *Reckendorfer v. Faber*, 92 U. S. 347. A

combination of a fire lighter and a bundle of kindling wood. *Alcott v. Young*, 21 Pat. Office Gaz. 361; s. c., 9 Fed. Rep. 450. A glass chimney base and a mica chimney top. *Blackman v. Hibbler*, 17 Blatchf. (C. C.) 333; s. c., 4 Bann. & Ard. Pat. Cas. (C. C.) 641. A camera and a finder located thereon, each working independently. *Schmid v. Schoville Mfg. Co.*, 37 Fed. Rep. 345.

Use in Succession of Well Known Instruments.—The use in succession of two distinct pairs of dies, of well known kinds, not combined in one machine, nor co-operating to one result, but each pair doing by itself its own work, is not a patentable invention. *Beecher Mfg. Co. v. Atwater Mfg. Co.*, 114 U. S. 523.

Example Where Superiority of Device Did Not Arise from Combination.—If the superiority of a wheel arose from the fact that two devices combined in it, each of which was better intrinsically than the other and yet each operating independently of the other, the combination would be but the exercise of judgment in the choice of parts, and not invention. *Sarven v. Hall*, 5 Fisher Pat. Cas. 41c.

Examples of Devices Held Not Aggregation.—The combination of a wire gauze and a grating and a point, the object being that they may be driven into the earth and serve as a filter without being injured in the driving, and the combination of a grating and a wire gauze so that the water may be controlled in its ingress into the pump, *held* not aggregation. *Christman v. Rumsey*, 4 Bann. & Ard. Pat. Cas. 506; s. c., 17 Blatchf. (U. S.) 148. The application to safe doors of chronometric mechanism for automatic locking and unlocking at predetermined times, required invention. *Yale Lock Mfg. Co. v. Norwich Nat. Bank*, 6 Fed. Rep. 377. Cases in which combination held not aggregation but invention. *Booth v. Parks*, 1 Flippin (C. C.) 381; s. c., 1 Bann. & Ard. Pat. Cas. 225; *Loom Co. v. Higgins*, 105 U. S. 580; *Temple Pump Co. v. Rubber Bucket Mfg. Co.*, 39 Pat. Office Gaz. 467.

1. Omission of Parts of Combination—When Invention.—The reconstruction of a machine, so that a less number of parts will perform all the requirements

m. Putting Two Old Things Side by Side Without Change of Function.—The use of two or more old things side by side¹ or placing two old elements side by side in a combination,² the placing together of parts which had previously been used for the same purposes as in the patent, though not in the same combination,³ is not invention.

of a greater, may be an invention of a high order, but the omission of a part with a corresponding omission of the function, so that the remaining parts do precisely what they did before, cannot be more than a mere matter of judgment, depending upon whether it is desirable to have the machine do more or less. *McClain v. Ortemager & Sons*, 2 Pat. Office Gaz. 724; s. c., 4 Fed. Rep.

A process of curing fish by the removal of the mucous membrane, it not being previously known that such membrane was injurious to the keeping qualities of the fish, is an invention. *Crowell v. Harlow*, 1 Fed. Rep. 140.

1. *Lake v. Fitzgerald*, 6 Fisher Pat. Cas. 420. This case is referred to in "double use," and the close connection of the two can easily be seen. *Adams v. Bellaire Stamping Co.*, 36 Pat. Office Gaz. 1149; s. c., 28 Fed. Rep. 360. Application of blast of hot air formerly used for dispersion of moisture and dry molds here used for drying and heating interior of cask preparatory to pitching. "The patentee took old and well known mechanical contrivances for accomplishing useful results and applied them to a new purpose. In this there was nothing to support a claim for a patentable invention or process. The various instrumentalities operated just as they had previously operated when the blast was used for other purposes. They employed old mechanism without producing a new effect. It may be true that this device produced a better result, but that of itself was not enough to sustain the patent. *Gottfried v. Brewing Co.*, 22 Pat. Office Gaz. 497; s. c., 9 Fed. Rep. 762. There is no invention in making a scale pan of glass with glass legs made integral therewith, and suspending it by branching metal bows passing through holes in said legs, glass and glazed porcelain scales being old and metallic scale pans suspended on branching bows being old. *Fuschmer v. Baumgarten*, 26 Fed. Rep. 858; s. c., 36 Pat. Office Gaz. 167.

Full Statement of the Rules and Its

Reasons.—Where the mode of construction of the article claimed, the materials employed and the purpose for which it was to be used had all been described separately in earlier patents, although the article itself had never been described in any previous patent, and to that extent was novel and was of great utility, it did not require invention to produce it. *Gardner et al. v. Herz*, 35 Pat. Office Gaz. 999; s. c., 118 U. S. 180.

2. An ingenious arrangement of old parts which produces a device in its entirety novel and useful is not necessarily invention. *Calkins v. Oshkosh Carriage Co.*, 36 Pat. Office Gaz. 1149; s. c., 27 Fed. Rep. 296. A new combination of old parts may sometimes perhaps often, be so obvious as to merit no title to invention. *Enterprise Mfg. Co. of Pennsylvania v. Sargent*, 37 Pat. Office Gaz. 891; s. c., 28 Fed. Rep. 185. Any new combination of old ingredients is patentable when any new result follows, but the mere exercise of judgment of mechanical skill, of selecting a few ingredients from a larger number already known and specified in former patents, is not invention. *Welling v. Crane*, 14 Fed. Rep. 571; s. c., 23 Pat. Office Gaz. 189.

Putting a stereoscope on a stand like those used for cameras, telescopes, etc., not patentable; such use is only putting an old stand to a new use. *Quirole v. Ardito*, 17 Blatchf. (U. S.) 400. The application to a bar in use on one kind of wrench of a nut in use on another kind is not invention. *Collins Co. v. Coes*, 21 Fed. Rep. 38, overruling *5 Bann. & Ard. Pat. Cas. 548*. Putting flanges to the gutters on a cover to stiffen them is mere mechanical skill. *Haynes v. Biuckelhaupt*, 21 Fed. Rep. 567; s. c., 29 Pat. Office Gaz. 368. The adaptation of an automatic device known and in use before the plaintiffs patent to a steam fire engine is not such an invention as will sustain a patent. *Blake v. San Francisco*, 113 U. S. 679.

3. In trucks already in use on railroad cars, the ring bolt which held the

n. Mere Carrying Forward of Old Idea.—Any mere carrying forward of new or more extended application of the original thought in which substantially the same thing is accomplished in substantially the same way by substantially the same means with better results,¹ or a change where the only difference is one of degree as to quantity of product or of convenience as to char-

car to each truck passed through a bolster supporting the weight of the car and through an elongated opening in the plate below, so as to allow the swivelling of the truck upon the bolt and lateral motion in the truck and the bolster was suspended by divergent pendent links from the brackets on the frame, whereby the weight of the car tended to counteract any tendency to depart from the line of the track. *Held*, that a patent for employing such a truck for the forward truck of a locomotive with fixed driving wheels was void. *Penna. Railroad Co. v. Truck Co.*, 110 U. S. 490; s. c., 27 Pat. Office Gaz. 207. A solid conical bolt having existed, adding a screw thread to it is not invention. *Hall v. McNeal*, 107 U. S. 90; s. c., 23 Pat. Office Gaz. 937. In a "clamping finger" in a lead pencil the slots, screw threads, etc., were all old, and some had been previously combined with each other, therefore putting two or more slots in a tube threaded inside and slewed outside is not invention. *Holland v. Shipley & Tyndall Mfg. Co.*, 127 U. S. 396; s. c., 44 Pat. Office Gaz. 231.

Where an element of a claim performs no other or different function in a new combination than it has performed in other combination there is no invention in merely changing its location in the new combination to adapt it to a modification of form of one of the other elements. *Phipps v. Yost*, 26 Fed. Rep. 447.

1. *Sawyer v. Miller*, 12 Fed. Rep. 725; *Smith v. Nichols*, 21 Wall. (U. S.) 112. It is the invention of what is new, and not the arrival at a comparative superiority or greater excellence in that which is already known, which the law protects as exclusive property, and which it secures by patent. *Smith v. Nichols*, 21 Wall. (U. S.) 112.

Merely improving the conceptions of another by chance in form, proportion, or degree, is not such an invention as will sustain a patent. *Theberath v. Celluloid Harness Trimming Co.*, 15 Fed. Rep. 246.

Mere Improvement, Not Invention.—

Merely making an article better than it was before does not in itself involve invention. *Crouch v. Roemer*, 103 U. S. 797; s. c., 19 Pat. Office Gaz. 1067. "Slight variations in form or superior smoothness" (in an article in which smoothness was desirable) will not make things new articles of manufacture. *Hatch v. Moffitt*, 15 Fed. Rep. 252. The adjustment of the various parts of a combination may be novel and the result useful, yet it may only exhibit the expected skill of a mechanic and not the creative work of an inventor. *Calkins v. Oshkosh Carriage Co.*, 30 Fed. Rep. 296.

Examples of Above Doctrine.—Manufacture.—Where a textile fabric, having a certain substantial construction and possessing essential properties, has been long known and in use; a patent is void when all that distinguishes a new fabric is a higher finish, greater beauty of surface, the result perhaps of greater tightness of weaving, and due to the skill or observation of the workman or perfection of machinery employed. *Smith v. Nichols*, 21 Wall. (U. S.) 112. The improvement consisted in increasing the size and distance apart of the India rubber cords in a fabric was properly rejected, that not being considered an invention in the sense of the law. *Smith v. Nichols*, 6 Fisher Pat. Cas. 60.

Machine.—When a firm bed and an open joint for foot hold had been obtained before by using parallelopeds with rough surface in conjunction with a filling of sand, it required no invention to secure the entire result by selecting stones with rougher side surface and dispensing with artificial means for keeping the stones apart; the change was only of degree, only carrying forward the old idea and doing what had been done before in substantially the same way, but with better results. *Guidet v. City of Brooklyn*, 21 Pat. Office Gaz. 1692; s. c., 105 U. S. 550.

Process.—The substitution of dissolved bone for ground bone as a fertilizer not an invention, but mere carrying on of a thought to produce a better product.

acter of the device,¹ is not invention. But where the new idea engrafted upon an old invention is distinct from it and not a mere carrying forward of the idea contained in it, it is an invention.²

2. Result as Evidence of Invention—*a. Novelty and Utility of Result as Evidence of Invention.*—In determining whether a device is an invention or not, the result that has been produced by a change can be taken into consideration with it,³ and the novelty of a result or its superior utility is evidence of invention.⁴

Boykin v. Baker, 9 Fed. Rep. 699; s. c., 4 Hughes (U. S.) 82.

1. *Perry v. Co-operative F. Co.*, 12 Fed. Rep. 149.

Change Only in Degree.—Where the results are produced by mere mechanical skill or where the change is only in degree and not new, the improvement is not patentable. *Wood v. Packer*, 17 Fed. Rep. 650.

The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. It is never their object to grant a monopoly for every trifling device, every shadow or shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. *Atlantic Works v. Brady*, 107 U. S. 192.

Change Producing Better Result Sometimes Patentable.—An arrangement of mechanical operations that produces an old result in an easier or better manner is understood to be patentable. *Cochrane v. Deener*, 94 U. S. 789; *Telephone Cases*, 126 U. S. 1; s. c. (Dolbear v. Amer. Bell Tel. Co.), 42 Pat. Office Gaz. 271; *Hake v. Brown*, 47 Pat. Office Gaz. 1071.

The apparatus was a grate which will discharge a greater quantity of refuse at one revolution than a previous one and with which the poker would be of a more convenient shape. *Perry v. Co-operative Foundry Co.*, 12 Fed. Rep. 149.

2. *Heald v. Rice*, 104 U. S. 739; s. c., 21 Pat. Office Gaz. 1443.

Difference in the Use of the Word "Improvement."—An improvement may not be merely a new application of a prior invention, but it may be an article complete in itself and involve an invention. *Lindsay v. Stein*, 10 Fed. Rep. 907.

3. *Hall v. Wills*, 2 Blatchf. (U. S.) 194.

Reason.—Because the result, if greatly more beneficial than it was with the old

contrivance, reflects back, and tends to characterize in some degree the importance of the change. *Hall v. Wills*, 2 Blatchf. (U. S.) 194.

4. *Smith v. Goodyear*, 93 U. S. 486.

Example of Novelty Presuming Invention.—Where the result produced by an aggregation of parts is the transmission of signals to a car when in motion, which had never been produced before the combination was adopted, and some of the parts in the combination performed a new function, the whole combination produces a new result, and is an invention. *Western Electric Mfg. Co. v. Chicago Electric Mfg. Co.*, 14 Fed. Rep. 601.

The patentability of an alleged invention is, in many cases, most satisfactorily shown by its utility. *Penna. Salt Mfg. Co. v. Thomas*, 5 Fisher Pat. Cas. 148; s. c., 8 Phila. 144.

Increase in Product Presumes Invention.—Such a combination of known devices as to give a loom the capacity of weaving fifty yards of carpet a day, instead of forty, is patentable. *Loom Co. v. Higgins*, 105 U. S. 580.

Utility Evidence of Some New Principle.—Superior utility in the defendant's device (a wheel) is evidence that some new principle, or mechanical power, or new mode of operation, producing a new kind of result, has been. This utility, however, must be derived from the changes introduced, not from use of better material or greater care or skill in manufacture. *Many v. Sizer*, 1 Fisher Pat. Cas. 17.

New and Useful Result.—A new combination of known devices, producing a new and useful result (as that of greatly increasing the effectiveness of the machine), is evidence of invention, and may be the subject of letters patent. *Loom Co. v. Higgins*, 105 U. S. 580. In determining whether there was invention in any particular combination, the important point is to ascertain whether novelty and utility exist. *Hoe v. Cottrell*, 1 Fed. Rep. 597.

In the older cases, where both novelty and superior utility existed in the device, they were considered conclusive evidence of invention.¹ This ruling has been modified by the later cases,² and it is now held that a device must show invention as well as novelty and utility to be patentable.³

1. If a new or improved useful result is effected by means before well known, or any useful result is produced by a new mechanical device, or combination of old mechanical devices, in both cases the exercise of invention must be presumed, because both are proper subjects of a patent. *McMillin v. Barclay*, 5 Fisher Pat. Cas. 191; s. c., 4 Brews. (U. S.) 275.

Courts Not Exacting in Proving Invention in New or Useful Device.—"When a device produces or has a new mode of operation which accomplishes beneficial results, courts look with favor upon it, and are not exacting as to the degree of inventive skill which was required to produce it; there must be some, but a little will suffice." *Hoe v. Cottrell*, 5 Bann. & Ard. Pat. Cas. 257; s. c., 17 Blatchf. (U. S.) 546; s. c., 18 Pat. Office Gaz. 59.

Rearrangement of Combination, Producing New and Improved Results, Invention.—Where the arrangement of a patented combination, many of whose elements were in use before the patent was granted, has many advantages over the previous device and is an improvement thereon, *held*, a new combination. *Nat. Car Brake Shoe Co. v. Boston & Albany R. R. Co.*, 15 Fed. Rep. 46.

A change in an old device, which produces a new and useful result, is patentable. *Sewing Machine Co. v. Frame*, 24 Fed. Rep. 596.

Nothing has a greater tendency to prove that these changes involve some functional difference beyond mere mechanical perfection and adjustment than the greatly improved result attending the change. *Pearl v. Ocean Mills*, 11 Pat. Office Gaz. 2; 2 Bann. & Ard. Pat. Cas. 469; *Patterson v. Duff*, 20 Fed. Rep. 641.

Example.—The changes necessary to convert old time locks, that unlocked at predetermined times, into structures which should also lock at predetermined times, required the exercise of inventive power. *Yale Lock Mfg. Co. v. Norwich Nat. Bank*, 6 Fed. Rep. 377.

Slightness of Change Not Fatal.—When the change in construction and mode of operation is slight, but the con-

sequences of the change are considerable, as established by the affidavits of persons who have made actual tests of the devices in question, there is sufficient invention to support a patent. *In re John C. Walsh*, 1 Mc A. 530.

The Production of a Machine Better for Some Things Is Invention.—A new thing produced better for some purposes than had been produced before, although it appears easy of accomplishment when seen, is such success as is within the benefits of the patent law. *Davis v. Fredericks*, 19 Fed. Rep. 99.

Public Benefit Part of the Consideration.—Where the improvement and consequent public benefit is great, very little evidence of invention is required. *Asenus v. Alden*, 27 Fed. Rep. 684.

Attainment of Same Result in Better Manner.—A device which, while it may not effect any new result, does attain the same result in a better manner than was before known, and is therefore a valid subject for a patent. *Detroit Lubricator Co. v. Renchard*, 9 Fed. Rep. 293.

New Mode of Operation and Better Result, Invention.—Where a combination produces a new mode of operation, and a more efficient machine, and the conception involved thought and intellect, it implies invention. *Wisner v. Grant*, 7 Fed. Rep. 485.

If an article is rendered salable which was before unsalable, this is evidence of invention. *Sargent v. Yale Lock Mfg. Co.*, 17 Pat. Office Gaz. 106; s. c., 17 Blatchf. (U. S.) 249; s. c., 4 Bann. & Ard. Pat. Cas. 579.

2. This doctrine has lately been much restrained in its application. The utility of a device and the fact that it has superseded all others previously employed for like purposes, is proper to be considered and in some cases is almost if not quite decisive. It *does not of itself* establish the fact that it is the product of the inventive faculties. *Phillips v. Detroit*, 4 Bann. & Ard. Pat. Cas. 347.

3. Novelty and increased utility in an improvement does not necessarily make it an invention. *Hollister v. Benedict*, 113 U. S. 59.

b. General and Extensive Use of a Device as Evidence of Invention.—The extensive use of a device is evidence that it is the product of the inventive faculties,¹ especially where it is also generally accepted by the public,² was imitated by others³ in the trade, or drove out other prior inventions.⁴ It is, however,

Under the constitution a patent can only be granted for an *invention*, and under the statute the thing for which a patent may be granted must be not only new and useful, but must amount to an invention or discovery. *Spill v. Celluloid Mfg. Co.*, 21 Fed. Rep. 631; *May v. County of Fond du Lac*, 27 Fed. Rep. 691. Must also amount to an invention or discovery. *May v. County of Fond du Lac*, 27 Fed. Rep. 691.

Judicial Discussion of Change of Rule.—Formerly, when a change or device was new, and accomplished beneficial results, courts, in determining the question of its patentability, were not rigid in requiring evidence of inventive genius, but since the decision in *Hollister v. Benedict* (113 U. S. 54; see *supra*) more stress must be laid on the presence or absence of mechanical skill. *Celluloid Mfg. Co. v. Comstock & Cheney*, 27 Fed. Rep. 358.

Great Utility May Result from Mechanical Change.—Utility does not establish invention. Great utility may have some bearing on the question of invention, yet great utility may sometimes result from changes in mechanical devices which embrace no invention. *Sax v. Taylor Iron Works*, 30 Fed. Rep. 835.

Where the Merits Arose from Something Else than the Invention.—Where the merit of a machine consists in its being able to overcome a prejudice against machine-made goods and not in the invention of any radically new process for making goods by machinery, it is not properly patentable. *Butler v. Steckel*, 27 Fed. Rep. 219.

1. *Shedd v. Washburn*, 9 Fed. Rep. 904.

2. General acceptance and extensive use evidence of invention. *Washburn v. Haish*, 4 Fed. Rep. 900.

3. Over thirty devices, embodying substantially the device of the patentee, having entered the field since his patent went before the public, shows invention. *Shannon v. J. M. W. Jones Stationery and Printing Co.*, 9 Fed. Rep. 205; *Hancock Ins. Co. v. Jenks*, 21 Fed. Rep. 911.

Merits Quickly Appreciated.—Where

the merits of the invention were quickly appreciated by the public, and it was accepted and adopted by the trade and went into general use, it will be sustained. *Strobridge v. Lindsay*, 2 Fed. Rep. 692.

4. When an invention involves reflection and experiment to bring it to practical maturity, its evident utility, indicated by its prompt displacement of other devices and extensive use strongly attest its patentable merit. *Lorillard Co. v. McDowell*, 2 Bann. & Ard. Pat. Cas. 531.

The fact that as soon as a patented improvement was made and introduced its advantages over devices which had preceded it became manifest at once, and it commended itself to the public as a practical and desirable improvement, affords a safer criterion of inventive novelty than any subsequent opinion of an expert or intuition of a judge. *Palmer v. Johnson*, 34 Fed. Rep. 336.

May Always be Considered as an Element.—Whether the single fact that a device has gone into general use and displaced other devices previously employed for analogous uses establishes in all cases or not that the latter device involves patentable invention, it may always be considered as an element in the case, and, when the other facts leave it in doubt, is sufficient to turn the scale. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486; *Shipman Eng. Co. v. Rochester Tool Co.*, 44 Pat. Office Gaz. 1067; s. c., 34 Fed. Rep. 747.

This Evidence Is of Great Weight in a Doubtful Case.—In doubtful cases involving the validity of a patent, the fact that the article made by the use of the process described in the patent has been extensively sold, is a consideration of great weight with the court. *Watson Packing Co. v. Chicago Packing & Prov. Co.*, 9 Fed. Rep. 547.

Where an article is of great utility, has superseded older articles, and is largely recognized by the public and licensees as a useful invention, there is a strong presumption in favor of its patentability. *Lindsey v. Stein*, 10 Fed. Rep. 907; *Eclipse Windmill Co.*

not conclusive, though highly persuasive evidence, and will not *per se* sustain a patent.¹

c. Ineffectual Attempts by Former Experimenters.—Ineffectual attempts by previous experimenters to obtain the result desired are evidence that the inventor had more than mere mechanical difficulties to overcome.² Where the time during which the experiments lasted is long, the simplicity of the change is of little importance,³ and the evidence of invention may be conclusive.⁴ But where the inventor had, by a simple and obvious

v. May, 17 Fed. Rep. 344; *Pickering v. Miller*, 25 Pat. Office Gaz. 89.

1. **Not Conclusive but Highly Persuasive Evidence.**—The utility of a machine, instrument or contrivance as shown by the public demand for it, while not conclusive, is highly persuasive evidence of novelty and invention. *Hill v. Biddle*, 27 Fed. Rep. 560, but not enough *per se* to sustain a patent. *Wilson Packing Co. v. Chicago Packing Co.*, 7 Fed. Rep. 547; s. c., 21 Pat. Office Gaz. 411.

Although a device may be evidenced by public favor and extensive use to be an improvement on older devices, the question is whether it is a patentable improvement. *Consolidated Fruit Jar Co. v. Bellaire Stamping Co.*, 28 Fed. Rep. 91.

While the fact that a device, is useful and has superseded all others previously employed for like purposes is proper to be considered, and in some cases is almost if not quite decisive, it does not of itself establish the fact that it is the product of the inventive faculties. *Phillips v. Detroit*, 4 Bann. & Ard. Pat. Cas. 347; s. c., 17 Pat. Office Gaz. 191. The improvements were *prima facie* due to mechanical skill. *Held*, that the device had commended itself to public favor was no proof of invention. *Corbin etc. Co. v. Eagle Lock Co.*, 37 Fed. Rep. 338.

2. *Terry Clock Co. v. New Haven Clock Co.*, 17 Pat. Office Gaz. 909; s. c., 3 Bann. & Ard. Pat. Cas. 332.

3. A change, simple as it may be, was not made for twenty-five years after the device came into common use, and was useful; *held*, invention was to be inferred. *Collins Co. v. Coes*, 5 Bann. & Ard. Pat. Cas. 548; s. c., 3 Fed. Rep. 225.

4. When skill has been obviously reaching out for years and finally some one, by a new device of a new process which no one else had thought of accomplishes it, the fact is indication of

invention and may be conclusive. *Wilcox v. Bookwalter*, 31 Fed. Rep. 224 (see 230); s. c., 39 Pat. Office Gaz. 1200.

Where the attention of persons skilled in the art had been directed for many years to the discovery of a more convenient and effective contrivance and the patentee was the first to produce it; *held*, something more than mere mechanical skill was required to produce it. *Niles Tool Co. v. Betts Machine Co.*, 27 Fed. Rep. 301.

Where Device Also Went Into General Use.—Others having endeavored unsuccessfully to accomplish what the complainant achieved and also that the device of complainant was at once accepted by the public, the fact of success and acceptance by the public in a field where others had tried and failed is sufficient evidence that the device was both new and useful. *Ward v. Grand Detour Plow Co.*, 14 Fed. Rep. 696.

If an article be new and useful, the fact that no mechanic ever made it is sufficient proof that it required invention. *Dederick v. Cassell*, 20 Pat. Office Gaz. 1233; s. c., 9 Fed. Rep. 306. Where an old device or machine is taken in hand, and by changing its form or structure the defects are removed and a different and greatly improved result obtained, it may safely be affirmed it required invention. *Asmus v. Alden*, 27 Fed. Rep. 684.

It is urged that as the edge rolling of metals and spiral springs are well known in the arts before the date of the patent in question, the alleged invention described in it is without patentable merit. This is sufficiently answered by the fact that *Pickering* was the first to conceive the idea of constructing a spring of the peculiar form described in his patent whereby improved results were accomplished, and that the public has attested its superior utility and value by adopting it instead of other springs then in use. These facts imply the exercise of suffi-

modification of a former device, made a machine which would do something that had long been sought to be done by complex mechanism, there is no evidence of invention.¹

VI. AMOUNT OF INVENTION EMPLOYED IN CONTRIVING DEVICE UNIMPORTANT.—The validity of a patent is not to be determined by the amount of invention required to produce it,² provided it be something more than the "shadow or shade of an idea."³

cient inventiveness to sustain a patent. *Miller v. Pickering*, 40 Leg. Int. 187. s. c., 16 Fed. Rep. 540; s. c., 25 Pat. Office Gaz. 89.

"In the multiplicity of printing press mechanism had not been hit upon its utility was universally recognized. It being plain that, in order to make the combination, some changes were necessary, satisfies me that the result required changes which the mere skill of the skilled mechanic would not suggest." *Hoe v. Cottrell*, 53 Bann. & Ard. Pat. Cas. 256. Although paper bag machines were old and had been constructed by various persons, in various forms, with more or less utility, for more than twenty years, this particular device had not been hit upon. *Paper Bag Co. v. Murphy*, 13 Pat. Office Gaz. 366; *Union Paper Bag Co. v. Pultz & Walkley Co.*, 15 Pat. Office Gaz. 423; s. c., 15 Blatchf. (U. S.) 160; s. c., 3 Bann. & Ard. 403.

1. The problem before the inventor had been to make pretzels by machinery instead of by hand. Various dies had been made by which dough had been cut into different shapes. The inventor simply contrived a die which cut the dough into the shape of a pretzel. Prior to his time pretzel machines had been unsuccessfully endeavored to be made to draw out the dough and plate it as in hand made pretzels. The court held this was not invention, saying, "I cannot see that the mere fact that others were so long wandering by the wrong path is any evidence that it requires invention to accomplish what has been done by taking the direct path as pursued by these patentees." *Butler v. Steckel*, 27 Fed. Rep. 219; s. c., 36 Pat. Office Gaz. 455.

2. *Potter v. Holland*, 1 Fisher Pat. Cas. 382.

If any is required in the production of a device, the law will not attempt to measure its extent or degree. *Washburn & Wren Mfg. Co. v. Haish*, 4 Fed. Rep. 900.

Degree of Mental Labor and Inventive Skill—With regard to the degree

of mental labor and inventive skill required in the work of invention, the law has no nice or rigid standard. There must be some inventive skill exercised, but the degree of that skill is not material. It frequently happens that, in the progress of the mechanic arts, the time arrives when the whole atmosphere of inventive thought is quickened with the life of an approaching discovery; that many lines of investigation and experiment, converging for a long time towards a point, almost but not quite reaching it, when at last some mind, by a happy thought, supplies some new element or instrument and gives birth to the organized idea. *Clark Patent Co. v. Copeland*, 2 Fisher Pat. Cas. 221. A patented invention is a mental result. *Smith v. Nichols*, 6 Fisher Pat. Cas. 61. The validity of a patent does not depend upon the opinion formed after the event as to the ease with which the mind could form the idea embodied by the invention. *Colgate v. West. Union Tel. Co.*, 4 Bann. & Ard. Pat. Cas. 37; s. c., 15 Blatchf. (U. S.) 365; s. c., 14 Pat. Office Gaz. 37.

3. *Atlantic Works v. Brady*, 107 U. S. 192; *Perry v. Co-operative Foundry Co.*, 12 Fed. Rep. 149.

The subject matter, to be patentable, must require invention, but not necessarily painful or long study, or embodied alone in complex mechanism. A single flash of thought may reveal to the inventor the new idea, and a frail and simple contrivance may embody it. *Magic Ruffle Co. v. Douglas*, 2 Fisher Pat. Cas. 330. It is of no consequence how much or how little labor, study or thought the invention may cost, if it really be a new and useful invention. *Many v. Sizer*, 1 Fisher Pat. Cas. 17. It matters not how the thought (which is the basis of the invention) is acquired or brought into action, whether by sudden conjecture or chance experiment, or by the labors and investigations of a life, or that it proves preeminently serviceable and profitable to the industries and enjoyments of life,

The slightness of the labor or thought involved,¹ or the simplicity or frailty of the device employed,² are no reason that it should not be the product of the inventive faculties.

1. *Accidental Making of a Device; When Invention.*—That the invention was the result of accident does not invalidate the patent for it.³ But a device made accidentally without any knowledge how to accomplish it, or to duplicate it, is not invention.⁴

VII. DISTINCTION BETWEEN INVENTION AND UNPATENTABLE DISCOVERY—1. *Definition of Unpatentable Discovery.*—A discovery in its unpatentable sense is a bringing to light of things that existed before, but were not known before.⁵

2. *Subjects of Discovery.*—The subject of a discovery may be:

a. *When Principle of Nature, Force or Law Acting Upon Matter* is unpatentable. By "principle," in the patent law, is understood

or only to a very small degree. *Carr v. Rice*, 1 Fisher Pat. Cas. 108. A combination, if simple and obvious, yet entirely new, is an invention. 1 Robb. Pat. Cas. 490; s. c., 4 Mason (U. S.) 371.

1. *Stewart v. Mahoney*, 4 Bann. & Ard. Pat. Cas. 84; s. c., 5 Fed. Rep. 302.

Neither does the validity of a patent depend upon an opinion, formed after the event, respecting the ease or difficulty of the result. *Forbush v. Cook*, 2 Fisher Pat. Cas. 668.

2. *The simplicity* of an invention, so far from being an objection to it, may constitute its great excellence and value. Indeed, to produce a great result by simple means, before unknown or unthought of, is not unfrequently the peculiar characteristic of the very highest class of minds. *STORY, J., Ryan v. Goodwin*, 1 Robb Pat. Cas. 725; s. c., 3 Sumner (U. S.) 514.

3. *Accidental Making*—*English Authorities.*—May be the result of accident, dependent on no theory, but on a lucky experiment. *Liardel v. Johnson*, Webster's Pat. Cas. (Eng.) 54. And it is not essential that labor, thought or money should have been bestowed on the invention. *Crane v. Price*, Webster Pat. Cas. (Eng.) 411.

American Authorities.—An invention is not like a will, depending on intention. It is a fact, and if the fact exists, it does not appear material whether it came by design or accidentally, without being bidden. *Badische Anilin & Soda Fabrik v. Cochrane*, 16 Blatchf. (U. S.) 155. *Stephens v. Salisbury*, 1 Mc A. Pat. Cas. 379.

4. *Pelton v. Walters*, 7 Pat. Office

Gaz. 425; s. c., 1 Bann. & Ard. Pat. Cas. 599.

A simple successful use of a cutter intended to cut leather, but having the same construction of a subsequently patented glass cutter to cut glass, is not invention of a glass cutter. *Monce v. Adams*, 1 Bann. & Ard. Pat. Cas. 126. (See p. 133); s. c., 12 Blatchf. (U. S.) 1; s. c., 7 Pat. Office Gaz. 177.

A man had made a close joint, impervious to steam, upon the neck of a glass globe. He afterwards tried to make another, but broke many bottles in his attempt, and did not succeed, except partially, in a single instance. *Held*, that he had not made an invention. *Pelton v. Walters*, 1 Bann. & Ard. Pat. Cas. 603; s. c., 7 Pat. Office Gaz. 425.

5. *Ex parte Kemper*, Cranch Pat. Dec. 89; s. c., Pat. Office Rep. for 1847, vol. 2, 797. *Morton v. N. Y. Eye and Ear Infirmary*, 1 Fisher Pat. Cas. 320.

In this case the court said: "The real discovery was that this well known inhalation of known agents [ether] (in increased quantities) would produce insensibility to pain. . . . The effect alone was new, and to that only can the term "discovery" apply. . . . This mere discovery, however novel and important, is not patentable." *Morton v. N. Y. Eye and Ear Infirmary*, 1 Fisher Pat. Cas. 320.

Example of "Discovery."—A party cannot obtain a patent for a plan of packing ice by putting the blocks on edge, although he was the first to discover the beneficial effects of that mode, for it was a mere discovery of a new effect of that which existed before. *Ex*

a fundamental truth (in science), an original cause or motive.¹ Such a principle or force, or their synonymous terms, cannot by themselves be patented.²

b. How Far Principle May Become Patentable.—The embodiment of a principle or a force³ in a machine⁴ or a process⁵ is an invention, and the patent is not void, even if this embodiment

paris Kemper, Cranch Pat. Dec. 89; s. c., Pat. Office Rep. for 1847, vol. 2, 797.

1. *Le Roy v. Tatham*, 14 How. (U. S.) 156.

The words "power," law of nature, etc., seem generally used in their regular meaning.

Principle is defined as "mode of operation" in *Burr v. Duryee*, 1 Wall. (U. S.) 531.

2. *Le Roy v. Tatham*, 14 How. (U. S.) 156; *Evans v. Eaton*, 1 Peters (C. C.) 322; *Morton v. N. Y. Eye and Ear Infirmary*, 1 Fisher Pat. Cas. 320; *O'Reilly v. Morse*, 15 How. (U. S.) 62; *Hatch v. Moffitt*, 15 Fed. Rep. 252; *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 17 Fed. Rep. 531.

Examples of "forces," "steam power," "electricity," *Leroy v. Tatham*, 14 How. (U. S.) 156.

A new power of nature would not be patentable. *Le Roy v. Tatham*, 14 How. (U. S.) 156.

Idea Unpatentable.—*Wicke v. Ostrum*, 103 U. S. 461; *Burr v. Duryee*, 1 Wall. (U. S.) 531; *Case v. Brown*, 2 Wall. (U. S.) 531.

3. The distinction between a patent for a principle and a patent which can be supported is, that there must be an embodiment of the principle in some practical mode described in the specification for carrying it into actual effect; and then a patent may be taken out, not for the principle, but for the mode of carrying the principle into effect. *Le Roy v. Tatham*, 22 How. (U. S.) 132; *Wintermute v. Reddington*, Fisher Pat. Cas. 239. The idea he could not patent, but the contrivance to make it practically useful he could. *Wicke v. Ostrum*, 103 U. S. 461; *Case v. Brown*, 2 Wall. (U. S.) 531.

Explanation of Above Doctrine.—He then controls his discovery through the means by which he has brought it into practical action, or their equivalents, and only through them. It is then an *invention*, although it embraces a discovery. Sever the force or principle discovered from the means or mechanism, and it immediately falls out of that domain and eludes his grasp. Every

invention may, in a certain sense, embrace more or less of discovery . . .

but it by no means follows that every discovery is an invention. It may be the soul of an invention, but it cannot be the subject of exclusive control of the patentee or the patent law, until it inhabits a body, no more than can a disembodied spirit be subjected to the control of human laws. *Morton v. N. Y. Eye Infirmary*, 2 Fisher Pat. Cas. 320; s. c., *Blatchf.* (U. S.) 116; *Tyler v. Devlin*, 1 A. L. J. 248.

4. Patentee restricted to particular device, by which he has undertaken to avail himself of that principle. *Steam Gauge and Lantern Co. v. St. Louis R. R. Supplies & Manufacturing Co.*, 25 Fed. Rep. 491; *Stainthorp v. Elkinton*, 1 Fisher Pat. Cas. 349.

"A machine is a concrete thing, consisting of parts, or of certain devices or combination of devices. The principle of a machine is properly defined to be its 'mode of operation,' or that peculiar combination of devices which distinguishes it from other machines." *Burr v. Duryee*, 1 Wall. (U. S.) 531.

5. In all such cases, application of principle; the processes used to extract, modify and concentrate natural agencies constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects. *Le Roy v. Tatham*, 14 How. (U. S.) 156; *O'Reilly v. Morse*, 15 How. (U. S.) 62.

There can be no patent for a mere principle, nor can the discoverer of a *natural force* or a scientific fact obtain a patent therefor; but if he invents a process by which a certain effect of one of the *forces of nature* is made useful to mankind, and fully describes and claims that process, and describes a mode or apparatus by which it may be usefully applied, he is entitled to a patent for the process, and is not restricted to the particular *form of mechanism* or apparatus employed. *American Bell Tel. Co. v. Dolbear*, 15 Fed. Rep. 448.

Invention Good Although Principle Discovered.—Doubtless an invention

is the only means by which the principle or force can be used.¹

may be good though the subject of it consists in the discovery of some principle of science or property of matter never before known or used, by which some new and useful result is obtained, and such invention or discovery may be the subject of a valid patent without including in the claim any new arrangement of machinery to accomplish the object, provided the inventor describes, as required by the patent law, the method, process or means of applying the invention to practical use and of obtaining the described new and useful result. *Household Co. v. Neilson*, 1 Webster's Pat. Cas. (Eng.) 683.

Discovery of Application of Property of Nature.—Where a party has discovered a new application of some property in nature, never before known or in use, by which he has produced a new and useful result, the discovery is the subject of the patent, independently of any peculiar or new arrangement of machinery, for the purpose of applying the new property in nature. *Silby v. Foote*, 2 Blatchf. (U. S.) 260.

Distinction Between Claim for Process and Principle of Nature.—The patent of Neilson for a hot blast smelting furnace, the claim is thus explained and commented on, explaining the previous comments by American courts: "But upon full consideration we think the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered as if, the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention consists in this, by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which was before of cold air, in a heated state to the furnace. Webster's Rep. [Eng.] 371."

In this passage we think the court of exchequer drew the true distinction between a mere principle as the subject of his patent and a process by which a principle is applied to effect a useful result. That a hot blast is better than a cold blast for smelting iron in a furnace was the principle or scientific

fact discovered by Neilson. And yet being nothing but a principle he could not have a patent for that. But having invented and practically exemplified a process for utilizing this principle, namely, that of heating the blast in a receptacle between the blowing apparatus and the furnace—he was entitled to a patent for that process. *Tilghman v. Procter*, 102 U. S. 707.

Latest Cases Distinguishing Invention and Principle.—In this art, or what is the same thing under the patent law, this process, this way of transmitting speech electricity, one of the forces of nature, is employed; but electricity left to itself will not do what is wanted. The art consists in so controlling the force as to make it accomplish the purpose. It had long been believed that if the vibrations of air caused by the voice in speaking could be reproduced at a distance by means of electricity the speech itself would be reproduced and understood. How to do it was the question. Bell discovered that it could be done by gradually changing the intensity of a continuous electric current so as to make it correspond exactly to the changes in the density of the air caused by the sound of the voice. This was his art. *Dolbear v. American Bell Telephone Co.*, 126 U. S. 1 (Telephone Cases); s. c., 43 Pat. Office Gaz. 377.

Latest Constructions of O'Reilly v. Morse, 15 How. (U. S.) 62.—The eighth claim of Morse's patent has been held to be invalid because it was regarded by the court as being not for a process but for a mere principle. It amounted to this, namely, a claim to the exclusive right to the use of electro magnetism as a motive power for making intelligible marks at a distance—that is, a claim of the exclusive use of one of the powers of nature for a particular purpose. It is not a claim of any particular machinery, nor a claim of any particular process for utilizing the power but a claim of the power itself; a claim put forward on the ground that the patentee was the first to discover that it could be thus employed. *Tilghman v. Procter*, 102 U. S. 707.

1. It may be that electricity cannot be used at all for the transmission of speech, except in the way Bell has discovered. But that does not make his claim, one for the use of electricity, distinct from the particular process

c. Effect or Result.—An effect or result is not patentable; the invention consists in the means by which the result is produced.¹

VIII. JOINT INVENTION—1. **Definition.**—A joint invention takes place where each party invents or discovers something essential to the whole,² or where the completed invention is the gradual result of the combined mental operations of two persons;³ but

with which it is connected in this patent. Telephone Cas. 126 U. S. 1; s. c. (Dolbear v. American Bell Telephone Co.), 43 Pat. Office Gaz. 377.

1. Leroy v. Tatham, 14 How. (U. S.) 156; Sangster v. Miller, 2 Fish. Pat. Cas. (C. C.) 563; Carr v. Rice, 1 Fisher Pat. Cas. (C. C.) 325; Burr v. Durgee, 1 Wall. (U. S.) 531.

A person cannot patent a *result*, but only the means or art by which the result may be effected. New Process Fer. Co. v. Mans, 20 Fed. Rep. 725.

It is not purpose or results that are the subjects of a patent, but the instrumentality, contrivance or machinery through the agency of which results are effected. *Ex parte* Merrill, 1 McArthur (Sup. Ct. D. C.) 301.

A new effect produced by old agents operating by old means upon old subjects, however novel and important, is not patentable. It is nothing more than the application of a well known agent, by well known means, to a new and more perfect use. Morton v. N. Y. Eye Infirmary, 2 Fisher Pat. Cas. (C. C.) 320; s. c., 5 Blatchf. (U. S.) 116.

Distinction Between Decision on Eighth and Other Claims.—In *O'Reilly v. Morse*, 15 How. (U. S.) 62, it was decided that a claim in broad terms (p. 86) for the use of the motive power of the electric or galvanic current, called "electro magnetism, however developed for making or printing intelligible characters, letters, signs at any distances," although "a new application of that power" first made by Morse, was void, because (p. 120) it was a claim for "a patent for an effect produced by the use of electro magnetism distinct from the process or machinery necessary to produce it," but a claim (p. 85) for "making use of the motive power of magnetism when developed by the action of such currents or current, substantially as set forth in the foregoing description . . . as means of operating or giving motion to machinery, which may be used to imprint signals on paper or other suitable material, or to produce sounds in any desired manner, for the purpose of

telegraphic communication at any distance," was sustained. The effect of that decision was, therefore, that the use of magnetism as a motive power, without regard to the particular process with which it was connected in the patent, could not be claimed, but its use in that connection could.

In the present case the claim is not for the use of a current of electricity in its natural state, as it comes from the battery, but for putting a continuous current in a closed circuit into a certain specified condition, suited to the transmission of vocal and other sounds, and using it in that condition for that purpose, hence parallel with second quoted clause. Dolbear v. Bell Telephone Co., 126, U. S.; s. c., 43 Pat. Office Gaz. 377.

The plaintiff cannot claim the double dropping of corn,—that is a result or an effect; he can only claim the double dropping by the particular mode which he has devised, and "*the so combining*" of two sides, one of which is at or near the reed hopper, etc., with a lever *as that*" a certain result will be obtained, is a claim for a principle or result. Case v. Brown, 2 Wall. (U. S.) 320.

But a claim for a combination of devices, when "so arranged as to produce a specified mechanical result," is not a claim for a function. Renwick v. Pond, 2 Pat. Office Gazette, 392; s. c., 10 Blatchf. (U. S.) 39.

Arrangement of Machinery Intended to Secure Operation of Principle.—The arrangement of machinery is designed to secure the operation of laws whose operation is certain to follow such arrangements of it, and those laws are the laws operative, and it is because those known laws are certain to follow such an arrangement that the arrangement is made. The arrangement is none the less an invention because it brings into operation the laws of nature. Hammerschlag v. Scamoni, 7 Fed. Rep. 584.

2. Slemmer's Appeal, 58 Pa. St. 155.

3. Barrett v. Hall, 1 Mason (U. S.)

where one person invents one part of a device and another another, each is a separate inventor of his own contrivance, and not a joint inventor of the whole machine.¹

2. Suggestion; When Suggestor Is an Inventor.—Where an idea is suggested by one and is carried out by another, the two are joint inventors;² but the mere suggestion of ideas which are developed by another does not give any right to the invention,³ and

447; *Stearns v. Barrett*, 1 *Mason* (U. S.) 153. Neither of them could justly claim to be the sole inventor; the invention is joint, and they are jointly entitled to a patent. *Barrett v. Hall*, 1 *Mason* (C. C.) 447; *Stearns v. Barrett*, 1 *Mason* (C. C.) 153.

Extreme Case of Joint Invention.—A man had made a model of a device which he was satisfied would be useful; he then communicated with another party, who suggested certain improvements, and assisted him in contriving them; *held*, joint invention. *Warden v. Fisher*, 11 *Fed. Rep.* 505; *s. c.*, 21 *Pat. Office Gaz.* 1957.

1. *Worden v. Fisher*, 21 *Pat. Office Gaz.* 1957; *s. c.*, 11 *Fed. Rep.* 505.

If the joint invention is the final one of a series of complete separate inventions, made by one inventor alone before he was joined by his associate inventor, they are joint inventors only to the last invention. *Mfg. Co. v. Corbin*, 103 U. S. 786; *s. c.*, 20 *Pat. Office Gaz.* 297.

2. Suggestion to Patentee When Making a Joint Invention.—*Worden v. Fisher*, 21 *Pat. Office Gaz.* 1957; *s. c.*, 11 *Fed. Rep.* 505. If one suggests an idea in a general way and the other falls in with it and by his aid develops it and makes it a practical device. *Gottfried v. P. Best Brewing Co.*, 17 *Pat. Office Gaz.* 675; *s. c.*, 5 *Bann. & Ard. Pat. Cas.* 4. If one conceives the entire invention and another makes a suggestion of practical value which the first one failed to think of but which is needed to make the conception a success. *Consolidated Bunting Co. v. Woerle*, 38 *Pat. Office Gaz.* 1015; *s. c.*, 29 *Fed. Rep.* 449.

Where an idea is suggested by one and utilized by another *semble*, a joint patent should be taken out. *Thomas v. Weeks*, 2 *Paine* (U. S.) 92.

3. *Blandy v. Griffith*, 3 *Fisher Pat. Cas.* 609. "Is no more the inventor than the tools with which he wrought."

Employer and Employee.—If an employer conceives the result embraced in an invention, or the general idea of a machine upon a particular principle,

and then, to carry his conception into effect, it is necessary to employ manual dexterity or even inventive skill in mechanical details and arrangements requisite for carrying out the original conception, in such cases the employer will be the inventor and the servant the mere instrument through which he realizes his ideas. *King v. Gedney*, 1 *Mc. A. Pat. Cas.* 443; *Wellman v. Blood*, 1 *Mc. A. Pat. Cas.* 432.

The inventor is he whose "inventive suggestiveness" produced the invention, not the mechanic whose only function was to materialize it. *Yorder v. Mills*, 25 *Fed. Rep.* 821.

Employee's Suggestions Belong to the Main Inventor.—Where a person has discovered an improved principle in a machine, manufacture or composition of matter, and employs other persons to assist him in carrying out the principle, and they in course of that employment make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original improved principle and may be embodied in his patent as part of his invention. *Agawam Co. v. Jordan*, 7 *Wall* (U. S.) 583.

Roberts v. Dickey, 4 *Brewster* (U. S.) 260.

Suggestions Which Give No Right to Invention and Do Not Invalidate a Patent.—Suggestions by another person which do not amount to patentable inventions or improvements. *Pennock v. Dialogue*, 4 *Wash. (C. C.)* 538. Suggestions by others as to mere alteration of form or proportions. *Watson v. Bladen*, 4 *Wash. (C. C.)* 580. Suggestions made to the inventor while experimenting upon and during the progress of the development and testing his invention. *Spaulding v. Tucker*, 1 *Dead. (U. S.)* 649. Suggestions as to the possibility of making the improvement subsequently patented. *Bell v. Daniels*, 1 *Bond (U. S.)* 212. A mere suggestion that a given result may be obtained. *Graham v. Gammon*, 7 *Biss.*

even important suggestions give no right against an inventor who was the first to combine and arrange his device into a complete and efficient invention.¹

Suggestions, to give entire right of the invention to the suggestor, must convey such information as would enable an ordinary mechanic, without the exercise of special skill, to construct the complete device.²

3. Right of Mechanic Who Constructs Machine to be Considered as Inventor.—If the conception of the invention be practically complete in the mind of the inventor, the artisan who embodies it in a device is not an inventor.³

(U. S.) 490. Or suggestions about the way an improvement may be carried out. *Judson v. Moore*, 1 Bond (U. S.) 285. A mere hint as to how the patented improvement might be made. *Alden v. Dewey*, 1 Story (U. S.) 336.

Suggestions from Scientists.—Neither the enquiries that may have been made, nor the information or advice that may have been received from men of science in the course of the patentee's researches can impair his right to the character of an inventor. It can make no difference whether he derived his information from books or from conversations with men skilled in the sciences. *O'Reilly v. Morse*, 15 How. (U. S.) 62.

Conversations About Invention.—Mere conversations about the practicability of an improvement will not defeat a patent. *Judson v. Moore*, 1 Bond (U. S.) 285.

Suggestion from Efforts of Previous Experiments.—The prior efforts of unsuccessful experiments, though they may have suggested the construction of the patent he finally adopted, will not invalidate a patent. *Whittlesey v. Ames*, 9 Biss. (U. S.) 225.

1. Although the idea of the invention and hints concerning it came to the patentee from others, still, if he was the first who gave that idea a useful and practical form his rights will not be defeated. *Teese v. Phillips*, 1 Mc. Al. (S. Ct. D. C.) 48; *Bell v. Daniels*, 1 Fisher Pat. Cas. 372; *Mathews v. Skates*, 1 Fisher Pat. Cas. 602.

Inventor He Who First Gave Practical Form.—Not the man who may form an imperfect machine which may suggest to a higher and more practical mind valuable ideas, but he who embodies those ideas in a practicable form, is the inventor. *Pitts v. Edmonds*, 1 Biss. (U. S.) 168.

2. *Agawam Co. v. Jordan*, 7 Wall.

(U. S.) 583; *Slemmer's Appeal*, 58 Pa. St. 155; *Watson v. Belfield*, 35 Pat. Office Gaz. 1112; s. c., 26 Fed. Rep. 536.

Where the employer has conceived the plan, the employee's suggestions must amount to a complete invention, containing the substance of all that is embodied in the patent subsequently issued to the employer, to render the patent void. *Agawam Co. v. Jordan*, 7 Wall. (U. S.) 583; *Collar Co. v. Van Dusen*, 23 Wall. (U. S.) 530. But if the whole or any of the essential parts or principles of a machine are invented by another, and introduced into the machine upon his suggestion, the whole patent is void. *Watson v. Bladen*, 4 Wash. (C. C.) 580; *Pitts v. Hall*, 2 Blatchf. (U. S.) 229.

What Suggestions Render a Patent Void.—A patent for an invention communicated to the patentee by another person is void. *Alden v. Dewey*, 1 Story (U. S.) 336.

Information to a patentee sufficient to enable him to construct his improvement. *Judson v. Moore*, 1 Bond (C. C.) 285; *Pitts v. Hall*, 2 Blatchf. (U. S.) 229.

Making a Device at Instance of Another.—Paper maker who devises a paper possessing certain qualities, at the instance of one who merely requested that such a paper be made for him, can be considered at most only as a joint inventor with him. *Union Paper Collar Co. v. Van Deusen*, 10 Blatchf. (U. S.) 109.

Reducing to Practice the Theory of Another.—A man who reduces to practice the theory of another, who assists in the reduction of it to practice, cannot be considered as the sole inventor of the machine. *Arnold v. Bishop*, 1 McA. Pat. Cas. 30.

3. See *infra*, this article, JOINT INVENTION.

INVENTORY—INVESTIGATE—INVESTITURE.

INVENTORY—(See EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; INSOLVENCY; SCHEDULES).—An inventory is a list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and, in some cases, the land and tenements, of a person or persons.¹

INVESTIGATE—INVESTIGATION.—To make search or enquiry for truth or facts.²

INVESTITURE.—Delivery of seisin.³

1. 1 Bouv. L. Dict. 837; 1 Abb. L. Dict. 643. The inventory is to be made in the presence of at least two of the creditors of the deceased or legatees, or next of kin, and in their default and absence, of two honest persons. The appraiser must sign it and make oath or affirmation that the appraisement is just to the best of their knowledge. 1 Bouv. L. Dict. 837. See generally Ayl. Pan. 414; Bac. Abr., Executors, etc. (E. 11); Ayl. Par. 305; 14 Vin. Abr. 465; Com. Dig., Administration (B. 7); 3 Burr. 1922; 2 Bla. Com. 514; Love Wills, 38; 2 Ecccl. 322; Wms. Ex., Index; 8 S. & R. 128.

Assignment.—Where the assignor, in a general assignment for the benefit of creditors, has made and filed a correct inventory of his assets and list of creditors as required by the statute, the assignment is not invalidated by the mere fact that the assignee has failed to affix his certificate thereto within ten days after the execution of the assignment (see 1697, R. S.); the provision as to such certificate not requiring it, in terms, to be affixed before the filing of the list and inventory, and being merely *directory*. Steinlein v. Halstead, 52 Wis. 289. See also Swart v. Thomas, 26 Minn. 141; Farwell v. Gundry, 52 Wis. 268; Haben v. Harshaw, 59 Wis. 403.

Attachment.—In a proceeding under the act of 1805, the omission of the sheriff to sign the inventory and appraisement was *held* to be a mere irregularity, not affecting the validity of the proceeding. Mitchell v. Eyster, 7 Ohio, 1 pt. 257.

Insolvency.—The inventory of an insolvent's estate should be made as full and complete as possible; but in the enumeration of his losses and debts there is no special reason for much exactness or detail. Wilson v. His Creditors, 32 Cal. 406.

2. "Much stress is laid by appellant

on the fact that it does not appear in so many words, that the commissioners of public works did, in fact, investigate whether there was any real estate which would be specially benefited to the extent of the assessment, over and above the city at large." This was unnecessary if there was a substantial compliance with the requirement to make such investigation, nor was it necessary to go upon the ground to make the investigation. "Full investigation of a subject, be it moral, political or philosophical, can generally be better pursued in the closet than in the open air, in crowded streets. Eminent lexicographers define investigation to be, the action or process of searching minutely for truth, facts or principles; a careful enquiry to find out what is unknown, either in the physical or moral world, and either by observation or experiment, or by argument and discussion." Wright v. Chicago, 48 Ill. 285.

A legislative investigation is within the meaning of that term as used in an act compelling persons concerned in bribery "to attend and testify upon any trial, hearing, proceeding, or investigation in the same manner as any other person;" and providing that "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying." The term is not confined to investigations in the course of criminal prosecution. People v. Sharp, 107 N. Y. 427; s. c., 37 Abb. L. J. 69, overruling, s. c., 5 N. Y. Cr. Rep. 388.

3. Whar. Law Lex.; and see 2 Bl. Com. 209.

"**Vestimento** is seisin, investure (whence the Saxon term, vest), a metaphor, the feudists, took from clothing; by which they meant to intimate 'that the naked possession was clothed with solemnities of the feudal tenure.'" LORD MANSFIELD in Taylor v. Atkyns, 1 Burr. 109.

INVESTMENT—(See CHARITY AND TRUSTS FOR CHARITABLE USES; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; PERPETUITIES; TAXATION; TRUSTS; TRUSTEES; WILLS).

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DEFINITION.—Investment, with reference to money, is the loaning or placing of it to produce interest or profit. With respect to trust funds, it is the loaning or placing of them by the trustee to produce interest or profit for the benefit of the *cestui que trust*.¹

I. INVESTMENT OF TRUST FUNDS AT COMMON LAW—1. **What Is Required of the Trustee Personally**—(1) *Good Faith and Diligence*.—The rule is universal that the trustee, in the investment of trust funds, must act in good faith, use sound discretion and reasonable vigilance, and select such securities as the court will approve. He must do as a good business man would do in putting out his own money for the purpose of producing income without greatly risking its safety, yet confine himself to such investments as the law of his State and the rule of court favor. However the rule as to the security may vary in the several States, may have been modified in them and in England by statute, or may be controlled by trust instruments, it remains everywhere the same with respect to the required honesty, diligence and intelligence of the trustee, his keeping within the line of duty, and his selection of such securities as the law allows. This rule has been broadly stated not only in the States of *Pennsylvania*, *New York* and *New Jersey*, where the strictness of the English law with respect to securities has prevailed, but in other States, and in *England*.²

1. **Invest.**—To lay out money or capital in some permanent form so as to produce an income." *Abbott's Law Dict.*

"A sum is 'invested' whenever its amount is represented by anything but money." *The Parker Mills v. Commrs.* etc., 23 N. Y. 242.

Cases showing the meaning of "investment": *People v. Utica*, 15 Johns. (N. Y.) 358, 384; *Scott v. Depeyster*, 1

Edw. Ch. (N. Y.) 513; *N. Y. Fire Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678; *Shoemaker v. Smith*, 37 Ind. 122; *Duncan v. Maryland Sav. Inst.*, 10 Gill & J. (Md.) 299.

2. **Diligence, Good Faith, etc.**—"The measure of diligence and care required of a trustee is precisely that which a man of ordinary prudence would practice in the care of his own estate. This rule has been so often laid down in our

(2) *Sound Discretion*.—The good motives of a trustee will not shield him from blame and loss if he does not observe the other requirements mentioned. He may neglect his duty without any dishonest design; he may trust injudiciously to improper agents; he may unnecessarily delay in investing; he may fail to call in the fund when he should do so; he may omit to sell at the proper time. While strongly laying down the rule that good faith and reasonable diligence, etc., are always required, the English courts of chancery have repeatedly held that trustees cannot exonerate themselves for neglect of duty on the plea that they acted with good motives; and this is the general rule.¹

2. *Personal Securities Not Favored*.—(1) *Notes, Bonds, etc., Insufficient*.—At common law there seems to be no settled rule as to the securities to be selected, further than that the safest rather than the most productive must be chosen. What is the most safe and therefore the right security is left to the determination of the chancery courts when they have no statutory or instrumental direction, but are governed by equity in their administration of the common law. Personal securities are not favored, since they are not safe. Though a good business man sometimes risks his own money in consideration of high interest or large possible profits on such inadequate surety, the trustee, acting as he does in a fiduciary capacity, cannot imperil the funds of the *cestui que trust* for such purpose, nor excuse himself for loss on the plea that he did as a discreet business man might have done with his own money. The English courts have strongly con-

books that it seems unnecessary to refer to authorities on that point. A reasonable degree of vigilance and the exercise of good faith is the standard of the trustee's duty." *Fahnestock's Appeal*, 104 Pa. St. 46.

"The just and true rule is that the trustee is bound to employ such diligence and such prudence in the care and management as, in general, prudent men of discretion and intelligence in such matters employ in their own like affairs." *Mills v. Hoffman*, 26 Hun (N. Y.) 594.

Courts will be slow to hold a trustee guilty of a breach of trust, so long as he acts in good faith. Investing, after the fund had become payable, was excused. *Perrine v. Vreeland*, 33 N. J. Eq. 102.

In *Massachusetts*, it is well settled that nothing more can be required of a trustee than good faith, sound discretion, ordinary business prudence and intelligence, and regard for income and the safety of the investment. *Bowker v. Pierce*, 130 Mass. 262.

So in *New Hampshire*. *French v. Currier*, 47 N. H. 88, 99.

So in *Vermont*. *Barney v. Parsons*, 54 Vt. 623.

Good faith, reasonable diligence and strictly keeping within the line of duty, are required of trustees; and, if not observed, they are held responsible for losses. *Clough v. Bond*, 3 Mylne & Craig (Eng.) 490.

But the security must be such as the court will approve, or the trustee will be held liable for losses, notwithstanding his good faith. *Hansom v. Allen*, 2 Dick. (Eng.) 498; *Peat v. Crane*, 2 Dick. (Eng.) 498 n.

Where a trustee "acts in such a manner as a prudent man would act in relation to his own property, he is entitled to the protection of the court." Otherwise he is personally responsible for the consequences. *Harrison v. Mock*, 10 Ala. 185, 193.

1. *English Authorities*.—"It will be found to be the result of all the best authorities on this subject, that although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund, in which any

demned the risking of trust funds on such security.¹ Trustees cannot loan on a mere promissory note, though there be several endorsers or obligors.² Nor can an executor do so, though the testator may have set him the example.³ The fact that a trustee has shown his personal confidence in a personal security by risking his own private funds thereon is no justification for his investment of trust funds in the same way.⁴ If his object is merely to accommodate the borrower, it has been held that the loan cannot be legalized afterwards by the *cestui que trust* himself;⁵ for the act of loaning trust funds on an unsecured note is a breach of trust, not only in *England*, but it has been so held in this country.⁶

(2) *All Personal Securities Disfavored.*—The courts of *England* have so often reprobated personal securities for trust funds that they may be said to have established the rule that such funds cannot be loaned on such securities.⁷ And though this rule has

part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative, in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss is thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to result from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it afterwards be lost without any fault of his, he is liable." *Clough v. Bond*, 3 Mylne & Craig 495.

See *Oliver v. Court*, 8 Price 127; *Lawson v. Copeland*, 2 Bro. C. C. (Eng.) 156; *Phillips v. Phillips*, Freeman C. C. (Eng.) 11; *Powell v. Evans*, 5 Ves. 839; *Bacon v. Bacon*, 5 Ves. 331; *Hanbury v. Kirkland*, 3 Simons 265; *Underwood v. Stevens*, 1 Merivale 712; *King v. King*, 3 Johns. (N. Y.) 552; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *Thompson v. Brown*, 4 Johns. (N. Y.) 619.

1. "No rule is better established than that a trustee cannot lend on mere personal security, and it ought to be rung in the ears of everyone who acts in the character of trustee." *Holmes v. Dring*, 2 Cox 1.

"The court will always discourage lending trust moneys on private security, though large interest may be

given." *Adye v. Feuilliteau*, 1 Cox 24; 3 Swanst. 84.

"A promissory note is evidence of debt, but no security for it." *Walker v. Symonds*, 3 Swanst. 81, note a.

"Lending on personal credit, for the purpose of a larger interest, is a species of gambling." *Adye v. Feuilliteau*, 1 Cox 25.

2. There may be several obligors, but that will not render their promise to pay any better compliance with the rule that inhibits personal security for trust funds, and holds the trustee responsible for loss. *Clark v. Garfield*, 8 Allen (Mass.) 427.

3. The fact that a testator has trusted a certain person on his individual promise, does not justify the executor in doing so. *Styles v. Guy*, 1 Mac. & G. 423.

4. *Bond.*—The fact that a trustee was accustomed to loan his private money on bond, was held no justification for loaning trust funds on such security. *Adye v. Feuilliteau*, 3 Swanst. (Eng.) 84; s. c., 1 Cox 24; *Holmes v. Dring*, 2 Cox 1.

5. It has been held that when a trustee has loaned on personal security and with the object of favoring the borrower, his illegal act cannot be subsequently ratified by the *cestui que trust* so as to legalize it. *Bateman v. Davis*, 3 Mad. (Eng.) 98.

6. It is a breach of trust to loan trust funds on a promissory note not secured. *Johnston v. Maples*, 49 Ill. 101. Compare *Pope v. Matthews*, 18 S. Car. 444. Or to loan to a co-trustee. *Gleadow v. Atkin*, 2 Cr. & J. (Eng.) 548.

7. *Personal Securities.*—It is well est-

not been stringently followed in all of the United States, it has been repeatedly asserted in *New York, Pennsylvania* and other States.¹

(3) *Private Corporation Stock*.—The courts of *England*, acting under the common law without statutory direction or specification in the trust instrument, have condemned the investment of trust funds in bank stock or the stock or shares of any private corporation. They deem such investments too precarious, too much subject to the fluctuations of trade and the money market, and too much dependent upon the action of boards of directors, to afford any adequate and certain security. No exception is made in favor of any such stock, though it may be considered good by discreet business men who invest their own funds therein and thus evince their confidence.²

But in some of our States the courts have acted upon a different rule, and held that investment of trust funds in the stocks of private corporations may be properly ordered by them in the absence of statutory prohibition.³ While it has been so held in

established that trustees cannot invest in personal securities; and this may be considered a rule of English law. *Pocock v. Reddington*, 5 Ves. 799; *Powell v. Evans*, 5 Ves. 841; *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Collis v. Collis*, 2 Sim. 365; *Walker v. Symonds*, 3 Swanst. 62; *Darke v. Martyn*, 1 Beav. 525; *Anonymous*, Lofft 492; *Watts v. Girdleson*, 6 Beav. 188; *Terry v. Terry*, Pr. Ch. 273; *Keble v. Thompson*, 3 Bro. Ch. 112; *Graves v. Strahan*, 8 De G. M. & G. 291; *Adye v. Feuillateau*, 1 Cox 24; s. c., 3 Swanst. 84; *Wilkes v. Steward*, G. Coop. 6; *Holmes v. Dring*, 2 Cox 1; *Fowler v. Reynal*, 3 Mac. & G. 500; *Vigras v. Binfield*, 3 Mad. 62; *Clough v. Bond*, 3 M. & Cr. 496; *Knight v. Plymouth*, 1 Dick. 120; s. c., 3 Atk. 480; *Speight v. Gaunt*, 22 Ch. Div. 727; *Ex parte Belchier*, 1 Ken. 38.

1. And this rule relative to the investment in personal securities has been frequently held in the United States. *Clark v. St. Louis etc. R. Co.*, 58 How. (N. Y.) 21; *Goodwin v. Howe*, 62 How. (N. Y.) 134; *Adair v. Brimmer*, 74 N. Y. 539; *Ormiston v. Olcott*, 84 N. Y. 339; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 281; *King v. Talbot*, 40 N. Y. 76; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *In re Foster*, 15 Hun (N. Y.) 387; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348; *Bates v. Underhill*, 3 Redf. (N. Y.) 365; *Judd v. Warner*, 2 Dem. (N. Y.) 104; *Lefever v. Hasbrouck*, 2 Dem. (N.

Y.) 567; *Nyce's Est.*, 5 W. & S. (Pa.) 254; *Wills's Appeal*, 22 Pa. St. 330; *Wilson's Appeal*, 115 Pa. St. 95; *Swoyer's Appeal*, 5 (Pa.) 377; *Gray v. Fox*, 1 N. J. Eq. (Sax.) 259; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Gray v. Fox*, 1 N. J. Eq. (Sax.) 259; *Spear v. Spear*, 9 Rich. (S. Car.) 184; *Moore v. Hamilton*, 4 Fla. 112; *Sullivan v. Howard*, 20 Md. 191; *Garesche v. Priest*, 78 Mo. 126; s. c., 9 Mo. App. 270.

Where personal security is permissible, the trustee should call in the fund when it is unsafely invested in such security. *Brazer v. Clark*, 5 Pick. (Mass.) 96.

See *Harding v. Larned*, 4 Allen (Mass.) 426; *Clark v. Garfield*, 8 Allen (Mass.) 427.

2. *Investment in Corporation Stock*.—It has been frequently held in *England* that trust funds cannot be invested in bank shares, manufacturing companies' stock, or the stock or shares of any private corporation, however apparently safe and good. *Powell v. Cleaver*, 7 Ves. 142 n.; *Howe v. Dartmouth*, 7 Ves. 150; *Haynes v. Redington*, 1 Jo. & Lat. 589; *Trafford v. Boehm*, 3 Atk. 440; *Clough v. Bond*, 3 M. & Cr. 496; *Band v. Fardell*, 7 De G. M. & G. 633; *Emelie v. Emelie*, 7 Bro. P. C. 259; *Mills v. Mills*, 7 Sim. 501; *Hancorn v. Allen*, 2 Dick. 499 n.; *Peat v. Crane*, 2 Dick. 499 n.

3. Such stocks may be taken as security for trust funds, when there is no statutory inhibition, under order of

some of the more conservative States, in *Massachusetts* (which, with the other *New England* and most of the *western* and *southern States*, have been liberal in respect to trust investments) such stocks are generally treated as proper securities; and investments of trust funds in banking, insurance, manufacturing and other private corporation stocks, are freely allowed.¹

In *Pennsylvania*, though such investments were formerly permissible under statutory authorization, they are now forbidden by the constitution of the State.²

(4) *Preferred Stock Secured by Mortgage*.—Distinction was made between a loan on preferred and one on common stock of a private corporation. In the one case there was a lien upon the income which was amply secured by the real estate of the corporation; in the other there was no such security, and the trustee was held to have committed a breach of trust for investing trust funds in the common stock under these circumstances.³

(5) *Railroad Bonds*.—But railroad bonds have been held not permissible, though secured by mortgage on the roadbed, fran-

court. *Tucker v. Tucker*, 33 N. J. Eq. 235; *Woodruff v. Ward*, 35 N. J. Eq. 467; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349.

1. Such stocks are considered proper securities in *Massachusetts*. *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Lovell v. Minot*, 20 Pick. (Mass.) 116; *Kinmouth v. Brigham*, 5 Allen (Mass.) 270; *Clark v. Garfield*, 8 Allen (Mass.) 427; *Brown v. French*, 125 Mass. 410; *Bowker v. Pierce*, 130 Mass. 262.

Even promissory notes, when corporation stocks are pledged as collaterals, have been held sufficient. *Lovell v. Minot*, 20 Pick. (Mass.) 116.

Interest bearing securities are recognized as proper, in some of the States, for the investment of funds in an administrator's hands. *Dortch v. Dortch*, 71 N. Car. 224; *Moore v. Felkel*, 7 Fla. 44.

2. *Constitutional Prohibition*.—Investment of trust funds in private corporation stock or bonds is inhibited by the constitution of *Pennsylvania*. Const. Pa., art. 3, § 22.

For the course of decisions on the subject of investment in private corporation stocks, *pro* and *con*, mostly in exposition of statutes. See *Nyce's Estate*, 5 Watts & S. (Pa.) 254; *Morris v. Wallace*, 3 Pa. St. 319; *Pray's Appeal*, 34 Pa. St. 100; *Twaddell's Appeal*, 5 Pa. St. 15; *Rush's Estate*, 12 Pa. St. 375; *Burton's Estate*, 1 Pars. (Pa.) 24; *Worrell's Appeal*, 9 Pa. St. 508; 23 Pa. St. 44; *Stanley's Appeal*, 8 Pa.

St. 431; *Hemphill's Appeal*, 18 Pa. St. 303; *Ihmsen's Appeal*, 43 Pa. St. 431; *Pleasant's Appeal*, 77 Pa. St. 356.

These cases were discussed in 25 Am. Law Reg. (N. S.), p. 21, in the leading article, and reference made to *McCahan's Appeal*, 7 Pa. St. 56; *Angue's Estate*, 2 Phila. (Pa.) 137; *Seidler's Estate*, 5 Phila. (Pa.) 85; *Gaw's Estate*, 34 Leg. Int. 66; s. c., 24 Pitts. L. J. (Pa.) 128; *Shield's Estate*, 14 Phila. (Pa.) 307; *Jack's Appeal*, 94 Pa. St. 367; *Pleasanton's Appeal*, 99 Pa. St. 362; *Eyster's Appeal*, 16 Pa. St. 372; *Fahnestock's Appeal*, 104 Pa. St. 46.

3. *Coal Lands, etc.*—Where real estate security was allowed, it was held that a company, owning coal lands and a canal, and which gave the trustee a preferred claim on their income, substantially gave real security, as the realty held by the company exceeded in value the sum of the debts. *Twaddle's Appeal*, 5 Barr. (Pa.) 15; *Rush's Estate*, 12 Pa. St. 375. But an investment in the common stock of the same company was held not such security as the law requires a trustee to obtain when loaning trust funds, and it was decided that he had committed a breach of trust in taking such security. The difference between the two loans was that the first was on preferred stock while the second was on stock of the same company not preferred. *Worrell's Appeal*, 9 Pa. St. 508. See *Hemphill's Appeal*, 18 Pa. St. 303.

chise, etc., for the reason that the trustee could not himself directly enforce the collection of the bonds by foreclosure.¹

(6) *Investment by Testator in Secured Bonds.*—When, however, an executor forms an investment already made by the testator in bonds secured by mortgage on real estate, it was not held a breach of trust when he continued the investment. The exercise of his sound discretion was properly respected by the court, and the investment was apparently free from such risk as would have made it his duty to withdraw the trust fund.² Indeed, circumstances may be such that a prudent executor may even add to the sum already loaned by the testator; for instance, when further advancement is necessary to secure it.³

(7) *Bank Stock.*—If the trustee finds that the fund which he is appointed to administer has been already invested; if he is an executor, and the fund was put into bank stock by the testator, he is not to be held responsible for the loss of it by the failure of the bank.⁴

Where bank stock is allowable security, he has no right to convert it into bonds.⁵ He should discreetly select good bank stock when he makes that species of security his choice; and, if it is at par when chosen, subsequent loss will not be attributed to his fault.⁶

A trustee, however, should not invest in new stocks paying no dividends, in the hope of their rising in value. Such a risk has been held a breach of trust.⁷

(8) *Business or Trade.*—If a trustee cannot entrust the money of others in his care to private corporations for its management, he certainly cannot employ it himself in his own business, nor

1. Mortgage of Railroad Bed, etc.—Railroad bonds secured by mortgage on the franchise, bed and other property of the railway company, were held not proper security for the loan of trust funds. The reason given was that the trustee could not foreclose the mortgage, but would be driven to the usual mode of enforcing such bonds, and therefore he had little more than mere personal security. *Mant v. Leith*, 15 Beav. 524; *Allen v. Gaillard*, 1 S. Car. 279; *Robinson v. Robinson*, 11 Beav. 371.

2. Investment by Testator in Bonds.—An executor commits no breach of trust by allowing trust funds to remain where they were invested by the testator himself in bonds secured by mortgage on the real estate, tolls, etc., of a turnpike company. *Miller v. Proctor*, 20 Ohio St. 444.

3. A trustee may even loan additionally to secure an investment made by the testator in a mortgage, provided the circumstances of the case warrant it. *Collinson v. Lister*, 20 Beav. 356.

4. Investment Made by Testator.—An executor is not at fault nor responsible for the loss of an investment in bank stock, when it is lost by the failure of the bank, if the investment was made by the testator himself. *Parker v. Glover*, 42 N. J. Eq. 559, in exposition of a statute; *Pope v. Matthews*, 18 S. Car. 444.

5. He has no right to convert bank stock into bonds as an investment, though empowered to sell the personal estate. *Columbus Ins. etc. Co. v. Humphries*, 64 Miss. 258.

6. Trust funds were invested in a certificate of deposit of a national bank when the stock was at par. Loss following, the trustee was held not liable for it. *Hunt's Appeal*, 141 Mass. 515.

7. New Stocks.—It would generally be held a breach of trust for a trustee to invest in stocks of new corporations or companies, taking the risk attending loans to such untried and adventurous companies, though he act in good faith and risk his private funds in the same

risk it in the hands of merchants or any tradesmen as capital to earn profits, nor speculate with it in any way, directly or indirectly. If he should do so, at his own volition, without authority from the court, or the trust instrument, or the *cestui que trust*, he would commit a breach of trust. He would be held responsible for any loss, and he would be denied any personal profit should the venture prove remunerative.¹

(9) *When Previous Investment in Trade May be Continued.*—

There are circumstances, however, under which courts will grant orders for the temporary continuance of trust funds in trade, when they have been already invested, as when the executor of the estate of a deceased partner acts with the survivors in closing out the stock in trade.² But, beyond what he finds already employed in the business, he should not risk the trust fund. Even when authorized to conduct "legitimate business" for the benefit of an heir, he must not invest the whole estate in it, though it be a continuance of the testator's business.³ He may be obliged, by contracts previously made, to employ trust funds in fulfilment of obligations assumed by the testator;⁴ or he may be empowered by the *cestui que trusts* to continue an established line of trade for a given time and purpose;⁵ but if not thus obligated by the testator's contracts, or authorized by those for whom he acts, he should not allow the funds to remain at the risk of business casualties, but should withdraw them immediately.⁶ Even

way and at the same time. *Ihmsen's Appeal*, 43 Pa. St. 431; *Kimball v. Redding*, 31 N. H. 352.

1. **Business or Trade.**—To employ trust funds in speculation, risk them in ordinary trade, or do mercantile or other business upon them without express authority, is a breach of trust, and if loss ensue, the trustee is responsible, while he cannot avail himself of profits if the venture prove successful. *Kyle v. Barnett*, 17 Ala. 306; *Martin v. Raborn*, 42 Ala. 648; *Flagg v. Ely*, 1 Edm. (N. Y.) 206; *King v. Talbot*, 40 N. Y. 76; *Stedman v. Fieder*, 20 N. Y. 437; *Featherstone v. Fenwick*, 17 Ves. (N. Y.) 298; *French v. Hobson*, 9 Ves. 103; *Ex parte Garland*, 10 Ves. 129; *Crawshay v. Collins*, 15 Ves. 218; *Brown v. De Tastel*, Jac. 284; *Cook v. Collingridge*, Jac. 607; *Docker v. Somes*, 2 M. & K. 655; *Wedderburn v. Wedderburn*, 2 Keen 722; *Booth v. Booth*, 1 Beav. 125; *Munch v. Cockerell*, 5 M. & Cr. 178; *Lucht v. Behrens*, 28 Ohio St. 231; *Pitkin v. Pitkin*, 1 Conn. 307; *Alsop v. Mather*, 8 Conn. 584; *Muntz v. Brown*, 11 La. Ann. 472.

2. An executor, however, may let the surviving partner of the testator sell out the joint stock in regular course of

trade. *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *Stern's appeal*, 95 Pa. St. 504; *Merritt v. Merritt*, 62 Mo. 150. See *Laughlin v. Lorenz*, 48 Pa. St. 275; *Jones v. Walker*, 103 U. S. 444.

3. **Trust Fund in Business.**—An executor cannot legally use all the estate in continuing the testator's business, when authorized to carry on "some legitimate business" for the benefit of the testator's son, after the payment of debts and expenses. *Re Sharp*, 5 Dem. (N. Y.) 516.

4. **Continuance of Business by Use of Trust Money.**—The trustee is not liable for carrying out contracts made before his appointment, when beyond his control. *Collinson v. Lister*, 20 Beav. 356.

5. It has been held that when those for whom the trustee acts are all competent to contract, and all legally empower him to continue the funds of an estate in business till an heir shall have become of age, he may comply by rendering himself responsible for subsequent loss. *Poole v. Munday*, 103 Mass. 174.

6. But trustees, when not bound by previous contract or otherwise to continue the funds in the business in which they are already employed, should with-

though thus authorized, he ought not to leave the fund with that of a firm which has been dissolved subsequent to the authorization.¹

3. Investment in Public Funds.—(1) *Favored by Courts.*—Public securities have been the most highly favored. The theory is that governments are perpetual and their obligations sure. However fallacious the theory has proved to be in the case of State bonds in some of our States, courts presume the stability of the authority under which they sit, and generally credit the plighted faith of its promises to pay. In *England*, before statutory authorization for investments of trust funds in other securities, when courts were left to their own judgment as to what should be the guaranty of payment, government securities were considered the only safe and proper ones. And they are still the most highly favored, and have often been held the only ones which courts will order when they are not controlled by statutory direction, or by the trust instrument²

(2) *Secured Annuities.*—When the rule was held more firmly than now since its relaxation by statute, courts made a distinction between investments in annuities (of which the dividends were payable by directors while the government was pledged to pay the principal) and stock of private corporations controlled in both respects by their directors; a distinction between "south sea or bank annuities" on the one hand, and "south sea or bank stock" on the other.³

(3) *Government Securities.*—In *New York*, the most approved securities are government and State bonds, or first mortgages on real estate, without any expressed preference for either. These are not only the most favored, but may be said to be the only securities for trust funds that the courts are sure to approve, and that the trustee may safely rely upon to save him from liability for losses; yet the courts there hold no inflexible rule upon the subject.⁴

draw them. *Murray v. Glasse*, 23 L. J. Ch. 124.

1. When authorized to continue funds employed in a partnership, the trustee must withdraw them upon the death of a member of the firm, or upon dissolution of the partnership in any other way. *Cummins v. Cummins*, 8 Ir. Eq. 723.

2. **Public Funds.**—It seems that the chancery courts of *England* approved of none but public funds as security for trust investments, when the character and sufficiency of the security is left for them to determine, uncontrolled by statute or by direction in the trust instrument. *Vigrass v. Binfield*, 3 Mad. 62; *Tebbs v. Carpenter*, 1 Mad. 290; *Collis v. Collis*, 2 Sim. 365; *Keble v. Thompson*, 3 Croch. 112; *Pocock v. Reddington*, 5 Ves. (Eng.) 799; *Howe*

v. Earl of Dartmouth, 7 Ves. 150; *Holland v. Hughes*, 16 Ves. 111; *Drake v. Martyn*, 1 Beav. 525; *Watts v. Girdlestone*, 6 Beav. 188; *Fowler v. Reynal*, 3 Mac. & G. 500; *Graves v. Strahan*, 8 De G. M. & G. 291.

3. **Stocks and Annuities.**—It was formerly held in *England* that "neither South Sea stock nor bank stock is considered a good security, because it depends upon the management of the governors and directors, and is subject to losses;" but that an investment "in South Sea or bank annuities, where the directors have nothing to do with the principal, and have only to pay the dividends and interest until such time as the government pay off the capital, would be good security." *Trafford v. Boehm*, 3 Atk. 444.

4. **General Rule in New York.**—"From

Unless the trustee is protected by an order of court, he cannot invest in any other than the two classes of security above named without incurring the risk that the courts will hold him for losses, in *New York*, and also in *Pennsylvania* and *New Jersey*. He is not at liberty to select bank or railroad stock.¹

4. Investment in Real Securities—(1) First Mortgages.—Before the passage of Lord St. Leonard's act, it was questionable in *England* whether first mortgages on land were such securities for trust funds as the courts ought to approve.² They are now allowed, but there must be an excess of value in the mortgaged real estate above the sum loaned.³ Junior mortgages are gener-

our examination of the authorities and the cases referred to, we have come to the conclusion that as a general rule it is the duty of trustees to invest funds held by them in government or State securities, or in bonds and mortgages, on unencumbered estate; that, while this rule is not arbitrary and inflexible so as to admit of no possible exceptions, it is the basis upon which trustees should usually act; that, in any event, the trustee is bound to employ such diligence, care and prudence, in the management of the trust, as diligent, careful, prudent men of discretion and intelligence generally employ in their own like affairs; and that for a neglect to make use of such diligence, care and prudence, the trustee becomes liable."

Mills v. Hoffman, 26 Hun (N. Y.) 594.

See *Adair v. Brimmer*, 74 N. Y. 539; *Clark v. St. Louis*, Alton etc. Rd., 58 How. (N. Y.) 21; *In re Foster* 15 Hun (N. Y.) 387; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348; *Bates v. Underhill*, 3 Redf. (N. Y.) 365; *Judd v. Warner*, 2 Dem. (N. Y.) 104; *Ormiston v. Olcott*, 22 Hun (N. Y.) 270; s. c., 84 N. Y. 339; *Goodwin v. Howe*, 62 How. (N. Y.) 134; cited in article Investment of Trust Funds, 25 Am. L. Reg. 227.

1. "By the later decisions in that State [New York], investments in bank or railroad stock have been held to be at the risk of the trustee, and it has been intimated that the only investments that a trustee can safely make without an express order of court are in government or real estate securities. *King v. Talbot*, 40 N. Y. 76 (*affirming* s. c., 50 Barb. (N. Y.) 453); *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; 2 Kent Com. 416, n. b. So the decisions in *New Jersey* and *Pennsylvania* tend to disallow investments in the stock of banks or other business corporations, or otherwise than in the public funds or

in mortgages of real estate. *Gray v. Fox*, 1 N. J. Eq. (Saxton) 259, 268; *Halsted v. Meeker*, 3 Green (N. J.) 136; *Lathrop v. Smalley*, 8 C. E. Green (N. J.) 192; *Worrell's Appeal*, 9 Pa. St. 508, and 23 Pa. St. 44; *Hemphill's Appeal*, 18 Pa. St. 303; *Ihmssen's Appeal*, 43 Pa. St. 431." *Lamar v. Micon*, 112 U. S. 452.

2. Real Estate Securities.—Whether, in the absence of statutory authorization, trustees could loan on real estate mortgages, was a question in *England*. The affirmative was held. *Pocock v. Redington*, 5 Ves. 800; *Brown v. Litton*, 1 P. Williams 141; *Knight v. Plymouth*, 1 Dickens 126; *Lyse v. Kingdon*, 1 Coll. 188.

And the negative was held in other cases. *Barry v. Marriott*, 2 De G. & Sm. (Eng.) 491; *Ex parte Franklyn*, 1 De G. & Sm. (Eng.) 531.

Under the Lord St. Leonard's act, mortgages on realty are held good securities. *Stickney v. Sewell*, 1 M. & C. 8; *Macleod v. Annesley*, 16 Beav. 600; *Norris v. Wright*, 14 Beav. 307.

3. Trust funds should be loaned, not on mere personal security, like a promissory note, but "on some such security as binds land, or something, to be answerable for it." *Ryder v. Bickerton*, 3 Swanst. 81, n.; s. c., 1 Eden 149, n. Same principle, *Barney v. Saunders*, 16 How. (U. S.) 535, 545.

Loans on real mortgages are allowed in *England*, as proper investment of trust funds, when there is proper margin of value of the real estate, above the sum loaned. *Norris v. Wright*, 14 Beav. 307; *Drosier v. Brereton*, 15 Beav. 221; *Macleod v. Annesley*, 16 Beav. 600; *Ingle v. Partridge*, 34 Beav. (Eng.) 411; *Stickney v. Sewell*, 1 M. & C. 8; *Phillipson v. Gatty*, 7 Hare 16; *Farrar v. Barraclough*, 2 Sm. & Gif. 231; *Jones v. Lewis*, 3 De G. & Sm. 471; *Brown v. Litton*, 1 P. Williams 141.

ally disapproved there,¹ and are not favored in this country.²

When a second mortgage had been taken under the belief that it was a primary one—the belief being induced by the fraud of the mortgagor—a guardian, who had thus lent his ward's money and lost it, was not held liable for the loss.³

(2) *Second Mortgages*.—On the other hand, where trustees knowingly loaned money of a trust estate upon a junior mortgage, they were held not at liberty to do so, though they had not been instructed what security to require, but had been left to their own discretion. They were bound in law to exercise a sound discretion, and the risk of the money on a second mortgage was not considered a rightful exercise of it.⁴ But, while this was held in *New York*, a trustee was more liberally treated in *Pennsylvania*, when there was loss on a second mortgage. His good faith and general prudence were considered.⁵

5. *Changing Investments*.—(1) *Not Optional by the Trustee*.—It has been frequently held, both in *England* and in the *United States*, that after trust funds have been regularly invested, the trustee cannot change them at his option by substituting one security for another. There should be permanency in the investment, just as in the monetary dispositions of good business men. Intervals between loans would result in loss of interest, and, therefore, in wrong to the *cestui que trust*.⁶

1. *Second Mortgages*.—But loans of trust funds on second mortgages are not favored. *Robinson v. Robinson*, 11 Beav. 371; *Lockhart v. Reilly*, 1 De G. & J. 476.

2. Such loans have been held objectionable in this country. *Nance v. Nance*, 1 S. Car. 209; *Wilson v. State*, 33 N. J. Eq. 524; *Bogart v. Van Velsor*, 4 Edw. Ch. (N. Y.) 718.

3. *Guardian Mortgage*.—A guardian lent his ward's money on second mortgage security, honestly believing it to be first mortgage, but being deceived by the mortgagor, who, between the time of the examination of the records and the execution of the mortgage to the guardian, had given another mortgage which was recorded first. The guardian was not held liable, though the investment proved worthless. *Slanter v. Favorite*, 107 Ind. 291; s. c., 57 Am. Rep. 106.

4. *Discretionary Power*.—Where testamentary trustees were allowed discretion in dealing with a trust estate, and not instructed what investment to make, they were yet not free to loan to each other; or to take a second mortgage as security. *Re Petrie*, 5 Dem. (N. Y.) 352; *Re Cant*, 5 Dem. (N. Y.) 269.

5. Where an executor allowed an-

other to secure to him trust money by secondary mortgages, and to collect the rents (part of which the mortgagor failed to pay over according to agreement), it was held that considering the good faith of the executor, and his management as within ordinary prudence, he was not personally responsible for the rents which had not been collected by him. *Dabney's Appeal*, 120 Pa. St. 344.

6. *Change of Investments*.—Trustees cannot change at will the investments of trust funds properly made. *Pawlett v. Herbert*, 1 Ves. Jr. 297; *Witter v. Witter*, 3 P. Williams 100; *Underwood v. Stevens*, 1 Mer. 712; *Lawson v. Copeland*, 2 Bro. Ch. 157; *Bryce v. Stokes*, 11 Ves. 324; *Tebbs v. Carpenter*, 1 Mad. 208; *Crackelt v. Bethune*, 1 J. & W. 586; *Williams v. Nixon*, 2 Beav. 672; *Watts v. Girdlestone*, 6 Beav. (Eng.) 190; *Fyler v. Fyler*, 3 Beav. 550; *De Manneville v. Crompton*, 1 V. & B. 359; *Fowler v. Reynall*, 3 M. & G. 500; *Adams v. Clifton*, 1 Russ. 297; *Broadhurst v. Balquy*, 1 N. C. C. 16; *Hanbury v. Kirkland*, 3 Sim. 265. See *Stephens v. Milnor*, 24 N. J. Eq. 358; *Pleasant's Appeal*, 77 Pa. St. 356; *Baldwin v. Hatchett*, 56 Ala. 461; *Mosman v. Bender*, 80 Mo. 579.

(2) *Changes May be Ordered.*—Changes or reinvestments, however, may be ordered by the chancery courts when the safety of the fund or the interest of the beneficiary requires it. The trust funds may be withdrawn and reloaned; the trustee may buy and sell to effect such purposes under judicial order, and this is consonant with the common law.¹

II. TRUST INVESTMENTS REGULATED BY STATUTES—1. **Statutory Directions in England**—(1) *Modification of the English Rule.*—The stern rule that formerly prevailed in England relative to trust investments has been much relaxed by acts of parliament, so that now securities are not limited to public funds or real estate mortgages, but some classes of stocks are approved by the courts—certainly when directed by trust instruments.² It has been held, however, that a fund or stock, to be approved as good security, should be guaranteed by the government in some way.³

(2) *Retrospective Effect.*—The courts have held to a strict construction of the statutory authorization, and some of the decisions go so far as to disapprove investments made in authorized securities, before the authorization. There does not seem to be uniformity on this point.⁴ The act (called Lord St. Leonard's act"), though retrospective, leaves the courts free to order the change of investments.⁵ Since the passage of that act, first real mortgages with good margins are favored as securities for trust funds, though formerly were not, or, at least, they were

1. **Reinvestment.**—"For effectuating the trust most safely and beneficially, the common law authorized the trustee, with the sanction of a court of equity, to reinvest, and, for that purpose, to sell and buy whenever found useful." *Allen v. Graves*, 3 Bush (Ky.) 491.

One holding a fund, as trustee for remainder men, may change transient security into cash to be permanently invested for their benefit. *Mason v. Commerce Bank*, 90 Mo. 452.

2. **Statutory Modification of Former English Rule.**—From a liberal treatment of trustees, the chancery courts of England had come to hold them for losses on all investments in funds except in consols, when parliament interfered; but now stock in the Bank of England and the Bank of Ireland, or real estate mortgage, is considered good security. Stats. 22 & 23 Vict., ch. 35, and 23 & 24 Vict., ch. 38; *Lewin on Trusts* (7th ed.), 252-7.

3. **Construction of Lord St. Leonard's Act.**—"In order to come within the description, 'government or parliamentary stock or funds,' a fund ought to be either managed by parliament, or paid out of the resources of the British government, or at least guaranteed by that

government." *Brown v. Brown*, 4 K. & J. 704.

The provision expounded: "It shall be lawful for any trustee, executor or administrator to invest any fund in his possession, or under his control, in any securities the interest of which is or shall be guaranteed by parliament." 30 & 31 Vict., ch. 132, § 2.

4. **Investment in Stocks, Under Statute.**—Although the act of 22 and 23 Vict., ch. 35 (called "Lord St. Leonard's act"), authorized the investment of trust funds in certain specified stocks, it was held that it did not authorize investment of trust funds, settled before the enactment, in those stocks. *Re Miles's Will*, 5 Jur. (N. S.) 1266; *Dodson v. Sammell*, 6 Jur. (N. S.) 137.

Decisions do not well agree upon this, and some are to the contrary. See *Page v. Bennett*, 2 Gif. 117; *Mortimer v. Picton*, 4 De G. J. & S. 166; *Simpson's Trusts*, 1 John. & H. 89.

5. The act has been made retrospective (23 & 24 Vict., ch. 38), but does not apply to funds previously specifically settled so as to leave no power in the courts to change the investment. *Ward's Settlement*, 2 John. & H. 191; *In re Wilkinson*, L. R., 9 Eq. 343; *Ex parte*

grudgingly approved when allowed at all.¹ Even when authorized by the trust instrument they were disapproved by the court, at least in one instance, in which the reason given was general in character; but, under statutory modification, the rule of practice is to accept real securities when not inhibited by the trust instrument.²

2. Statutory Directions in the United States.—(1) *Designation of Securities.*—In *Massachusetts*, the statute on the subject provides that courts of probate may direct the investment of trust funds of estates.³ In *Maine*, courts direct trust investments on application; and in *New Hampshire* and *Vermont*, they usually approve any good and productive investment.⁴ In *New Jersey*, the courts have statutory authorization to order investments without limit as to the class of securities to be chosen; but, in the exercise of their discretion under the authority, they almost wholly confine themselves to real and government securities.⁵ In *Pennsylvania* the constitution prohibits the investment of trust funds in bonds or stock of private corporations.⁶ The statutes authorize the proper courts to direct the investment of trust funds in real security or in "the stock or debt" of the United States, of the State of Pennsylvania, or of the city of Philadelphia, and exempts trustees for loss on such investments. Also, investments may be made in the same manner in any bonds or certificates of debt legally issued by any counties, cities, school districts or municipal corporations of that State, with the same protection against loss.⁷ Also, under court order, "ground rents" as well as other real estate are declared proper security for trust funds.⁸

(2) *Designation Left to the Courts.*—Some of the States have prescribed no class of securities, and courts may direct the investments, in their orders, generally speaking. In *Georgia*, a statute

Great Northern R. Co., L. R., 9 Eq. 274.

1. Loans on Mortgages, in England.—Before statutory authorization, when real estate security was left for the approval or disapproval of the chancery courts, loans on mortgages of land were not generally much favored by the courts. *Ex parte Carthorpe*, 1 Cox 182; *Bocock v. Reddington*, 5 Ves. 800; *Ex parte Johnson*, 1 Moll. 128; *Norbury v. Norbury*, 4 Mad. 191; *Ex parte Franklin*, 1 De G. & Sm. 531; *Barry v. Marriott*, 2 De G. & Sm. 491; *Ex parte Ridgeway*, 1 Hag. 309; *Ex parte Ellice*, Jacob 234; *Widdowson v. Duck*, 2 Mer. 494; *Brown v. Litton*, 1 P. Wms. 141; *Knight v. Plymouth*, 1 Dickens 126.

2. Real Security—Change of Rule.—It was said that though express power to lend on real security was given, the court would not approve a loan upon a mortgage, for the reason that "in ninety-nine cases out of a hundred" the

expense of the mortgage was greater than the increase of income. *Barry v. Marriott*, 2 De G. & Sm. 491.

But now, under statutory authorization for investments of trust funds on real securities, the rule seems to be that unless such security is inhibited by the trust instrument, it may be accepted. *Lewin on Trusts* (8th ed.), 313; *Perry on Trusts* (3rd ed.), § 457.

3. Stat. of 1873, ch. 224, § 1 *et seq.*

4. *Knowlton v. Brady*, 17 N. H. 458; *Kimball v. Reding*, 31 N. H. 352; *French v. Currier*, 47 N. H. 88; *Barney v. Parsons*, 54 Vt. 623.

5. *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Gray v. Fox*, 1 N. J. Eq. (Sax.) 259; *Woodruff v. Ward*, 35 N. J. Eq. 467.

6. Const. Pa., art. 3, § 22.

7. Act of May 8th, 1876, extending the act of 1832.

8. Act April 13th, 1854.

requires investment in State securities when the trustee is not controlled by a judicial order to invest in some other.¹ The code of *Alabama* permits trustees to select any good security, and they are not held responsible for unintentional mistakes in choosing resulting in loss.² In *Mississippi*, the trustee is required to invest under judicial order, so held with respect to investment of a guardian for his ward.³

In *Missouri*, the courts direct the investments upon application.⁴ In *Maryland*, there seems to be no statutory limitation to real and government securities, for, besides these, the courts approve of good bank stock as security.⁵

In States where the securities are not designated by statutes, as well as those in which they are, trustees may be directed by court orders to invest in securities not prohibited, so as to hold the trustees harmless in case of loss.

In *Michigan*, a trust fund created by an independent instrument separate from a deed conveying the land which is to secure the trust investment, is not governed by the statute which prescribes that every disposition of realty shall be to the person or persons who are to have the right of possession, etc. The two deeds passed upon were made at different times, and could not be considered as one transaction.⁶

3. Regulation of Trust Investments by the Courts—(1) Court Orders in Particular Cases.—When under statutory requirement, or in pursuance of the general powers of chancery courts, orders are made designating what security must be taken by the trustees, they cannot disobey without incurring liability for losses. The order may be made with reference to a particular case, or it may be general.⁷

(2) *General Orders.*—Pursuant to statute, a general order was made in *England* specifying the securities that would be acceptable to the courts, including some classes of stocks of private corporations, and even exchequer bills, as well as real estate.⁸

1. *Georgia Statute.*—Investment must be made in State securities, unless the trustee acts under judicial order to invest in other securities; and a deviation from this statutory rule, made in January, 1863, puts the investment at his risk. Cobb's Digest, 333; *Brown v. Wright*, 39 Ga. 96; *Moses v. Moses*, 50 Ga. 9, 30.

2. *Alabama Stat.*—Trustees may invest on bond and mortgage or good personal security and are held harmless for losses when acting prudently and in good faith. Code of 1867, § 2426; *Foscue v. Lyon*, 55 Ala. 440, 452.

3. *Coffin v. Bramlitt*, 42 Miss. 194. See *Smyth v. Burns*, 25 Miss. 422.

4. *Gauble v. Gibson*, 59 Mo. 585.

5. *Murray v. Feinour*, 2 Md. Ch. 418; *Gray v. Lynch*, 8 Gill (Md.) 410; Ham-

mond v. Hammond, 2 Bland (Md.) 306; *Evans v. Iglehart*, 6 Gill & J. (Md.) 171.

6. The statute of *Michigan* requiring that every disposition of land shall be directly to the person in whom the right of possession and profits is intended to be vested, etc., does not apply to a trust not expressed in the deed but created by an independent instrument executed at a different time. *Loring v. Palmer*, 118 U. S. 321.

7. *Court Orders.*—Trust investments are frequently made under order of court. It may be in a particular case, with reference to a particular fund, or by a rule of court designating the kind of securities that may be chosen. *Wheeler v. Perry*, 18 N. H. 307.

8. In *England*, "in pursuance of

(3) *Obedience the Criterion as to Liability*.—Whether the trustee is held for loss or not depends upon his obedience or disobedience of the court order.¹

This distinction has been repeatedly drawn in this country with respect to investments in the stock of private corporations. It would not do to allow investments of trust funds in the shares of such corporations indiscriminately, for there is a great variety in such securities, some being very safe and good, while others would afford no certain security.²

(4) *Limitation of Court's Power*.—There is a limit even in the power of courts to designate the investment. For instance, it has been held that a county court could not legally order an executor to buy new supplies of merchandise for the purpose of continuing the business that the testator had left.³

The trustee is bound to obey the court order prescribing the investment. He may be proceeded against summarily in case of neglect or refusal, and may be compelled to deliver the trust funds to the court, to be there retained till his compliance with the order.⁴

(5) *Voluntary Action by Trustee*.—When the statute is not imperative with reference to investments under judicial order, a trustee acting upon his own motion, but with honest purpose, cannot be said to commit a breach of trust. If he should not show sound discretion in his selection of the security, he might be held for loss, however.⁵

(6) *Unconstitutional Orders*.—Though the court should issue an order pursuant to statutory direction, neither the judicial com-

statute, a general order was issued in 1861, as follows: 'Cash under the control of the court may be invested in bank stock, East India stock, exchequer bills, and £2 10s. annuities, and upon freehold and copyhold estates respectively in England and Wales,' etc. *Perry on Trusts*, § 455.

1. When a trustee invested in funds adopted by the court, he was held harmless in case of loss. *Peat v. Crane*, 2 Dick. 498, n. But not when the court had not adopted the security. *Hancorn v. Allen*, 2 Dick. 498, n.

2. An investment of trust funds in the corporate stock of an ordinary business enterprise, without an order of court authorizing it, "constitutes a well recognized violation of duty on the part of the trustee." *Tucker v. State*, 72 Ind. 242, citing *King v. Talbot*, 40 N. Y. 76; *Allen v. Gaillard*, 1 S. Car. 279; 13 Am. Law Reg. (N. S.) 201; *Hill on Trustees*, *369; *Perry on Trusts*, §§ 552-3. Compare *Ferguson v. Epes*, 77 Va. 499; *Sharpe v. Rockwood*, 78 Va. 24.

3. It was held in *Illinois* that a county court could not confer on an executor authority to invest trust funds in the purchase of new goods to continue mercantile business; and that the executor could not purchase them for the purpose without the consent of the *cestui que trust*. *Field v. Colton*, 7 Bradw. (Ill.) 379.

4. *Disobedience of Order*.—When a trustee, appointed by the court, fails to invest trust funds as directed by it, he may be proceeded against by rule, with his sureties as codefendants to the rule; and, under this proceeding, he may be ordered to return the funds to the court, where they will remain in judicial custody till the order be obeyed relative to the investment. *Dickinson v. Trout*, 8 Bush (Ky.) 441.

5. If an executor should invest without being ordered to do so by the court, though he would thus incur a personal risk, he would not be held to have made a breach of trust, if the investment was an honest and judicious one. Statutes are not all imperative that investments

mand nor the investment made in compliance with it will hold good if the statute itself was violative of the constitution.¹ Illustration of this may be found in cases of investments in "Confederate" bonds. The Supreme Court of the United States has repeatedly and emphatically held that the legislative authorization of investments therein was unconstitutional, and gave no valid power for the loaning of trust funds on such securities. Not only the legislative action, but the orders of courts pursuant thereto, and decisions sustaining it, have been condemned by the supreme court.²

4. Statutory Regulation of Trust Funds Held by Public Corporations as Trustees—Funds for Special Uses.—It has been considered questionable whether public corporations can be directed by statute in their management of trust funds devoted to special uses which are neither public nor charitable. Doubtless they may be with regard to the latter, but whether a fund which such a corporation has been empowered to employ specifically to a different use may be directed by the legislature, *quære*.³ The power of a legislature to change the control of a charitable trust from one public corporation as trustee to another, does not affect the question.⁴

shall be made only under judicial order. *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *Richardson v. Knight*, 69 Me. 285.

1. An order of court directing an investment pursuant to an act of the legislature will not justify the investment, if the statute itself is not constitutional. *Horn v. Lockhart*, 17 Wall. (U. S.) 570.

2. "Confederate" Bonds.—"The investment in bonds of the confederate States was clearly unlawful, and no legislative act or judicial decree or decision of any State could justify it. The so-called confederate government was in no sense a lawful government, but was a mere government of force; having its origin and foundation in rebellion against the United States. The notes and bonds issued in its name and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested. *Thorington v. Smith*, 8 Wall. (U. S.) 1; *Head v. Starke*, Chase's Dec. (U. S.) 312; *Horn v. Lockhart*, 17 Wall. (U. S.) 570; *Confederate Note Case*, 19 Wall. (U. S.) 548; *Sprott v. United States*, 20 Wall. (U. S.) 459; *Fretz v. Stover*, 22 Wall.

(U. S.) 198; *Alexander v. Bryan*, 110 U. S. 414." *Lamar v. Micon*, 112 U. S. 452, 476.

For a list of decisions on "confederate" securities with respect to trust investments, see EXECUTORS AND ADMINISTRATORS, vol. 7, p. 351.

3. **Public Corporations as Trustees.**—Whether the legislature can control public corporations which are entrusted with funds for specific uses, when those uses are not public or charitable, "is left in doubt by the cases." *Dillon's Man. Corp.* (3rd ed.), § 80.

4. It was held to be competent for the legislature of *Pennsylvania* to take from Philadelphia the administration of charitable trusts under the will of Stephen Girard, and those of others, and give it to a board called "Directors of City Trusts." *Philadelphia v. Fox*, 64 Pa. St. 169.

"A municipal corporation may be a trustee, under the grant or will of an individual or of a private corporation, but only, as it seems, for public purposes germane to its objects." *SHARSWOOD, J.*, in *Phila. v. Fox*, 64 Pa. St. 169, citing *The Mayor v. Elliott*, 3 Rawle (Pa.) 170; *Cresson's Appeal*, 30 Pa. St. 437; *Vidal v. Mayor (Girard's Exrs.)*, 2 How. (U.S.) 127, 189; *Jones v. Habersham*, 107 U. S. 174. Compare *Mayor v. Gloucester*, 1 H. L. Cas. 285.

It has been held that a municipal corporation can be a trustee only for public purposes.¹

(2) *Diversion of Trust Funds*.—Whether such a public corporation may be charged with trust funds for other than public or charitable uses or not, it has been frequently decided that it cannot divert such funds to uses other than those designed when the trust was conferred.²

(3) *Legislative Decision Between Towns Claiming Trusteeship*.—Though the legislature, under constitutional restraint, may be of limited power to control all trusts held by public corporations, yet it was held competent for such body to determine which of two town corporations, formed from one which had held a trust, should succeed to the trusteeship, or which was the original corporation, and how it should administer the trust for both.³

1. It cannot, as the trustee of a charity, claim a vested right and prevent the State from changing it as the public interests may demand. *Montpelier v. East Montpelier*, 29 Vt. 21; *Girard v. Philadelphia*, 7 Wall. (U. S.) 14; *Perin v. Carey*, 24 How. (U. S.) 465; *McDonough Will Case*, 15 How. (U. S.) 367.

If in accord with proper corporation purposes, a trust for charitable objects may be held and administered by a city or other public corporation, though not expressly authorized by charter so to do. *McDonough v. Murdock*, 15 How. (U. S.) 367; *Perin v. Carey*, 24 How. (U. S.) 465; *Lawrence County v. Leonard*, 34 Leg. Int. (Pa.) 104; *Barnum v. Baltimore*, 62 Md. 275; s. c., 6 Am. & Eng. Corp. Cas. 203. Compare *Mason v. Church*, 27 N. J. Eq. 47.

Cities and like corporations may be trustees for funds given for corporate purposes which have been considered charitable, or which are governed in some respects as charitable uses, such as donations for public buildings, maintenance of a fire department, building or maintaining water works, making public improvements, sustaining the inhibition of distilling and selling spirituous liquors, for the payment of debts, and for public institutions. *Coggeshall v. Pelton*, 7 Johns. Ch. (N. Y.) 292; *Humane Fire Co.'s Appeal*, 88 Pa. St. 389; *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. (Pa.) 98; *Bethlehem v. Perseverance Fire Co.*, 81 Pa. St. 445; *Jones v. Williams*, Amb. 651; *Howse v. Chapman*, 4 Ves. 542; *Attorney General v. Heelis*, 2 Sim. & S. 67; *Haines v. Allen*, 78 Ind. 100; *Dickson v. United States*, 125 Mass. 311; *Newland v. At-*

torney General, 3 Mer. 684; *Ashton v. Langdale*, 4 Eng. Law & Eq. 139; *United States v. Fox*, 94 U. S. 315; *Beaumont v. Olivevia*, L. R., 6 Eq. 534; *British Museum v. White*, 2 Sim. & S. 594; *Town of Hamden v. Rice*, 24 Ct. 350; *Cresson's Appeal*, 30 Pa. St. 437.

2. It seems well settled that a city or other municipal trustee cannot apply trust funds otherwise than for the trust purpose with which it is charged. *Trustees v. Bradbury*, 2 Fairf. (11 Me.) 118; *Poultney v. Wells*, 1 Aik. (Vt.) 180; *Montpelier v. E. Montpelier*, 27 Vt. 704, & 29 Vt. 12; *White v. Fuller*, 39 Vt. 193; *Harrison v. Bridgeton*, 16 Mass. 16; *Plymouth v. Jackson*, 15 Pa. St. 44; *Daniel v. Memphis*, 11 Humph. (Tenn.) 582; *Aberdeen v. Saunderson*, 8 S. & M. (Miss.) 670; *Holland v. San Francisco*, 7 Cal. 361; *Chambers v. St. Louis*, 29 Mo. 543.

3. It was held that, upon the division of a town holding a trust, the legislature could decide which new corporation should hold the trust for the benefit of the inhabitants of both. *North Yarmouth v. Skillings*, 45 Me. 133. See *Trustees etc. v. Bradbury*, 11 Me. 118; *Norris v. Abington Academy*, 7 Gill & J. (Md.) 7; *Bass v. Fontleroy*, 11 Tex. 608; *Louisville v. University*, 15 B. Mon. (Ky.) 642.

But in *New Hampshire*, it was held that a new town, made by division of a town previously existing and holding a trust, was not entitled to any portion of the trust fund; that it was incompetent for the legislature to direct a different distribution from that directed by the donor of the fund to the original corporation. *Greenville v. Mason*, 53 N. H. 515.

III. INVESTMENTS AS AFFECTED BY PROVISIONS IN THE TRUST INSTRUMENT—1. When the Instruction Is Positive—(1) *Strict Construction.*—When the instrument leaves the trustee no discretion, but specifies precisely what security shall be selected, he is bound to obey implicitly. It must, however, be such direction as is consonant with law and practicable.¹

(2) *Directions as to the Amount to be Invested.*—If a stated sum is directed to be invested in a particular security, the trustee cannot invest a greater amount therein, unless there is no direction as to a remaining portion of the trust fund. In such case, if the security is such as the courts generally approve, he may invest more in it.²

(3) *Restrictions.*—Not only in respect to the amount designated in the instrument, but in all other matters lawfully enjoined, he must comply with the instructions. He cannot depart from the letter and spirit of the directions so far as to loan on a note when a bond is required; to substitute his own judgment for that of another person named in the trust instrument as the one to select the security; to loan to a less number of persons than the instrument requires as obligors, and the like. At the same time he must take his instructions with the law, and not do an illegal thing under color of the letter of his instructions.³

(4) *General and Special Instructions.*—A trustee cannot loan on a mortgage of real estate as security, when instructed to invest in the public funds.⁴ When a will is the instrument, there may be general powers conferred so as to justify an executor in disregarding clauses of the will designating a particular investment; the general powers may give him discretion, though the spirit of the instructions as a whole cannot be disregarded.⁵ Instructed

1. Strict Construction of the Investment.—Courts will hold trustees to the exact obedience of the directions in the instrument. *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *King v. Talbott*, 40 N. Y. 76; *Buttrill v. Shiel*, 2 Barb. (N. Y.) 457; *Wood v. Wood*, 5 Paige (N. Y.) 596; *Womack v. Austin*, 1 S. Car. 421; *Sanders v. Rogers*, 1 S. Car. 452; *Banister v. McKenzie*, 6 Munf. (Va.) 447; *Gilbert v. Welsch*, 75 Ind. 557; *Bromley v. Kelly*, 39 L. J. Ch. 274; *Mortimore v. Mortimore*, 4 De G. & J. 472; *Harris v. Harris*, 29 Beav. 107; *Smyth v. Burns*, 25 Miss. 422; *Kenzie v. Anderson*, 2 Woods (U. S.) 357.

2. They must not invest more money in a security designated in the instrument than the sum therein specified, if the security is not such as would be held proper in the absence of such direction. *Payne v. Collier*, 1 Ves. Jr. 170.

3. Directed to loan on bond, they cannot loan on a mere promissory note. *Greenwood v. Wakefield*, 1 Beav. 576.

Nor on foreign railroad bonds, though authorized to invest in foreign bonds or stocks. *In re Langdale's Settlement*, L. R., 19 Eq. 39. Nor without the approval of a person designated in the instrument, on whose judgment the loan is directed to be made. *McIntire v. Zanesville*, 17 Ohio St. 352. Nor in other than freehold security, when the instrument confines the direction to that. *Wyatt v. Wallace*, 8 Jur. 117. Nor can the loan be made to two persons only, when the instrument requires three. *Earlom v. Saunders*, Amb. 340; *Hereford v. Ravenhill*, 5 Beav. 51.

4. Direction in the instrument to invest in public funds precludes loans upon real estate mortgages. This is true in *England*, where the latter securities are allowable now under statute. The instrument governs. *Waring v. Waring*, 3 Ir. Ch. 331; *Pride v. Fooks*, 2 Beav. 430.

5. "Power under a will to change investments, etc., may control other

to invest in real estate, he was held justifiable in purchasing with it a right of dower.¹

Though, as a general rule, a trustee must make his investment within the State, he was sustained in purchasing a dwelling elsewhere to accommodate the beneficiary residing there, though the trust instrument merely instructed him to invest in a dwelling house.²

2. When the Instruction Leaves Discretion in the Trustee—(1) *Alternate Direction.*—Under the strict rule which formerly prevailed in *England*, it was held that where the trust instrument instructed the trustee to invest in public funds or other good securities, he yet could not legally invest in south sea stock.³ Trustees, however, in *England*, have not been invariably held for losses upon investments made in that stock when they have acted honestly and within the line of duty; and it is not the rule in the *United States*⁴ to hold trustees liable for stock investments generally considered good, when they have such discretion given them.

When the alternation in the instrument was "real estate or

clauses directing a particular investment, under appropriate circumstances." See *Stephens v. Milnor*, 24 N. J. Eq. 358; *Pleasant's Appeal*, 77 Pa. St. 356. *Schouler's Ex. & Adms.*, § 335, n.

1. Purchasing Real Estate.—A trustee was directed to invest in productive real estate, and it was held that he might purchase dwellings, and even a right of dower, in executing his trust. *Parsons v. Winslow*, 16 Mass. 361; *Amory v. Green*, 13 Allen (Mass.) 413.

And to prevent loss a trustee may buy real estate with trust money. *Royer's Appeal*, 11 Pa. St. 36; *Billington's Appeal*, 3 Rawle (Pa.) 55; *Bonsall's Appeal*, 1 Rawle (Pa.) 263. Compare *Oeslager v. Fisher*, 2 Pa. St. 467.

2. And, under direction to invest in a dwelling house, the trustee was held to have done his duty when he bought one in a foreign jurisdiction where the beneficiary was residing. *Amory v. Green*, 13 Allen (Mass.) 413. See *Denton v. Sanford*, 103 N. Y. 607.

The general rule is that the trustee must invest within the State. *Ormis-ton v. Olcott*, 84 N. Y. 339.

3. Bank Stock, etc.—The trust instrument required investment in government funds or other good securities. The trustee invested in South Sea stock. There was a loss, and the court held him responsible, saying that neither South Sea stock nor bank stock could be considered good security, since it de-

pended upon the management of the governor and directors, and the capital might be altogether lost. *Trafford v. Boehm*, 3 Atk. 440, 444. Such strictness would not be held now in this country, nor even in *England*, when the trust instrument uses such alternate expressions as above noted.

4. Even LORD HARDWICKE, who rendered the above decision, had previously held a trustee harmless for loss on South Sea stock, and had said: "To compel trustees to make up a deficiency not owing to their wilful default, is the hardest demand that can be made in a court of equity." *Jackson v. Jackson*, 1 Atk. (Eng.) 513; s. c., West Ch. (Eng.) 31.

"Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value, or on a security at the time apparently good which afterwards turns out not to be so, for the benefit of the *cestui que trust*, was there ever an instance of the trustee's being made to answer the actual sum so placed out? I answer, No. If there is no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favor him." LORD HARDWICKE, in *Knight v. Plymouth*, 3 Atk. (Eng.) 480; s. c., 1 Dickens 120-7, relied upon by him in *Ex parte Belchier*, Ambler 218, 219; s. c., 1 Kenyon 38, 47. Above cases cited are quoted by MR. JUSTICE GRAY in *Lamar v. Micon*, 112 U. S.

other security," an English court held that the investment should be in real estate.¹

(2) *General Directions—How Qualified by Law.*—Unrestricted instruction in the instrument to employ the trust fund was held to justify the trustee in employing it in business;² but where a loan was evidently contemplated, though the terms were vague, the ruling was against the use of a trust fund in that way.³

Personal securities are not favored by the *English* courts, even where general discretion is given by the trustee. Courts there will construe the instrument strictly in the interest of the public and the *cestui que trust*, and require unmistakable authorization to justify investment in such securities.⁴

Though the discretion given plainly leaves the trustee free to loan on such securities, the law will not hold him harmless if he has loaned to accommodate a fellow trustee or a relative, and the loan has resulted in loss. Having the good of another, rather than that of the *cestui que trust* in view, he could not be said to have acted in perfectly good faith.⁵

(3) *Directions to Employ Funds in Trade, etc.*—When the intent is clear and the authorization definite, the trustee may and should obey the instrument; should invest in personal and not real securities, when thus required; should employ the fund in trade (though his own judgment might not approve) when thus directed to do so. But though he be an executor positively directed by the will he executes to continue the testator's business,

452. The rule was afterwards more strict in *England*, till modified by statute.

1. *Construction of Alternate or Indefinite Directions—Ground Rents, Land.*

—It was held that when the instrument authorized investment in ground rents, redeemable ground rents were included. *Ex parte Huff*, 2 Pa. St. 227. When the investment was directed to be in real estate or other security, the court held that the true intent was to invest in land, and that other security was not allowable, if this could be done to advantage. *Earlom v. Saunders*, Amb. 340.

2. *Discretion Given in the Instrument.*

—When the trustee is directed to employ the fund, without any specification as to the security, the court thought that he might employ it in trade, in the particular case, without incurring liability. *Dickinson v. Player*, C. P. Coop. 178.

3. When the direction is to put the money at interest or "other way of improvement," it was held not sufficient to justify the trustee in embarking in business with it. *Cock v. Goodfellow*, 10 Mod. 489.

4. "If trustees have a discretion as to the kind of investments, it is not sound discretion to invest in personal securities." *Perry on Trusts*, § 453.

General authority to a trustee leaving him to his discretion, when not couched in definite terms, will not justify him in lending trust funds on personal security. *Wynne v. Warren*, 3 Heisk. (Tenn.) 118; *Pocock v. Reddington*, 5 Ves. 799; *Wilkes v. Steward*, G. Coop. 6; *Mills v. Osborne*, 7 Sim. 30.

The authorization should be specific and in due form, when a wife gives written consent that trust funds belonging to her may be loaned to her husband. *Cocker v. Quayle*, 1 R. & M. 535; *Pickard v. Anderson*, L. R. 13 Eq. 608.

5. Authority, in the instrument, to loan a personal security, will not shield the trustee from loss if he has loaned with the object of accommodating one of his kinsmen; or, where there are co-trustees, if they have loaned to one of themselves for such purpose. *De Jarnette v. De Jarnette*, 41 Ala. 708; *Langston v. Ollivant*, G. Coop. 33i.

he must not use more of the funds than are necessary, nor prolong the business beyond reasonable time.¹

(4) *Investment in Stocks Approved*.—Under instrumental authorization to invest in public funds or good, remunerative stock, with full discretion, the executor of the will which thus empowered him chose insurance and manufacturing companies' stock, and the court approved, taking into consideration the productiveness of the investments as well as their safety.²

Such directions by a decedent must be in his will, or at least in writing, to justify a trustee or executor in following them.³

(5) *Indefinite Instruction*.—When the direction merely requires "good and sufficient security," and there is no statutory designation of securities, the trustee should apply to the court for an order; so held in *England*, and also in this country in some instances.⁴

IV. LIABILITIES OF TRUSTEES—1. For Delay in Investing—(1) *When Investments Should be Made*.—The rule of law is that the trustee should invest within reasonable time. If the time is fixed by statute or the trust instrument, he must comply with the re-

Forbes v. Ross, 2 Cox 113; *Cock v. Goodfellow*, 10 Mod. 489; *Stickney v. Sewell*, 1 M. & Cr. 814; *Fitzgerald v. Pringle*, 2 Moll. 534; *Francis v. Francis*, 5 De G., M. & G. 108.

1. If the instrument is a will, and the testator has directed the executor to continue an established business for a reasonable time, the latter may do so without incurring liability to distributees for losses. *Paddon v. Richardson*, 7 De G., M. & G. 563. In such case, however, only the money already employed in the business can be used—no new investment, it was *held*. *McNeille v. Acton*, 4 De G., M. & G. 744.

2. When the instrument was a will directing the trustee, to invest with good security, "in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion, hereby enjoining on them particular care and attention in the choice of funds, and in the punctual collection of the dividends, interest and profits thereof, and authorizing them to sell out, reinvest and change the said loans and stocks from time to time, as the safety and interest of the said trust fund may, in their judgment, require," the court *held* investment in incorporated insurance and manufacturing companies to be proper. It broadly laid down this rule: "All that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound

discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." *Harvard College v. Amory*, 9 Pick. (Mass.) 446. And this is the rule at present in *Massachusetts*. *Brown v. French*, 125 Mass. 410; *Bowker v. Pierce*, 130 Mass. 262.

3. Unwritten directions made by the decedent will not warrant an executor or administrator to divert trust funds. *Malone v. Kelley*, 54 Ala. 532.

Specific legacies already invested with security, need not be disturbed by the executor. *Ward v. Kitchen*, 30 N. J. Eq. 31.

4. "Good and Sufficient Security."—When the trust instrument directs that the fund be invested in "good and sufficient security" (a phrase often employed), it is the duty of the trustee to select such security as the statutes recognize as such; or, in the absence of statutory direction, to apply to the court for designation. If he act at discretion, the court will judge whether his selection of security was proper. *Nance v. Nance*, 1 S. Car. 209; *Womack v. Austin*, 1 S. Car. 421; *McCall v. Peachy*, 3 Munf. (Va.) 288; *Trustees v. Clay*, 2 B. Mon. (Ky.) 385; *Trafford v. Boehm*, 3 Atk. 440; *Ryder v. Bickerton*, 3 Swans. 80, n.; *Booth v. Booth*, 1 Beav. 125; *De*

quirement, or the *onus* is upon him to show why not. When there is time thus fixed, the courts will determine what time is reasonable.¹

He must, within reasonable time, withdraw funds already invested if the law requires a different security for trust funds than that which the testator took when he invested them as his own, and he must reinvest with proper security without unnecessary delay.²

(2) *What Is Reasonable Time.*—Reasonable time may be more or less extended, according to the duty required and the difficulty of investing to the best advantage. A year was not deemed unreasonable when the investment was to be in real estate.³ An executor held trust funds a year before buying United States stock without incurring the disapproval of the court.⁴ Half, and even one fourth of that time have been held sufficient—the character of the investment and the circumstances being always considered. And sometimes immediate investment will be required, any delay being unreasonable.⁵

(3) *Interest During Delay.*—The beneficiary of the trust is not to lose by reason of the trustee's failure to invest at the proper time. If it is the trustee's fault that the fund is not productive, he must repair it by paying legal interest for the time unnecessarily delayed. The rule is that he is liable to be made to pay simple interest.⁶

Manneville v. Crompton, 1 V. & B. 259.

1. *Time of Investment.*—When no time is specified, the courts will adjudge what is a reasonable period within which trust funds should be invested. *Johnson v. Newton*, 11 Hare 160; *Parry v. Warrington*, 6 Mad. 155.

2. And an executor must invest trust funds within reasonable time, though they have been invested by the testator himself in securities other than those designated by law for the investment of trust funds. He must convert them into proper securities without unreasonable delay. *Pray's Appeal*, 34 Pa. St. 100; *Hemphill's Appeal*, 18 Pa. St. 303. Compare *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 283.

3. *Within One Year.*—Courts will judge as to the reasonableness of the time taken to select and effectuate a proper investment. A year may not be too long for finding and buying suitable land, and examining and deciding upon the title, etc. *Johnson v. Newton*, 11 Hare 160; *Parry v. Warrington*, 6 Mad. 155; *Wyatt v. Wallis*, 1 Coop. 154, n.

4. An executor, charged to invest in stock of the United States, delayed a

year, and was not deemed derelict in his duty. *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231.

5. *Six Months or Less.*—As "reasonable time" depends on the character of the directed investment, and the circumstances of each particular case, six months may be long enough; there may be sufficient, and immediate action may be necessary to avoid liability on the part of the trustee. *Armstrong v. Walkup*, 12 Gratt. (Va.) 608; *Hooper v. Royster*, 1 Munf. (Va.) 119; *Barney v. Saunders*, 16 How. (U. S.) 543; *Frey v. Frey*, 2 C. E. Green (17 N. J. Eq.) 71; *Duncomb v. Duncomb*, 1 Johns. Ch. (N. Y.) 508; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527; *Warrell's Appeal*, 23 Pa. St. 44; *Merrick's Estate*, 2 Ashm. (Pa.) 485.

6. *Interest Charged.*—If no investment be made within such time as the court deems reasonable, the trustee will be charged with simple interest for the time he needlessly withholds the trust fund from investment. *Barney v. Saunders*, 16 How. (U. S.) 535; *Duncomb v. Duncomb*, 1 Johns. Ch. (N. Y.) 508; *Forbes v. Ross*, 2 Cox 115; *Hughes v. Empson*, 22 Beav. 181; *Johnson v. Prendergast*, 28 Beav. 480; *Flan-*

(4) *Reparation for Losses.*—He is also liable for any losses that may have been caused by failure to invest, when he can show no good reason for his neglect, when the procrastination was intentional, when his tardiness is attributable to his want of business energy, or from an indifference akin to bad faith.¹

2. *For Commingling Trust Funds with His Own by Trustee*—(1) *By Commingling the Funds in Any Way.*—Whatever the way in which the funds are intermixed, whether by the trustee's depositing them with his personal money in bank, purchasing property partly for himself and partly for the *cestui que trust* without any designation of the interest of either, keeping his accounts so as to confound his own with the money held in trust, or creating confusion of interests in any one of many conceivable ways, he becomes responsible for not only the interest which the trust funds would have yielded if separately invested, but also for all losses which the intermingling may have caused.²

(2) *By Using Trust Funds in His Own Business.*—More reprehensible still is the trustee's employing trust funds in his private business. He has no right to subject them to the fluctuations of trade, though confidently believing in his own judgment and honest intent. His duty is to invest them, and borrowing them himself is not complying with this duty. He thus not only jeopardizes the sacred trust which he has assumed, but, even if suc-

agan v. Nolan, 1 Moll. 85; Moyle v. Moyle, 2 R. & M. 710; Johnson v. Newton, 11 Hare 160; Cogswell v. Cogswell, 2 Edw. Ch. (N. Y.) 231; Williamson v. Williamson, 6 Paige (N. Y.) 298; Mimose v. Cox, 5 Johns. Ch. (N. Y.) 441; Carter v. Cutting, 5 Munf. (Va.) 223.

1. *Interest and Loss.*—If the trustee fails to invest within reasonable time, he is chargeable with interest and liable for losses attributable to his neglect. Garniss v. Gardner, 1 Edw. Ch. (N. Y.) 128; Schieffelin v. Stewart, 1 Johns. Ch. (N. Y.) 620; Chase v. Lockerman, 11 G. & J. (Md.) 185; Lomax v. Pendleton, 3 Call. (Va.) 538; Lyse v. Kingdom, 1 Call. (Va.) 184; Bates v. Scales, 12 Ves. 402; Ryder v. Bickerton, 3 Swanst. 80; Trafford v. Boehm, 3 Atk. 440; Handly v. Snodgrass, 9 Leigh (Va.) 484; Shipp v. Hettrick, 63 N. Car. 329; Owen v. Peebles, 42 Ala. 338; *In re Thorp*, Davies (U. S.) 290; Aston's Estate, 5 Whart. (Pa.) 228; Clough v. Bond, 3 M. & Cr. (Eng.) 496; Byrchall v. Bradford, 6 Mad. 235; Johnson v. Newton, 11 Hare (Eng.) 160; Phillipson v. Gatty, 7 Hare 516; Challen v. Ship-pam, 4 Hare 555; Watts v. Girdlestone, 6 Beav. 188; Matthews v. Brice, 6 Beav. 239; Byrne v. Norcott, 13 Beav. 336;

Robinson v. Robinson, 1 De G., M. & G. 256; Fletcher v. Walker, 3 Mad. 73; Massey v. Banner, 4 Mad. 419; McDonnell v. Harding, 7 Sim. 178; Munch v. Cockerell, 9 Sim. 115; Lowry v. Fulton, 9 Sim. 115; Moyle v. Moyle, 2 R. & M. 701.

2. *Commingling Trust and Private Funds.*—Liability for interest and loss. Robinett's Appeal, 36 Pa. St. 174; Gilbert's Appeal, 78 Pa. St. 266; Dyott's Estate, 2 W. & S. (Pa.) 557, 565; Mer-rick's Estate, 2 Ash. (Pa.) 485; Com. v. McAlister, 28 Pa. St. 480; *In re Thorp*, Davies (U. S.) 290; McKenzie v. Anderson, 2 Woods (U. S.) 357; Munford v. Murray, 6 Johns. Ch. (N. Y.) 1; Spear v. Tinkham, 2 Barb. (N. Y.) 211; De Peyster v. Clarkson, 2 Wend. (N. Y.) 77; Case v. Abeel, 1 Paige (N. Y.) 393; Kellett v. Rathbun, 4 Paige (N. Y.) 102; Garniss v. Gardner, 1 Edw. Ch. (N. Y.) 128; Beverleys v. Miller, 6 Munf. (Va.) 99; Leake's Executors v. Leake, 75 Va. 794; Peyton v. Smith, 2 Dev. & Bat. Eq. (N. Car.) 325; Kerr v. Laird, 27 Miss. 544; State v. Cheston, 51 Md. 352; Diffenderfer v. Winder, 3 Gill & J. (Md.) 311; Jameson v. Shelby, 2 Humph. (Tenn.) 198; Henderson v. Henderson, 58 Ala. 582; Kirkman v. Benham, 28 Ala. 501; Dit-

cessful in his ventures, he puts a temptation in his own way. The law does not tolerate such dispositions of trust funds, but holds the trustee liable for all the damages which his illegal course may cause.¹

3. For Holding Trust Property in His Own Name—(1) *By Taking Mortgage in the Trustee's Own Name.*—It is held to be a mingling of trust with private funds when a trustee acts in his own name and private capacity when taking real estate security for the loan of trust money. Such conduct is held highly reprehensible. It is not only unjust to those whose interests are entrusted to his care, but it is detrimental to the public weal. The emphatic denunciations of such conduct by the English courts have been followed by reprobation as strong in this country.²

(2) *By Taking Title in His Own Name.*—So if the trustee, taking a trust deed to secure a loan of the trust money which he administers, has land conveyed to himself in his own name, he acts beyond the line of his duty. He thus makes himself not only liable in damages for any loss that may ensue, but puts the *cestui que trust* in a position where he may elect to claim the damages in case of loss, or to claim the land itself in case he chooses to adopt the investment. The principle has been often held that the beneficiary may avail himself of any benefit which his wrongdoing trustee may have meant to enure to himself, not-

mar *v.* Bogle, 53 Ala. 169; Henderson *v.* Henderson, 58 Ala. 582; Calvert *v.* Marlow, 6 Ala. 337; Nettles *v.* McCown, 5 S. Car. 43; Perkins' Estate, 59 Vt. 348; Hedricks *v.* Tuckwiller, 20 W. Va. 489; Hanbest's Estate, 12 Phila. (Pa.) 72.

1. Using Trust Funds in His Own Business—Trustee Liable.—Manning *v.* Manning, 1 Johns. Ch. (N. Y.) 527; Brown *v.* Ricketts, 4 Johns. Ch. (N. Y.) 303; Adye *v.* Feuilletau, 1 Cox 25; Tebbs *v.* Carpenter, 1 Mad. 304; Piety *v.* Stace, 4 Ves. 622; *In re* Hilliard, 1 Ves. Jr. (Eng.) 90; Docker *v.* Somes, 2 M. & R. 655; Palmer *v.* Mitchel, 2 M. & R. 672, n.; Kyle *v.* Barnett, 17 Ala. 306; Land's Appeal, 58 Pa. St. 142; Norris' Appeal, 71 Pa. St. 106; Hook *v.* Dyer, 47 Mo. 214.

Depositing trust funds on trustee's private account. Williams *v.* Williams, 55 Wis. 300; s. c., 42 Am. Rep. 708; Hanbest's Estate, 12 Phila. (Pa.) 72; Kirby *v.* State, 51 Md. 383; Thompson *v.* Brooke, 76 Va. 160.

2. Devastavit.—A trustee must not mingle trust funds with his own money. "If a trustee lend the trust fund and take a note and mortgage to himself individually, he thereby mingles the trust funds with his own individual

funds, and may be charged with a *devastavit* at the election of the *cestui que trust*." De Jarnette *v.* De Jarnette, 41 Ala. 708; citing Pennell *v.* Deffield, 23 Eng. L. & Eq. 460.

Among other authorities cited to show that the principle has been long recognized by the courts as "essential to the general interests of mankind," are the following: Freeman *v.* Fairlie, 3 Merivale 28; Wren *v.* Katron, 11 Ves. 377; Routh *v.* Howell, 3 Ves. 565; *Ex parte* Hilliard, 1 Ves. 89; Roche *v.* Hart, 11 Ves. 61; Massey *v.* Banner, 4 Mad. 413; Fletcher *v.* Walker, 3 Mad. 73; Robinson *v.* Ward, Ry. & M. 274; Verner's Estate, 9 Watts (Pa.) 250; West Br. Bank *v.* Fulmer, 3 Pa. St. 390; McAllister *v.* Com., 30 Pa. St. 536; Com. *v.* McAllister, 28 Pa. St. 480; Royer's Appeal, 11 Pa. St. 36; Kellett *v.* Rathbun, 4 Paige (N. Y.) 102; Case *v.* Abeel, 1 Paige (N. Y.) 393; Mumford *v.* Murray, 6 Johns. Ch. (N. Y.) 1; In the Matter of Stafford, 11 Barb. (N. Y.) 353; Lewin on Trusts, *pp. 296, 333; 2 Story Eq., § 1270; Fonblanque's Eq. 474, n.; Dayton on Surrogates, 489; Hill on Trustees, 376; Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270; Rorke *v.* McConville, 4 Redf. (N. Y.) 291; Lacoste's Estate, Myrick's Probate (Cal.) 67.

withstanding the form of title which the trustee may hold.¹

4. For Speculating with Trust Funds—(1) *Profits Enure to the Cestui que Trust.*—It is not permissible that the trustee may enrich himself from the funds which he administers. He cannot speculate with them without going out of his line of duty. Should he illegally do so, he is liable for all the losses that may result from his ventures, while all the profits belong to the *cestui que trusts*. If there are no profits he may be required to pay interest for the time the fund was thus unlawfully employed. If he has purchased anything for himself with the trust funds, the property may be claimed by the estate or person for whom he was legally bound to act.²

(2) *Purchases May be Taken by the Cestui que Trust.*—Even though a trustee, who has obtained an order of court to sell property of the estate he administers, be authorized by the order to bid at the public sale, he cannot thus buy land or other property for himself. Should he bid it in, those whom he is legally bound to represent may elect to take it. Should he thus buy and then dispose of it at a profit, the gains enure to them and not to himself. The rule with respect to private purchases, that losses are his and gains are theirs, applies to purchases at judicial sales with full force, even when he is specially authorized to bid. Ordinarily he cannot legally bid or become the buyer when he is the seller.³

1. Investment in Trustee's Own Name.—Should a trustee take the title to land himself, in trust, instead of a mortgage upon it as security for the *cestui que trust*, the latter may adopt the action and take the land. *Bonsall's Appeal*, 1 Rawle (Pa.) 266; *Billington's Appeal*, 3 Rawle (Pa.) 55; *Royer's Appeal*, 11 Pa. St. 36; *Kaufman v. Crawford*, 9 W. & S. (Pa.) 131; *Matthews v. Hayward*, 2 S. Car. 239; *Morton v. Adams*, 1 Strobh. Eq. (S. Car.) 72; *Keth v. Richmond etc.*, 4 Gratt. (Va.) 482; *Eckford v. De Kay*, 8 Paige (N. Y.) 89; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; *Winchelsea v. Nordcliffe*, 1 Vern. 134.

2. Speculating.—"It is a well settled rule that where a trustee speculates with the trust funds he may be held to profits or interest at the option of the *cestui que trust*: profits, if the investment has been successful; and interest, if it has been disastrous. In no event will the trustee be allowed to make a profit out of the trust funds. The law holds out no inducements to trustees to misapply the estate. He may lose, but he cannot make by so doing. It is equally clear that when the trust funds can be fairly traced into the purchase

of any particular stock, the latter shall be held to belong to the estate, if the *cestui que trust* so elect." *Norris's Appeal*, 71 Pa. St. 106; *Sequin's Appeal*, 103 Pa. St. 139; *McLaughlin v. Fulton*, 104 Pa. St. 161.

3. Speculating Purchases.—Profit cannot be legally made out of a trust fund, by the trustee, for his own benefit. Gains are to enure to the *cestui que trust*.

A trustee, at a judicial sale of land made upon his own application for the order, cannot become a purchaser and use trust funds in payment, and then resell by way of speculation, so as to enrich himself. Whatever profit he thus makes belongs to the *cestui que trust*. This is so, though the order of court allowed him to bid at the judicial sale. *Baker's Appeal*, 120 Pa. St. 33; *Sequin's Appeal*, 103 Pa. St. 139; *McLaughlin v. Fulton*, 104 Pa. St. 161. *Compare Patterson's Appeal*, 118 Pa. St. 571.

When land is sold by an agent of a trustee, and the latter has no authority conferred by the deed of trust to appoint an agent, no title passes to the purchaser. *Fuller v. O'Neil*, 69 Tex. 349; *Graham v. King*, 50 Mo. 22; *Bales*

5. For Losses on Unauthorized Investments—(1) *Losses on Investments Made in Contravention of Common Law.*—Whenever a trustee invests in derogation and violation of law, he takes the risk of any loss that may result, and the courts will treat him as having acted in bad faith, and will hold him accountable.¹

(2) *In Violation of Statutory Inhibitions.*—So if he wantonly disregards statutory directions, the loss, if any, will fall upon himself.²

(3) *In Disregard of Legal Directions in the Trust Instrument.*—So if he sets up his own will against that expressed in the instrument under which it is his duty to act, he makes himself liable for losses.³ And generally, when left to his own discretion, he may be held liable for losses when he has not obtained an order of court for the investment.

6. Rights and Liabilities of an Interested Trustee Acting for Others Interested—(1) *A Trustee Creditor May Pay Himself with Other Creditors Under Given Circumstances.*—While the rule that a trustee cannot act in his own interest is inflexible, there may be circumstances under which a trustee may act for himself in connection with others, in his administration of a trust, without violation of the spirit of the rule. One who was winding up the affairs of an insolvent corporation, having paid the other creditors, afterwards paid himself a credit due him by the corporation. The court held it inequitable to hold him to be a violator of the rule, and said that it was never applicable to such a case. Acting in good faith, and in perfect fairness to the other creditors, there was no good reason why he should not be paid as a creditor while acting in the capacity of trustee.⁴

(2) *Trustee Representing Coparties in Litigation.*—When a trustee represents the interests of others with which his own is indissolubly conjoined, he should be compensated from the com-

v. Perry, 51 Mo. 451; *Powell v. Tuttle*, 3 N. Y. 396.

A trustee cannot claim title in himself adverse to that of the *cestui que trust* whose interest he represents. "A contrary rule would render it extremely hazardous to entrust property to another; and would, in many instances, enable an unscrupulous trustee to profit by violating the terms of his agreements." *Neyland v. Bendy*, 69 Tex. 711.

1. See authorities cited *supra*, this title, INVESTMENT OF TRUST FUNDS AT COMMON LAW.

2. See *supra*, this title, TRUST INVESTMENTS REGULATED BY STATUTE.

3. See *supra*, this title, INVESTMENTS AS AFFECTED BY PROVISIONS IN THE TRUST INSTRUMENT.

4. Exception to the Rule.—The rule remains unimpaired that a trustee cannot buy trust property at a sale of it provoked by himself, unless he have leave of court so to do. But it was held not to be contrary to this rule, when a stockholding creditor, who had been made trustee of the stock of an insolvent corporation, paid himself four years after he had paid the other creditors. It was held on a bill filed for an amount, that he had acted within the law. The court said: "The complainants are in a court of equity, and there is no equity in what they ask. The principle which they invoke was never intended for such a case, and to apply it here would work the very reverse of equity." *Patterson's Appeal*, 118 Pa. St. 571. See *Grim's Appeal*, 105 Pa. St. 375.

mon property managed by him, or be paid by the others proportionably to their interest, for the outlay he has made in behalf of all. Should he act upon his own motion, and institute proceedings for the benefit of all without being authorized to represent the coparties in interest, they would yet be equitably bound to share the expense of the outlay if they should accept the benefits of it. But should he fail of success, they would not be so bound when they had not employed him.¹

7. Liability to Pay Interest on Balances.—(1) *How Balances Should be Ascertained.*—The trustee should charge himself with all the income for the current year, and credit himself with all the disbursements and his commissions at his annual settlement. The balance in his hands is chargeable with legal interest, as a general rule, it is held, though it seems that it should not be so when he has possessed it so little while that no opportunity for desirable investment may have occurred.²

(2) *When Liable for Interest on Balances.*—Holding balances after time and opportunity for investing have occurred, mingling them with his own funds or using them as his own in business, failing to render his account at the proper time so that the balance can be ascertained, or withholding the turning of them over to those entitled to receive them after balances have been struck, will render the trustee liable for interest at the legal or agreed rate, for all the time the money was unlawfully detained by him. The authorities on this subject are numerous, both in *England* and the *United States*.³

1. Trustee Representing Coparties in Interest.—"When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefit of his efforts. See *Trustees v. Greenough*, 105 U. S. 527, where the subject is discussed by MR. JUSTICE BRADLEY, and the cases cited; and *Central Railroad Co. v. Pettus*, 113 U. S. 116." And the court say that one bringing adversary proceedings to take trust property from those entitled to it, and failing in his suit, cannot have reimbursement for his outlay in such proceeding. *Hobbs v. McLean*, 117 U. S. 567.

2. Interest on Balances.—"The proper mode of taking the account of trustees is to treat all the income of the trust received during the current year as unproductive, and to charge against

the income of the current year all the disbursements, including the compensation or commissions of the trustees for the same year, and to strike a balance, upon which, as a general rule, interest is to be allowed. *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *Pettus v. Clawson*, 4 Rich. Eq. (S. Car.) 92; *Jones v. Morrall*, 2 Sim. (N. S.) (Eng.) 241; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 77; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287; *Luken's Appeal*, 47 Pa. St. 356; *Reynolds v. Walker*, 29 Miss. 250; *Roach v. Jelks*, 40 Miss. 754; *Crump v. Gerock*, 40 Miss. 765." *Perry on Trusts*, § 468. See *INTEREST*, vol. 11. Compound interest on balances: *In re Sanderson* (Cal.), 15 Pac. Rep. 753.

3. Rule Respecting Interest.—"If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name, or in the name of the firm of which he is a member, or neglects to settle his account for a long time, or to distribute

8. When Liable for Compound Interest—(1) *On Illegal Commissions.*—Should a trustee retain trust money as his own, on the pretence of paying himself commissions to which he is not entitled, he may be charged compound interest on the amount thus withheld.¹

(2) *On Sums Withheld from Court.*—If he fails to obey an order of court directing him to produce funds which are in litigation, compound interest on them may be exacted for the time in which he delays.²

(3) *For Breach of Trust.*—If he wantonly commits a breach of trust with respect to the fund with which he is charged, the court may require him to restore what he has taken, and compound interest may be exacted of him.³

(4) *Refusing to Account.*—If a trustee disobeys a judicial order requiring him to render his account, he may be compelled to pay compound interest for the time of delay. The *cestui que trust*

or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements. *Burdick v. Garrick*, L. R., 5 Ch. 241; *Blogg v. Johnson*, L. R., 2 Ch. 225; *Berwick v. Murray*, 7 De G. M. & G. 843; *Treves v. Townshend*, 1 Bro. Ch. 384; *Forbes v. Ross*, 2 Bro. Ch. 430; *Piety v. Stacy*, 4, Ves. 620; *Ashburnham v. Thompson*, 13 Ves. 402; *Bates v. Scales*, 12 Ves. 402; *Pocock v. Reddington*, 5 Ves. 794; *Sutton v. Sharp*, 1 Russ. 146; *Crockett v. Bethune*, 1 J. & W. 122; *Atty. Gen. v. Tolly*, 2 Sim. 515; *Heathcote v. Hulme*, 1 J. & W. 122; *Brown v. Sansome*, 1 Mc. & G. 327; *Westoven v. Chapman*, 1 Coll. 177; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Jones v. Foxall*, 15 Beav. 392; *Saltmarsh v. Barrett*, 21 Beav. 349; *Knott v. Cottee*, 16 Beav. 77; *Roche v. Hart*, 11 Ves. 58; *Lincoln v. Allen*, 4 Bro. P. C. 553; *Young v. Comb*, 4 Ves. 101; *Dawson Massey*, 1 Ball & B. 231; *Hicks v. Hicks*, 3 Atk. 274; *Perkins v. Boynton*, 1 Bro. Ch. 375; *King v. Talbott*, 40 N. Y. 76; *Nelson v. Hagerstown Bank*, 27 Md. 51; *Cook v. Addison*, L. R., 5 Ch. 466; *Duffy v. Duncan*, 35 N. Y. 187; *Young v. Brush*, 38 Barb. (N. Y.) 294; *Owen v. Peebles*, 42 Ala. 338; *Wistar's Appeal*, 54 Pa. St. 60; *Newton v. Bennett*, 1 Bro. Ch. 359; *Littlehales v. Gascoyne*, 3 Bro. Ch. 73; *Franklin v. Firth*, 3 Bro. Ch. 433; *Longmore v. Broom*, 7 Ves. 124; *Trimleston v. Hammill*, 1 Ball & B. 385; *Tebbs v. Carpenter*, 1 Mad. 290; *Mousley v. Carr*, 4 Beav. (Eng.) 49; *Hoskins v. Nichols*, 1 N. C. C.

Eng. 478; *Beverleys v. Miller*, 6 Munf. (Va.) 99; *Diffenderffer v. Winder*, 3 Gill & J. (Md.) 311; *Mumford & Murray*, 6 Johns. Ch. (N. Y.) 1; *Jacot v. Emmett*, 11 Paige (N. Y.) 142; *Kellet v. Rathbun*, 4 Paige (N. Y.) 102; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 77; *Garniss v. Gardiner*, 1 Edw. Ch. (N. Y.) 128; *Spear v. Tinkham*, 2 Barb. Ch. (N. Y.) 211; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527; *Brown v. Rickett*, 4 Johns. Ch. (N. Y.) 303; *Williamson v. Williamson*, 6 Paige (N. Y.) 298; *Kerr v. Laird*, 27 Miss. 544; *Handly v. Snodgrass*, 9 Leigh (Va.) 484; *Dillard v. Tomlinson*, 1 Munf. (Va.) 183; *Carter v. Cutting*, 5 Munf. (Va.) 223; *Wood v. Garnett*, 6 Leigh (Va.) 271; *Griswold v. Chandler*, 5 N. H. 492; *Lund v. Lund*, 41 N. H. 355; *Turney v. Williams*, 7 Yerg. (Tenn.) 172; *Wright v. Wright*, 2 McCord Ch. (S. Car.) 185; *Knowlton v. Bradley*, 17 N. H. 458," etc.; *Perry on Trusts*, § 468.

1. Compound Interest.—For retaining money as commission when not allowed by law or under order of court, a trustee may be charged compound interest on the sum thus retained. *McKnight v. Walsh*, 23 N. J. Eq. 136, and 24 N. J. Eq. 498.

2. If he fail to bring a litigated sum into court when ordered to do so, he may be made to pay compound interest on it for the time he thus withholds it: *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Latimer v. Hanson*, 1 Bland (Md.) 51; *Winder v. Diffenderffer*, 2 Bland (Md.) 166.

3. Compound interest may be charged when there is an intended breach of

is entitled to what he would have had if the trustee had made his settlements regularly so that the balances in his favor would have been upon interest from the time of their ascertainment; and justice to him requires that the interest should be compounded in case such settlements were not made at the regular times. And the trustee is not too rigidly dealt with when required to pay such interest for his culpable neglect. He is chargeable on reasonable presumptions of what he may have made. Besides, the public is interested in having settlements duly made.¹

9. When Trustees Are Not Liable—(1) *When Authorized by Cestui que Trust*.—Though trustees invest in improper securities, or such as the courts are known to avoid when ordering trust investments, yet they will not be responsible for losses nor be held for interest if the interested parties for whom they act have themselves directed the investment. Those parties, when of age and capable of contracting in all respects, estop themselves from complaining when they have instigated the transaction which results to their own detriment. Had the court acted for them and ordered investment in the security which proved inadequate, the trustees would not have been more clearly blameless than when the *cestui que trust* gave the direction.²

trust on the part of the trustee. *Fall v. Simmons*, 6 Ga. 265; *Kenan v. Hall*, 8 Ga. 417; *Cartledge v. Cutliff*, 21 Ga. 1; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171.

1. So, when he refuses to render his account. *Bryant v. Craig*, 12 Ala. 354; *Smith v. Kennard*, 38 Ala. 695; *Jannison v. Hapgood*, 10 Pick. (Mass.) 77; *McElhenny's Appeal*, 61 Pa. St. 188; *Knott v. Cottee*, 16 Beav. 77; *Swindall v. Swindall*, 8 Ired. Eq. (N. C.) 285. See *Scott v. Crews*, 72 Mo. 261.

Compound interest may be exacted, whether there was malfeasance on the part of the trustee or not, if he has so employed the trust fund that he may reasonably be presumed to have received from it profits equivalent to compound interest. *Docker v. Somes*, 2 My. & K. (Eng.) 655; *Atty. Gen. v. Alford*, 4 D. M. & G. (Eng.) 843; *Burdick v. Garrick*, 5 Ch. App. (Eng.) 233; *Tedds v. Carpenter*, 1 Madd. (Eng.) 290; *Crockett v. Bethune*, 1 Jac. & W. (Eng.) 586; *Boynston v. Dyer*, 18 Pick. (Mass.) 1; *Fay v. Howe*, 1 Pick. (Mass.) 527; *Elliott v. Sparrell*, 114 Mass. 404; *Wendell v. French*, 19 N. H. 205; *Lund v. Lund*, 41 N. H. 355; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 77; *Garniss v. Gardiner*, 2 Edw. Ch. (N. Y.) 128; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Barney v. Saunders*, 16

How. (U. S.) 535; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Prescott's Estate*, 1 Tuck. (N. Y.) 430; *Hood's Estate*, 1 Tuck. (N. Y.) 396; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527; *Spear v. Tinkham*, 2 Barb. Ch. (N. Y.) 211; *Ackerman v. Emmott*, 4 Barb. (N. Y.) 626; *Lansing v. Lansing*, 45 Barb. (N. Y.) 182; *McKnight v. Walsh*, 24 N. J. Eq. 498; *McCall's Estate*, 1 Ashm. (Pa.) 357; *English v. Harvey*, 2 Rawle (Pa.) 305; *Harland's Accounts*, 5 Rawle (Pa.) 323; *Lukens's Appeal*, 7 W. & S. (Pa.) 48; *Light's Appeal*, 24 Pa. St. 180; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171; *Kyle v. Barnett*, 17 Ala. 306; *Williams v. Petticrew*, 62 Mo. 460; *Scott v. Crews*, 72 Mo. 261; *Fall v. Simmons*, 6 Ga. 265; *Kenan v. Hall*, 8 Ga. 417; *Ringgold v. Ringgold*, 1 Harris & Gill (Md.) 11; *Myers v. Myers*, 2 McCord Ch. (S. Car.) 214; *Wright v. Wright*, 2 McCord Ch. (S. Car.) 185; *Johnson v. Miller*, 33 Miss. 553.

2. **Investments Under Authorization of the Cestui Que Trust**.—When the trustee acts for those who are capable of contracting; and under power from them to make a specified investment, he is not liable for interest or losses, though the investment be not such as the courts would have directed. *Poole v. Munday*, 103 Mass. 174; *Nyce's Appeal*, 5

(2) *When There Is Depreciation of Securities Without His Fault.*—If the investment is a good one when made, the trustee is not liable for a subsequent depreciation of the security. An apparently good first mortgage, which, after the investment, proves inadequate security, will not be held to have been improperly chosen; but the selection of second mortgage railroad bonds, which deteriorate subsequently, would render the trustee liable for loss.¹ But if the trustee has manifested due diligence in the selection, has consulted good business men and been advised in favor of a particular fund not inhibited by law, and the fund was generally thought to be safe, he ought not to be held liable for losses beyond his control.²

(3) *Fraud of Agents.*—When the investment is permissible by the terms of the trust, and made in good faith, and with business prudence, the trustee is not liable for loss occasioned by the fraud of a necessary agent.³

(4) *Premiums On Bonds.*—A trustee may pay premiums on bonds in which he invests trust funds. He may withhold dividends resulting from the investment, to restore the capital to the original sum which the payment of the premiums had diminished. And the market quotations as to the value of the bonds, after investment, do not affect his responsibility relative thereto.⁴

(5) *When Trustees Have Done Their Duty.*—Finally, there is no liability when the trustee has done his full duty.⁵

Watts & S. (Pa.) 254; Booth v. Booth, 1 Beav. 125; Walker v. Symonds, 3 Swanst. 64; Langford v. Gascoyne, 11 Ves. 333; Brice v. Stokes, 11 Ves. 319; Montfort v. Cadogan, 17 Ves. 489; Nail v. Punter, 5 Sim. 555.

1. *Loss on Mortgage.*—A trustee is not chargeable for loss when the security was a mortgage on real estate worth fifty per cent. more than the sum loaned, but which afterwards depreciated for cause beyond the trustee's control.

But for loss resulting from his having taken second mortgage bonds of a railroad company, the trustee was held liable. Clark v. Anderson, 13 Bush (Ky.) 111.

2. *Losses Beyond Trustee's Control.*—A faithful trustee who has invested in funds generally considered good at the time, or who has trusted necessarily to others who were deemed trustworthy, is not to be held for losses occasioned by the subsequent deterioration of the funds or the *mala fides* of the agent. Knight v. Plymouth, 1 Dickens 120; s. c., 3 Atk. 480; *Ex parte* Belchier, 1 Ken. 38; s. c., 1 Amb. 218.

3. *Fraud.*—"A trustee must not choose investments other than those which the terms of his trust permit." A trustee

is only bound to conduct the business of his trust in the same manner in which an ordinarily prudent man of business would conduct his own. A trustee held not liable for loss by reason of the fraud of his broker. (LORD HARDWICKES in Knight v. Plymouth, 3 Atk. (Eng.) 480, followed.) Speight v. Gaunt, 22 Ch. Div. 727, 739, 762; 9 App. Cas. 19.

4. *Bond Premiums.*—An investment in 4 per cent. bonds of the government was held judicious, although the purchaser had paid a premium of three per cent., and the trust fund might have commanded a higher rate in other securities. Emery v. Batchelder, 78 Me. 233.

A trustee bought bonds at a premium for a permanent investment. He was held not bound to pay to the life-tenant the entire net income. He may make successive deductions to restore the capital to what it was before the premium was paid. The quotations in the market meanwhile (or the fluctuation in the price of the bonds bought), do not affect the transaction nor his rights and liabilities. New England Trust Co. v. Eaton, 140 Mass. 532; s. c., 54 Am. Rep. 493.

5. "If there is no *mala fides*, nothing wilful in the conduct of the trustee, the

INVOLUNTARY—INVOLVED—IRREGULARITY.

INVOLUNTARY.—See note 1.

INVOLVED.—Directly affected.²

I O U.—A memorandum of debt, consisting of these letters; a sum of money and the debtor's signature is termed an I O U, these letters representing the words "I owe you."³

IRREGULARITY.—(See NULLITY and the different practical titles). The want of adherence to some prescribed rule or mode of proceeding; it consists either in omitting to do something

court will always favor him; for, as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in anyone to accept it. To add hazard or risk to that trouble, and subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring everyone from accepting so necessary an office." *Knight v. Plymouth*, 1 *Dickens* 120; s. c., 3 *Atk.* 480.

"It will be found to be the result of all the best authorities upon the subject, that although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, etc." *Clough v. Bond*, 3 *Mylne & Craig*, 490; *Fahnestock's Appeal*, 104 *Pa. St.* 46; *Mills v. Hoffman*, 26 *Hun (N. Y.)* 594; *Perrine v. Vreeland*, 33 *N. J. Eq.* 102; *Bowker v. Pierce*, 130 *Mass.* 262; *French v. Currier*, 47 *N. H.* 88; *Barney v. Parsons*, 54 *Vt.* 623; *Harrison v. Mock*, 10 *Ala.* 185, 193.

Authorities on Trust Investments.—*Perry on Trusts and Trustees* (3rd ed., 1882); *Sanders on Uses and Trusts* (2nd Am. ed., 1885); *Lewin on Trusts and Trustees* (2nd Am. ed., 1858); *Hill on Trustees* (4th Am. ed., 1867); *Tiffany and Ballard's Law of Trusts and Trustees*, 1862; *Zinn's Leading Cases on Trusts*, 1873; *Schouler on Executors and Admsrs.* (2nd ed., 1889); *Croswell on Executors* (announced), 25 *Am. L.*

1. The service of Italian children brought to this country with their parents' consent by a man, to earn money for him on the streets, is involuntary servitude. "They were incapable of

exercising will or choice affirmatively on the subject." They were cast off by their parents in violation of the law of Italy, and their being in this country at all with the defendant, was, on all the facts, really involuntary, although the sham form of their consent was gone through with." *U. S. v. Ancarola*, 17 *Blatchf. (U. S.)* 423; s. c., 1 *Fed. Rep.* 676.

On the use of the expression "involuntary servitude" in the thirteenth amendment to the constitution of the United States, see the *Slaughter House Cases*, 16 *Wall. (U. S.)* 36.

2. *Williams v. W. U. Tel. Co.*, 1 *Civ. Pro. Rep. (N. Y.)* 194.

In interpreting a constitutional provision giving superior courts original jurisdiction "in all cases at law which involve the title or possession of real property," it was said: "It is difficult to define with precision the word 'involve,' as it is employed in that section. The primary signification is to 'roll up or envelop,' and it also means 'to comprise, to contain, to include by rational or logical construction;' but none of these express the precise idea, and its exact synonym may not be found in a single word. The idea intended to be embodied in the phrase 'cases at law which involve the title or possession of real property' may be expressed by the paraphrase, 'cases at law in which the title or possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery or the defendant for a defence.' When the title or claim of title, the possession or right of possession of real property, or any right growing out of or dependent upon either is alleged in the pleadings, as an issuable fact, the case is within the meaning of the constitution." *Holman v. Taylor*, 31 *Cal.* 338; *Copertini v. Oppermann (Cal.)*, 18 *Pac. Rep.* 256.

3. *Abbott's Law Dict.* See also **BILLS AND NOTES**, p. 322.

that is necessary for the due and orderly conduct of a suit, or doing it in an unseasonable time or improper manner.¹

1. Sidd Pr. 434; *Barton v. Sanders* (Oreg.), 16 Pac. Rep. 923; *Ex parte Schwartz*, 2 Tex. App. 80; Repls. of *Bourdeaux v. The Treasurers*, 3 McCord (S. Car.) 142; *Ex parte Gibson*, 31 Cal. 625; *Downing v. Still*, 43 Mo. 317; *Bowman v. Tallman*, 2 Robt. (N. Y.) 634; s. c., 19 Abb. Pr. (N. Y.) 84; *Prior v. Hall*, 13 Civ. Pro. Rep. (N. Y.) 87; *MacNamara on Nullities and Irregularities*, 6. It is the technical term for every defect in practical proceedings or the mode of conducting an action or defence as distinguished from defects in pleadings. It is a comprehensive term, including all formal objections to practical proceedings. 3 Chit. Gen. Pr. 509; *Prior v. Hall*, 13 Civ. Pro. Rep. (N. Y.) 87; *Ex parte Gibson*, 31 Cal. 625.

Irregularity is to be distinguished from illegality, which is predicable of radical defects only, and signifies that which is contrary to the principles of the law as distinguished from mere rules of procedure. It denotes a complete defect in the proceedings. That which is illegal or *ultra vires* renders the proceedings void, an irregularity renders them voidable only. Tidd Pr. 435; Archb. Pr. 1192; *Ex parte Gibson*, 31 Cal. 625; *Barton v. Sanders* (Oreg.), 16 Pac. Rep. 923; *Ex parte Schwartz*, 2 Tex. App. 80.

"Sometimes the term 'irregular process' has been defined to mean process absolutely void, and not merely erroneous and voidable. *Woodcock v. Bennet*, 1 Cow. 735. But usually this term has been applied to all process not issued in strict conformity with the law, whether the defect appear upon the face of the process, or by reference to extrinsic facts, and whether such defects render the process absolutely void or only voidable.

"A sale under process absolutely void, from defects apparent upon the face of the writ, could convey no title to any purchaser; and where it is merely erroneous and voidable, the general rule is that the defects which render it so can only be taken advantage of, in direct proceedings for the purpose of having the errors, corrected, and unless reversed or set aside by the court from which it issued, such process will be deemed valid for all purposes as regards strangers, and in collateral ac-

tions." *Doe v. Harter*, 2 Ind. 252.

"No order, which a court is empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity, merely because it was made improvidently or in a manner not warranted by law or the previous state of the case. . . . It is a mere error or irregularity, which can only be taken advantage of by appeal." *Tallman v. McCarty*, 11 Wis. 401.

"Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not in some material respect comply with the legal requisites of such process, or which loses its vitality in consequence of non-compliance with a condition subsequent, obedience to which is rendered essential. Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence of some fact or circumstance, rendering it improper in such a case." An attorney who causes void or irregular process to issue is liable for damages occasioned thereby. In the case of void process, this liability attaches at once; in case of irregular process, the proceeding must be vacated or annulled by the court before an action can be maintained. *Fischer v. Langbein*, 103 N. Y. 84.

The entry of judgment for default of an answer by a court having jurisdiction to do so, but before the expiration of the time within which an answer might have been filed, is irregular but not void, and cannot be vacated by motion after the term. *Salter v. Hilgen*, 40 Wis. 363. The assumption by a court of a jurisdiction which it has not legally is not a mere irregularity. *Prior v. Hall*, 13 Civ. Pro. Rep. (N. Y.) 87.

A distinction is also taken between irregular and erroneous proceedings.

"It is well settled that where a judgment is reversed for error, the sale under the execution shall not be avoided.

. . . But there is a marked distinction between judgments reversed for error, and executions set aside for irregularity; in the latter case the party is never excused, if the irregularity be such as renders the process void. One case is the fault of the party, the other

IRRELEVANT—IRRESISTIBLE VIOLENCE.

IRRELEVANT—(See EVIDENCE; PLEADING; RELEVANT).—Impertinent; inapplicable.¹

IRREPARABLE INJURY.—See INJUNCTION.

IRRESISTIBLE VIOLENCE.—The same as *vis major*.²

is considered the error of the court.

In *Parsons v. Lloyd*, 3 Wils. 345, DE GREY, CHIEF JUSTICE, observes: 'There is a great difference between erroneous process and irregular (that is to say, void) process. The first stands valid and good until reversed, the latter is an absolute nullity from the beginning. The party may justify under the first until it be reversed, but he cannot justify under the latter because it was his own fault that it was irregular and void at first.' . . .

When, however, the term irregularity is used, and unexplained, it must be understood, as in *Parsons v. Lloyd*, and refers to void process." *Woodcock v. Bennet*, 1 Cow. 734.

"A judgment, however erroneous, rendered at one term, cannot be set aside at a subsequent term. But a judgment irregular, rendered at one may be set aside at a subsequent term. An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law; as where it is for one party when it ought to be for the other; or for too little or too much. An irregular judgment is one contrary to the course and practice of the courts, as judgment without service of process." *Wolfe v. Davis*, 74 N. Car. 599.

In doubtful cases the courts incline to treat defects as irregularities rather than nullities. *MacNamara on Nul. & Irreg* 6; *Salter v. Hilgen*, 40 Wis. 363.

"It is also said that an irregularity may be waived, while a nullity cannot; but the caution is added that waiver in the strict sense of the term is meant, and that the rule must not be carried so far 'as to suppose that at any period or under any circumstances, this objection must, of necessity, be available.'" *Ibidem*. "It is often waived by the subsequent action of a party, as by an appearance after defective process, so that the judgment will be valid notwithstanding such defect." *Downing v. Still*, 43 Mo. 317. An irregularity must be taken advantage of at the first opportunity after it is discovered or it will be considered waived. *Bowman v. Tallman*, 2 Robt. (N. Y.) 634; s. c., 19 Abb. Pr. (N. Y.) 84.

Where the record of a lower court states that the judgment of a justice was reversed for irregularity, the inference is that the court did not go into the merits. *Clarke v. Fulse*, 1 Penn. (N. J.) 263.

An illegal distress is not an irregular distress within the meaning of a statute providing that irregularity shall not make the distrainer a trespasser. *Russell v. Buckley*, 25 N. B. 264.

A statute provided that applications for highways be referred by the court to committees, to be heard by them after such notice as the court should order, and that the proceedings might be set aside for "irregular and improper conduct." The sitting without notice being given, although the court failed to order it, is irregular and improper. "It is true that this was primarily an error of the court, but this error took from the committee their jurisdiction." *Shelton v. Town of Derby*, 27 Conn. 414. And the action of a member of the committee by which one party gained an unfair advantage at the hearing is irregular and improper conduct. *Harris v. Town of Woodstock*, 27 Conn. 567.

1. "Matter is said to be irrelevant in a pleading which has no bearing upon the subject matter of the controversy and cannot affect the decision of the court." *Schofield v. State Nat. Bank*, 9 Neb. 321; *Fabbriotti v. Launitz*, 3 Sandf. (N. Y.) 743. "A pleading is irrelevant which has no substantial relation to the controversy between the parties to the suit. The word irrelevant is comparatively of modern introduction in England. It is used in parliamentary debate in that country to signify 'unassisting, unrelieving,' which are in accordance with the etymology of the word. But in Scotland, according to Mr. Elphinstone, it has been for a considerable period a jurisprudential word, and is there used in the same sense as the more appropriate word irrelevant. It has, I believe, uniformly received the same interpretation in the courts in this country, where it has been very generally used." *Seward v. Miller*, 6 How. Pr. (N. Y.) 313.

2. *Walker v. Guarantee Association*, 18 Q. B. 286.

IRRIGATION.

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1. Irrigation in General—Definition.—Irrigation is the operation of watering lands for agricultural purposes by artificial means.¹

Subordinate to Rights of Coproprietor.—It is the doctrine, which is supported by the later cases, that irrigation is not a natural want, authorizing an exclusive or undue appropriation by one proprietor,² but that the right to irrigate, when not indispensable, but used simply to increase the products of the soil, would be subordinate to the right of a coproprietor to supply his natural wants, and that of his family, tenants and stock; as to quench thirst, and to the right to use the water for necessary domestic purposes.³

Liberal View of Use of Water for Irrigation.—The most liberal use of water for purposes of irrigation was, however, favored in the earlier cases.

1. Rap. & L. Law Dict. 682. It is also defined as the act of wetting or moistening the ground by artificial means, in 1 Bouv. L. Dict. (15th ed.) 839.

Prevalence, Regulations, etc.—Concerning the prevalence of irrigation and the methods of effecting it, see article "Irrigation," 9 Am. Cycl. 414. The right to appropriate water for irrigation purposes is discussed in the note to *Tolle v. Carreth*, 98 Am. Dec. 540. The regulations of irrigation in different countries and localities is discussed, and a full review of the doctrines concerning irrigation is given in *Fleming v. Davis*, 37 Tex. 173, 199.

2. Gould on Waters, § 217, and cases cited.

3. *Baker v. Brown*, 55 Tex. 577.

Contract to Dig Ditch.—Where several persons agreed to form a company and dig a ditch across specified lands, to be dug and sustained by the parties to the contract in proportion to the lands benefited, and the company was dissolved before the ditch was dug, it was held that this agreement did not give an individual member of the company, after dissolution, a right to dig a ditch across another individual member's land. *Stewart v. Stevens* (Colo.), 15 Pac. Rep. 786.

Rights of Consumers.—Under the *Colorado Const.* (art. 16, §§ 5-8), declaring unappropriated water of natural streams "public" property, subject to appropriation for the "use of the people," free of charge, the distributor of water to consumers for hire not being the proprietor of water unappropriated by it, a demand of \$10 per acre, in advance, for "the right to receive and use water" from its canal is in violation of the constitutional right to the use of unappropriated waters free of charge. *Wheeler v. Northern Colo. Irrigating Co.* (Nev.), 17 Pac. Rep. 487.

Irrigation Bonds.—The *California* "Act to provide for organization and government of irrigation districts," etc. (Sess. Laws Cal. 1887, p. 29), authorizing such a district to issue bonds signed by its president and secretary for raising money to conduct necessary irrigating canals, etc., and levy assessments for the payment thereof upon the real estate of the district, is not unconstitutional as contemplating unequal taxation, or taxation for other than a public purpose, and the secretary of an irrigation district may be compelled by writ of mandate to sign bonds issued for such purpose. *Turlock Irrigation Dist. v. Williams* (Cal.), 18 Pac. Rep. 379.

Thus it has been declared that it may be admitted that the purpose of irrigation is one of the natural uses, such as thirst of people and cattle, and household purposes, which must absolutely be supplied, and that the appropriation of the water for this purpose would, therefore, afford no ground of complaint by the lower proprietor if it were entirely consumed.¹

Approximation to General View.—A near approach to the general view is formulated in the rule that by our law "the riparian proprietors are entitled to a reasonable use of the waters of the stream for the purpose of irrigation," and that what "is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case."²

2. Present Law of Irrigation.—*Comprehensive Statement of Present Law.*—A very comprehensive statement of the present law on this subject, contained in Gould on Waters, § 217, and quoted in *Lux v. Haggin*, 69 Cal. 255, 401, and in the note to *Tolle v. Correth*, 98 Am. Dec. 543, reads as follows: "The right of a riparian proprietor to divert the water of a stream for the purpose of irrigation is recognized in England,³ and generally in this country."⁴

1. *Rhodes v. Whitehead*, 27 Tex. 304; s. c., 84 Am. Dec. 631, 634, citing *Evans v. Merriweather*, 3 Scam. (Ill.) 492; s. c., 38 Am. Dec. 106. See explanation in *Union Mill etc. Co. v. Ferris*, 2 Sawy. (U. S.) 176; s. c., 28 Fed. Dec. 769, 780, and quoted in *Tolle v. Correth*, 30 Tex. 362; s. c., 98 Am. Dec. 540, 542.

Water Maxims.—In the case last cited, referring to cases holding a different view, it is said: The authorities cited from the distinguished courts of *New York*, *Massachusetts* and *England* are founded on the principle, or maxim, "The water runs, and let it run." "Every one has a right to have the advantage of a flow of water in his land without diminution or alteration." A moment's reflection will enable anyone to see the propriety of these maxims where water is useful only in its flow, and is subservient to mechanical or manufacturing purposes. But in a country or state where water is useful for agricultural purposes, and where the sovereign power grants, for a nominal consideration, water for the purposes of irrigation, these maxims do not apply; instead thereof we must substitute, "Water irrigates, and let it irrigate." Compare *Fleming v. Davis*, 37 Tex. 173, 194, 196.

2. *Lux v. Haggin*, 69 Cal. 255, 394. So it is laid down that whether "the use of the water for the purpose of irrigation is reasonable and lawful as

against another proprietor would depend upon the facts of the particular case. If the stream should be sufficiently large to admit of reasonable irrigation without unreasonably impairing the rights of other proprietors, then it would be reasonable and lawful, otherwise it would not. *Baker v. Brown*, 55 Tex. 577.

3. See *Embrey v. Owen*, 6 Exch. 353; *Sandwich v. Great Northern Railway Co.*, 10 Ch. D. 707, 711; *Chasemore v. Richards*, 2 H. & N. 190; 5 H. & N. 982; 7 H. L. Cas. 349; *Sampson v. Hodinott*, 1 C. B., N. S. 590; *Greenslade v. Haliday*, 6 Bing. 379; *Hall v. Swift*, 6 Scott 167; *Strutt v. Bovington*, 5 Esp. 56; *Gale & Whatley on Easements*, 284.

4. *Blanchard v. Baker*, 8 Me. 253, 266; *Davis v. Getchell*, 50 Me. 602; s. c., 79 Am. Dec. 638; *Newhall v. Iesson*, 8 Cush. (Mass.) 595; *Elliot v. Fitchburg Railroad Co.*, 10 Cush. (Mass.) 194; s. c., 57 Am. Dec. 85; *Colburn v. Richards*, 13 Mass. 420; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Cook v. Hull*, 3 Pick. (Mass.) 269; *Paine v. Woods*, 108 Mass. 160, 173; *Garwood v. New York Central Railroad Co.*, 83 N. Y. 400, 405; *Farrell v. Richards*, 30 N. J. Eq. 511; *Union Mill Co. v. Ferris*, 2 Sawy. (U. S.) 176; s. c., 28 Fed. Dec. 769; *Union Mill Co. v. Dangberg*, 2 Sawy. (U. S.) 450; s. c., 28 Fed. Dec. 736; *Ingraham v. Hutchinson*, 2 Conn.

According to the later decisions, this is not a natural want, authorizing an exclusive or undue appropriation by one proprietor, but the use of the stream for this purpose must be reasonable, and must not materially affect the application of the water by other riparian proprietors.¹

The extent of each proprietor's right to thus withdraw the water depends upon the circumstances of the case. The owner of a large tract of porous land abutting on one part of the stream could not lawfully irrigate such land continually by canals and drains, and so cause a serious diminution of the quantity of water, though there may be no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose.²

If the water used for irrigation is not abstracted on a person's own land, but is withdrawn at a distance above it or returned at a distance below it, this would have a material bearing upon the question of reasonable use with respect to an opposite or other proprietor affected by such diversion.³

So a riparian proprietor who obstructs the stream by a dam for the purpose of overflowing and irrigating his land, or who diverts the water for such purposes excessively, and without returning the surplus into the natural channel, is liable to the owner of a mill below, the operation of which is thereby impeded,⁴ or to another proprietor below, who only uses the water for irrigation, and is deprived of that right to an unreasonable extent.⁵

Former More Extended Recognition in Certain Jurisdictions.—The right to use water for purposes of irrigation was formerly recognized to the widest extent, even in those jurisdictions where it is now considerably restricted.⁶

584; *Wadsworth v. Tillotson*, 15 Conn. 365; *Gillett v. Johnson*, 30 Conn. 180; *Randall v. Silverthorn*, 4 Pa. St. 173; *Miller v. Miller*, 9 Pa. St. 74; *Tolle v. Correth*, 31 Texas 362; s. c., 98 Am. Dec. 540; *Fleming v. Davis*, 37 Tex. 173; *Stein v. Burden*, 29 Ala. 127; 24 Ala. 130; *Potier v. Burden*, 38 Ala. 651; *Blessing v. Blair*, 45 Ind. 546; *Ferrea v. Knipe*, 28 Cal. 341.

1. *Ibid.*—According to earlier authorities, irrigation is a natural want. See *Gould on Waters*, § 205, citing *Weston v. Alden*, 8 Mass. 136; *Bent v. Wheeler*, cited in *Sullivan's Land Titles*, 273; *Perkins v. Dow*, 1 Root (Conn.) 535; *Hayward v. Mason*, 1 Root (Conn.) 537; *Blanchard v. Baker*, 8 Me. 253. *Contra*, later, see *Baker v. Brown*, 55 Tex. 577.

2. *Embrey v. Owen*, 6 Exch. 353, 371.

3. *Embrey v. Owen*, 6 Exch. 353; *Union Mill Co. v. Ferris*, 2 Sawy. (U.

S.) 176; *Stein v. Burden*, 29 Ala. 127; 24 Ala. 130; *Wadsworth v. Tillotson*, 15 Conn. 365.

4. *Cook v. Hull*, 3 Pick. (Mass.) 269; *Colburn v. Richards*, 13 Mass. 420.

5. *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Cummings v. Barrett*, 10 Cush. (Mass.) 186; *Bent v. Wheeler*, 3 Dane Abr. 16.

6. Thus in an early *Massachusetts* case it is said (according to *Pomeroy on Riparian Rights*, § 142): "A man owning a close on an ancient brook may lawfully use the water thereof for the purposes of husbandry, as watering his cattle, or irrigating the close; and he may do this either by dipping water from the brook and pouring it upon his land, or by making small sluices for the same purpose; and if the owner of a close below is damaged thereby, it is *damnum absque injuria*." *Weston v. Alden*, 8 Mass. 136. But it is remarked in a subsequent case in *Maine* that

3. English Doctrine—Statement of.—In England, there are various cases which seem to refer with approbation to the "American" doctrine of irrigation;¹ but the maintenance and the scope of the different English doctrine is shown in a case which decides that the use of water by a defendant for irrigation was no injury to the plaintiff, a mill owner, in fact or law, where the irrigation took place only at intermittent periods when the river was full, etc.;² and in another case where, on the other hand, the court said that the detention for the purposes of irrigation was, under the circumstances of that case, necessarily injurious, the effect being *wholly to prevent* the natural course of the stream for a certain number of hours.³

In the former of these cases it is substantially laid down that in England no such liberal use of the stream for purposes of irrigation would be permitted as in America and elsewhere; that the extent of the allowable use was a question of degree, though it was exceedingly difficult to define precisely the limits which separate the permitted and reasonable use of the stream from its wrongful application; and that it must depend upon the circumstances of each case whether there was a lawful enjoyment of the water, if it was again returned into the stream with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor.⁴

"although by the case of *Weston v. Alden*, 7 Mass. 136, the right of irrigation might seem to be general and unlimited; yet subsequent cases have restrained it consistently with the enjoyment of the common bounty of nature by other proprietors, through whose land a stream had been accustomed to flow. *Colburn v. Richards*, 13 Mass. 420; *Cook v. Hull*, 3 Pick. (Mass.) 269; *Anthony v. Lapham*, 5 Pick. (Mass.) 175. And the qualification of the right by these later decisions is in accordance with the common law." *Blanchard v. Baker*, 8 Me. 253, 266.

1. See *Chasemore v. Richards*, 7 H. L. Cas. 349; Washb. Easements 234, referring to "two or three recent English cases" where the subject of irrigation is considered and where the courts take occasion to speak of the American cases with approbation.

2. *Embrey v. Owen*, 6 Exch. 352.

3. *Sampson v. Hoddinott*, 1 Com. B. N. S. 590.

4. See the opinion of PARKE, B., where, after quoting from *Kent* [3 Com. 429], he says: "In America, as may be inferred from this extract, and as is stated in the judgment of the court of ex-

chequer in *Wood v. Waud* [3 Ex. 748], a very liberal use of the stream for the purposes of irrigation, and for carrying on manufactures, is permitted. So in France, where every one may use it *en bon pere de famille, et pour son plus grand avantage*. Code Civil, art. 640, note a, by Paillett. He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused. In the above cited case of *Wood v. Waud* [3 Ex. 748], it was observed that in England it is not clear that a user to that extent would be permitted; nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains,

In the same case there was a full discussion of the general right of a riparian proprietor to the flow of the water passing through his land, and the enjoyment of it as subject to the similar rights of all the proprietors on the same bank on each side to the reasonable enjoyment of the natural element, and as not giving a ground of action for any abstraction of the water, however inconsiderable and unproductive of actual damage.¹

Inapplicability to Different Climate Suggested.—It has been suggested, however, in a judicial investigation of the law of irrigation, in the Pacific States and territories, that it would be expected that the decisions in Great Britain and Ireland would not much assist the enquiry, since, owing to the humidity of the cli-

and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose. On the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering pot into the stream in order to water his garden, or allow his family or his cattle to drink of it. It is entirely a question of *degree*, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not."

1. "It was very ably argued before us," said the learned judge just quoted, "by the learned counsel for the plaintiffs, that the plaintiffs had a *right* to the full flow of the water in its natural course and abundance, as an incident to the property in the land through which it flowed, and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a right, and if continued would be the foundation of a claim of adverse right in that proprietor. We by no means dispute the truth of this proposition with respect to every description of right. Actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to show the violation of a right, in which case the law will presume damage. *Injuria sine damno* is actionable, as was laid down in the case of *Ashby v. White*, 2 L. Raym. 938, by LORD HOLT, and in

many subsequent cases, which are all referred to, and the truth of the proposition powerfully enforced, in a very able judgment of the late MR. JUSTICE STORY in *Webb v. Portland Mfg. Co.*, 3 Sum. 189. But in applying this admitted rule to the case of rights to running water and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them. The law as to flowing water is now put on its right footing by a series of cases beginning with that of *Wright v. Howard*, 1 Sim. & S. 190, followed by *Mason v. Hill*, 3 Barn. & Adol. 304, and 5 Barn. & Adol. 1, and ending with that of *Wood v. Waud*, 3 Exch. 748, and is fully settled in the American courts. See 3 Kent Com. 439, 445. The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: that all may reasonably use it who have right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. See 5 Barn. v. Adol. 24. But each proprietor of the adjacent land has the right to the *usufruct* of the stream which flows through it. This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state. If it were, the argument of the learned counsel, that every abstraction of it

mate of those islands, it must rarely happen that any use for irrigation can be reasonable.¹

4. French Law.—By the laws of France, every proprietor of land bordering on a running stream may use it for the purpose of irrigating his land, and when his estate is intersected by such water he may divert it for purposes of irrigation, provided he restore it at the boundary of his property to its ordinary channel. And in all disputes respecting the right to take water from running streams, the courts are enjoined to reconcile as much as possible the interests of agriculture with the respect due to property and the rights of individuals.²

5. American Doctrine—Reasonable Use and Return of Surplus.—The right of a riparian proprietor to the reasonable use of the waters of a stream for purposes of irrigation is generally recognized by the American authorities.³

But even where it has been considered that a riparian proprietor had authority to make use of a stream for purposes of irrigation, and thus by that use divert a portion of it, this has been held under the condition that such diversion was, under all the circumstances, a reasonable use of the stream, and that the sur-

would give a cause of action would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, *subject to the similar rights* of all the proprietors of the bank on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; for such a use it will."

1. *Lux v. Haggin*, 69 Cal. 255, 397, here stating that for any purpose the use must be reasonable, the maxim, which every riparian proprietor is bound to respect being *sic utere tuo ut alienum non lædas*." This case furnishes, at pp. 397-400, the foregoing account of the English doctrine concerning irrigation, and its observation thereon, here given, is also quoted in *Pomeroy v. Riparian Rights*, § 40, p. 251, where it is said: In regard to the right of a riparian proprietor to use the water of the stream for irrigation, the rule in England appears to be that he may do so, provided he restores the water to its channel in a volume substantially undiminished. *Embrey v. Owen*, 6 Exch. 352; *Swindon Water Works v. Wilts Canal Co.*, L. R., 7 H. L. 697; *Earl of Sandwich v. Great Northern Ry.*, L. R., 10 Ch. 707, 711; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; *Miner v. Gilmour*, 12 Moore P. C. 156; *Norbury*

v. Kitchie, 9 Jur., N. S. 132; 1 Add. Torts, § 89)." The same statement of the English view is made in the note to *Davis v. Getchell*, 79 Am. Dec. 643.

2. Code Napoleon, liv. 2, nos. 640-645; *Pomeroy on Riparian Rights*, § 142, p. 252; referring to 1 Add. Torts, § 89. See also quotation from *Embrey v. Owen*, 6 Ex. 352, in *Lux v. Haggin*, 69 Cal. 255, 398.

3. Thus *WESTON, J.*, in *Blanchard v. Baker*, 8 Me. 253, observes: "A riparian proprietor may make a reasonable use of the water itself for domestic purposes, for watering his cattle, or even for irrigation, provided it is not unreasonably detained, or essentially diminished." So in *Gillett v. Johnson*, 30 Conn. 180, *BUTLER, J.*, thus speaks of the right of a defendant to irrigate as limited: "She was bound to apply the water in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle. The claim of the defendant was that she had a right to divert the whole for the purpose of irrigation, regardless of the rights of the plaintiff. Such diversion was unreasonable and therefore illegal." Again, in *Arnold v. Foot*, 12 Wend. (N. Y.) 330, it is said: "The defendant has a right to use so much as is necessary for his family and cattle, but he has no right to use it for irrigating his meadow, if he thereby deprives the

plus of the water thus used must be returned into its natural channel.¹

Controlling Circumstances and Rights of Other Proprietors.—

"Under the rules of the common law," it is remarked in a leading case of recent date, "the riparian proprietors would all have the right to a reasonable use of the waters of a stream for the purpose of irrigation. It is declared in all of the authorities upon this subject that it is impossible to lay down any precise rule which will be applicable to all cases. The question must be determined in each case with reference to the size of the stream, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate the lands per acre, and a variety of other circumstances and conditions surrounding each particular case;"² and "the true test in all cases" is "whether the use is of such a character as to materially affect the equally beneficial use of the waters by the other proprietors."³

6. Pacific Coast Doctrine—In General.—In the Pacific States and territories, the right to use water for purposes of irrigation is expressly recognized,⁴ and it is considered that irrigation must be held in that climate "to be a proper mode of using water by a riparian proprietor;" "the lawful extent of the use depending upon the circumstances of each case."⁵

With reference to these circumstances, it is laid down that "the use must be reasonable," and that "the right must be exercised

plaintiff of the reasonable use of the water in its natural channel." The supreme court of *Massachusetts* has also said: "Every man through whose land the water passes may use it for irrigating his land; but he must so use it as to do the least possible injury to his neighbor, who has the same right." *Anthony v. Lapham*, 5 Pick. (Mass.) 175.

1. *Newhall v. Ireson*, 8 Cush. 595. The foregoing review of the cases is derived from *Lux v. Haggin*, 69 Cal. 255, 401, 402.

General Principle.—In *Pomeroy on Riparian Rights*, § 142, it is said that on "examining the decision; in the eastern States, and the opinions of the text writers, we shall find, notwithstanding some diversity of language, the same thread of principle running through them all, namely, that the use must be reasonable, due regard being had to the equal rights of all the riparian owners."

2. *Jones v. Adams* (Nev.), 6 Pac. Rep. 442, 444.

3. *Jones v. Adams* (Nev.), 6 Pac. Rep. 442, 444, where it is further said:

"In *Vansickle v. Haines*, the court quoted with approval the doctrine announced by *SHAW, C. J.*, in *Elliot v. Fitchburg R. Co.*, 10 Cush. 194 [8. c., 57 Am. Dec. 85], that a portion of the water of a stream may be used for the purpose of irrigating land we think is well established as one of the rights of the proprietors of the soil along and through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly obstruct or divert the water course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably." Numerous authorities were cited in support of this doctrine. *Vansickle v. Haines*, 7 Nev. 249; *Farrell v. Richards*, 30 N. J. Eq. 511.

4. *Jones v. Adams* (Nev.), 6 Pac. Rep. 442, 444.

5. *Union M. & M. Co. v. Ferris*, 2 Sawy. (U. S.) 176; 8. c., 28 Fed. Dec. 769, 781.

so as to do the least possible injury to others;" and that there "must be no unreasonable detention or consumption of the water."¹

Diminution of Flow as Affecting Other Proprietors.—It is pointed out, however, that when it is said that such use must be made of the water as not to affect the material rights of other proprietors, it is not meant that there cannot be any diminution or decrease of the flow of water; for if this should be the rule, then no one could have any use of the water for irrigation, which must necessarily, in order to be beneficial, be so used as to absorb more or less of the water diverted for this purpose;"² and that "under the principles of the common law in relation to riparian rights, if applicable to our circumstances and condition, there must be allowed to all, of that which is common, a reasonable use."³

Summary of Principles.—According to a summary of principles governing in the Pacific States and territories, the conclusions which may be reached are that there is no right to use the water for the irrigation of nonriparian lands; that a prior appropriation can give no exclusive right to the use of the waters for irrigation and no superior right as to the quantity of water that may be consumed in that manner; that the equitable principle of relative equality must be preserved between all the riparian owners; that it is a part of the general riparian right to use the water for irrigation if the size of the stream is such that no injury is thereby done to any other proprietor; and that irrigation is not one of the natural wants, for which the whole stream may be consumed if necessary, but is subordinate to these uses.⁴

Riparian Rights and Prior Appropriators.—By the common law, the fact of ownership of lands on both sides of a river would give the proprietors the right to the usufruct of the waters as riparian owners, and that, too, notwithstanding the prior appropriation thereof by other parties; but it would be otherwise under the law as settled on the Pacific coast by the adjudications of the courts and the long established customs of the country,

1. *Union M. & M. Co. v. Ferris*, 2 Sawy. (U. S.) 176; s. c., 28 Fed. Dec. 769, 781, where it is further remarked: "That there may be some diminution and some detention follows necessarily from any use whatever. How long it may be detained or how much it may be diminished can never be stated as an arbitrary or abstract rule."

2. *Jones v. Adams* (Nev.), 6 Pac. Rep. 442, 444.

3. *Jones v. Adams* (Nev.), 6 Pac. Rep. 442, 445. Consult further, on Pacific coast doctrine, *Lux v. Haggin*, 69 Cal. 255, 394-409; cited to the effect that a riparian proprietor may take water from the stream for necessary household

purposes, and may make reasonable use of it for purposes of irrigation; in *Swift v. Goodrich*, 70 Cal. 103, 105.

4. *Pom. Riparian Rights*, § 139. The cases reviewed as a basis for these deductions are *Ellis v. Tone*, 58 Cal. 289; *Vansickle v. Haines*, 7 Nev. 249; *Union Mill Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Learned v. Tangeman*, 65 Cal. 334; *Baker v. Brown*, 55 Tex. 577.

Only Rule of General Application.—In the same work, in answer to the enquiry whether, aside from these specific principles, "there is any general law, applicable to all cases alike, governing the riparian right of irrigation," it is said that as a result of all the authorities it may be stated that the only rule

ratified and confirmed by the legislation of congress;¹ and this doctrine has been considered applicable in the Pacific States and territories, to irrigation as well as to mining.²

7. Injurious Diminution—In General.—It has been submitted whether it may not fairly be deduced from the authorities that for an *essential* diminution of the water of a water course, which

which admits of general application is this: The use of water for irrigation must in all cases be reasonable, regard being had to the rights and needs of all the other proprietors on the same stream, and reasonableness is a question of fact, to be determined upon all the circumstances of the particular case."

1. *Hill v. Lenormand* (Ariz.), 16 Pac. Rep. 266.

2. *Hill v. Lenormand* (Ariz.), 16 Pac. Rep. 266, 268, where it is said by WRIGHT, C. J.: "We deem no doctrine more clearly and thoroughly settled on this coast than this doctrine of water rights. It is *par excellence* the doctrine of the Pacific coast. Among the earliest apprehensions of the miners was the paramount importance of water. Among the miners the custom early grew of according to him the best right who was first in time. The privileges of irrigation soon became gauged by the same rule; so that now this doctrine is thoroughly interwoven into the jurisprudence of the coast, and may not be questioned. Riparian rights are the same here as elsewhere, wherever they apply; but they do not apply where the rights of prior appropriators have intervened. As is very generally the case in the Pacific States and territories the conditions are so changed that riparian rights do not attach . . . Mr. Gould, in his admirable work on Waters (section 228), says: In *California Nevada, and other Pacific States and territories*, the common law rule upon this subject has been modified, owing to the peculiar condition of the settlers and miners upon the public lands, and the right to running water exists without private ownership of the soil, upon the ground of prior location upon the land, or prior appropriation of the water. . . . The federal

government by act of congress, July 26th, 1866 (section 2339, Rev. St. U. S.) confirmed all rights to the use of water acquired by prior appropriation; and by the act of congress of July 9th, 1870, it is provided that all patents granted or pre-emptions or homesteads allowed,

shall be subject to any vested or accrued water rights, etc., acquired under the ninth section of the said act of July 20th, 1866. These federal statutes have been repeatedly construed by the courts of last resort on the Pacific Coast and we believe uniformly in harmony with the views expressed herein, unless it was in *Van Sickle v. Haines*, 7 Nev. 249, which was expressly overruled by the later case of *Jones v. Adams*. See *Jones v. Adams* (Sup. Ct. Nev.), 6 Pac. Rep. 442; *Kaylor v. Campbell* (Sup. Ct. Oreg.), 11 Pac. Rep. 301; *Farley v. Irrigating Co.*, 58 Cal. 142; *Basey v. Gallagher*, 20 Wall. (U. S.) 670; *Jennison v. Kirk*, 98 U. S. 453; *Lux v. Haggin*, 4 Pac. Rep. 919, and cases there cited.' [Consult also to like purport, *Dyke v. Caldwell*, 18 Pac. Rep. (Ariz.) 276, 278, quoting *Basey v. Gallagher*, 20 Wall. (U. S.) 670, which itself relies on *Atchison v. Peterson*, 20 Wall. (U. S.) 507.]

"By the common law of England," according to the recent California case of *Stanford v. Felt*, 71 Cal. 249, "the right of the riparian proprietor to the flow of a stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right of such proprietor extends to the natural and usual flow of all the water of the stream, unless when the quantity has been diminished as a consequence of the reasonable use or appropriation of it by other riparian owners for proper and legitimate purposes. *Ferreira v. Knipe*, 28 Cal. 341; 87 Am. Dec. 128; *Lux v. Haggin*, 69 Cal. 255; 10 Pac. Rep. 674. The uses by the riparian owner of the water for domestic purposes, for irrigation, and for the propulsion of machinery, are recognized as proper and legitimate purposes. This we regard as the law of this State. See *Ferreira v. Knipe* and *Lux v. Haggin*, *supra*. It appears to be law, that where all the water of a stream is needed for domestic purposes and for watering cattle,

nature has directed to run in a certain and determinate channel for *any* purpose, the law in this country will not interpose.¹

So far as the question may be supposed to imply that an upper proprietor may not "essentially" diminish the water by using it for domestic purposes, and for watering cattle, the weight of authority is stated to be that he may, if *necessary*, consume *all* the water of the stream for those purposes.²

Kent's View Considered.—CHANCELLOR KENT, who is sometimes quoted as proving that water cannot be employed for irrigation, sometimes that it may be, says: "Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the general sense of mankind to debar any riparian proprietor from the application of water for domestic, *agricultural* or manufacturing purposes, provided the use of water be made under the limitation that he do no *material injury* to his neighbor below him, who has an equal right to the subsequent use of the same water;"³ but it has been recently suggested that this language, although a very distinct statement of the general proposition, "ought not to be taken literally, unless the words 'material injury' be impressed with a signification the equivalent of a substantial definition of capacity in a lower proprietor to employ the water for useful purposes."⁴

and is thus consumed by one proprietor, the law allows such use. But in making such reasonable use of water, such proprietor must return the surplus which remains after such use to the natural channel of the stream (*Dilling v. Murray*, 6 Ind. 324; 63 Am. Dec. 385; *Gould on Waters*, § 213); and if this is not done, the diversion will be restrained at the suit of a riparian owner below. Nor is the owner lower down the stream required to show, in order to procure an injunction, any actual present damage. The diversion by lapse of time may grow into a right. *Crandall v. Woods*, 8 Cal. 136; *American Co. v. Bradford*, 27 Cal. 361; *Gould on Waters*, § 214; *Moore v. Water Works*, 68 Cal. 148; 8 Pac. Rep. 816; *Navigation Co. v. Water Works Co.*, L. R., 9 Ch. 451; L. R., 7 H. L. 697. To prevent such result, an injunction will be awarded. *Parker v. Griswold*, 17 Conn. 287, affirming *Chapman v. Manufacturing Co.*, 13 Conn. 268."

1. Angell on Water Courses (7th ed.), § 129.

2. See *Gould on Waters*, § 205. "Such is the California rule. *Ferrea v. Knipe* [28 Cal. 341] . . . and *Hale v. McLea* [53 Cal. 578] . . ." *Lux v. Haggin*, 69 Cal. 255, 395.

3. 3 Kent Com. 440.

4. *Lux v. Haggin*, 69 Cal. 255, 396, where it is further said: "The adjective is prefixed to 'injury,' and the words seem to have reference to the enjoyment of the use by the inferior owner, not to his mere abstract right to the use as against others than riparian owners, and to intimate that he cannot complain of the reasonable exercise of the use by another who possesses the general right in common with himself. The passage, as a whole, may be fairly said to convey the idea that water may be used for agricultural or manufacturing purposes when such use does not materially deprive the lower proprietors of water, either for drinking or for agriculture, etc. Undoubtedly, as against an appropriation by a mere wrong-doer, a riparian proprietor may insist upon the entire and complete natural flow of the stream. The employment by KENT of the words 'material injury' implies that every diminution is not any injury, and it excludes, where water is reasonably used above for irrigation, mere sentiment or the consideration of a diminution from the natural flow, so far merely as such flow pleases the eye or gratifies a taste for the beautiful. Of course, in ascertaining whether irrigation is reasonable, its effect in depriving the lower proprietor of natural irrigation, is to

Reasonable Appropriation, but No Total Diversion.—CHIEF JUSTICE SHAW lays down the doctrine that the use of the water of streams cannot be said to be wrongful or injurious to a proprietor lower down, so long as the stream is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use.¹

Beneficial Use by All Riparian Proprietors.—At the same time it is pointed out that this rule "that no riparian proprietor can wholly abstract or divert a water course by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound so to use his common right as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right by all the proprietors."²

be considered with the other circumstances. Moreover, as we have seen, it is established that, so far as the use for domestic purposes [is concerned], all the water of a stream may, if *necessary*, be exhausted. In that case the lower proprietor receives none of it, and CHANCELLOR KENT cannot have intended that material 'diminution' always means material 'injury.'

1. See *Elliot v. Fitchburg R. Co.*, 10 Cush. 193-195; s. c., 57 Am. Dec. 85, 87, where, referring to the facts of the particular case and an instruction asked by one of the parties to the suit, it is said: "This appears to have been a small stream of water; but it must, we think, be considered that the same rules of law apply to it and regulate the rights of riparian proprietors, through and along whose land it passes, as are held to apply to other water courses, subject, of course, to this consideration: that what would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream just sufficient for domestic uses, for farm yards and watering places for cattle. The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in water courses passing through or by their lands. It presupposes that the diversion of any portion of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land

lying below on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right. The right to flowing water is now well settled to be a right incident to property in the lands. It is a right *publici juris*, of such character that while it is common and equal to all through whose land it runs, and no one can obstruct or divert it; yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down."

2. *Elliot v. Fitchburg R. Co.*, 11 Cush. 193; s. c., 57 Am. Dec. 85, 88, where it is further said: "Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration or retardation of the natural current, it would follow that each lower proprietor would have a right of action against any upper proprietor for taking any portion of the water of the stream for any purpose. Such a taking would be a disturbance of his right; and if taken by means of a pump, a pipe, a drain, or otherwise, though causing no substantial damage, it would be a nuisance, and warrant the lower proprietor in entering the close of the upper to abate it.

Instances of Unwarranted Diversion.—Hence the owner of land bordering on a stream has no right to divert the water for the purposes of irrigation, and thereby diminish the quantity which has been accustomed to flow to a mill of forty years' standing, so as to impede its operation.¹

So there is no right, as between conflicting mill owners, to deepen the channel running from the main stream, divert the water, use it and fail to return it, as such action does not fall within the principle of irrigation.²

8. Natural and Artificial Wants—Nature of Distinction Made.—There can be little doubt, under the authorities, that for a riparian proprietor entirely to consume water (except ordinarily for domestic purposes, etc.) is to use it unreasonably.³

But in answering the question whether this is the case, a distinction has been made between natural wants, such as the need of quenching of thirst and the use of water for household purposes and the watering of cattle, and artificial wants, such as the need of water for irrigation.⁴

Ordinary and Extraordinary Purposes.—The distinction between natural and artificial "wants" seems to have been derived from a distinction previously recognized, and which has sometimes been designated as a difference between the use of water for "ordinary" and "extraordinary" purposes.⁵

Colburn v. Richards, 13 Mass. 420. It would also follow, as the legal and practicable result, that no proprietor could have any beneficial use of the stream without an encroachment on another's right, subjecting him to actions *toties quoties*, as well as to a forcible abatement of the nuisance."

Then applying these views to the particular case, it is said: "If the plaintiff could, in a case like the present, have such an action, then every proprietor on the brook, to its outlet in Nashua, would have the same; and because the quantity of diminution is not material, every riparian proprietor on the Nashua would have the same right, and so every proprietor on the Merrimac river to the ocean. This is a sort of *reductio ad absurdum*, which shows that such cannot be the rule, as was claimed by the plaintiff."

1. Cook v. Hull, 3 Pick. 269, 271, distinguishing Weston v. Alden, 8 Mass. 136, and explaining and following Colburn v. Richards, 13 Mass. 420.

2. Blanchard v. Baker, 8 Me. 253, 266.

3. Lux v. Haggin, 69 Cal. 255, 406.

4. See Evans v. Merriweather, 3 Scam. 492, 495, where the supreme court of Illinois said: "The use must be a reasonable one. Now, the ques-

tion fairly arises, is that a reasonable use of running water, by the upper proprietors, by which the fluid is entirely consumed? To answer the question satisfactorily it is proper to consider the wants in regard to the element of water. These wants are either natural or artificial. Natural are such as are absolutely necessary to be supplied in order to his existence; artificial, such only as by supplying them, his comfort and prosperity are increased. To quench thirst and for household purposes water is absolutely indispensable. In civilized life water for cattle is also necessary. These wants must be supplied or both man and beast will perish. The supply of a man's artificial wants is not necessary to his existence; he could live if water was not employed in irrigating his lands or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is indispensable for the cultivation of the soil, and in these water for irrigation would be a natural want."

5. Thus LORD KINGSDOWN, in Miner v. Gilmore, 12 Moore, P. C. 156, said: "By the general law applicable to riparian proprietors, each has a right to

The real difference pointed out between these classes of uses is that, as is assumed, water may be used for ordinary purposes without regard to the effects of such use, in case of deficiency below, while with reference to extraordinary uses the effects on those below must always be considered in determining its reasonableness.¹

Doubt Thrown on Such Classification.—It may be doubted, however, as is suggested in the most notable of recent cases on the law of irrigation, whether an arbitrary classification can be made which is applicable everywhere where the common law prevails.²

9. Reasonable Use—Doctrine Concerning.—Of course, in ascertaining whether irrigation is reasonable, its effect in depriving the lower proprietor of natural irrigation is to be considered with other circumstances.³

The question whether the use is reasonable is stated to be "not so much whether the water below is diminished thereby as whether the lower proprietor is materially 'injured' by the dimi-

what may be called the ordinary right of a use of water flowing past his land,—for instance, to the reasonable use of the water for domestic purposes, and for his cattle, and this without regard to the effect that such use may have, in case of deficiency, upon the proprietors lower down the stream. But further, he may have the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the lawful use of it by other proprietors, either above or below him. Subject to this condition, a riparian proprietor may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts on them a sensible injury."

1. *Lux v. Haggin*, 69 Cal. 255, 407, where it is said that LORD KINGS-DOWN'S instances "indicate that he was using them as illustrations of the relative importance of the uses by him mentioned."

2. *Lux v. Haggin*, 69 Cal. 255, 407. "Even the use of water of a stream for potation," it is explained in this case, "may not be of paramount importance, when the stream is small and the particular proprietor is amply supplied with water for such purpose by living springs independent of the creek; and it may happen, all the conditions being considered, that the exhaustion of an entire

stream by large bands of cattle ought not to be permitted. Or indeed, it might be that a flouring mill would be of more relative consequence than the cultivation of the ground. See *Erie* with respect to riparian rights in Mexico. This last, however, is hardly a supposable use since the general introduction of steam as a proper power. The distinction between natural and artificial 'wants' would be, under supposable conditions, somewhat fanciful. The urging and pressing necessity of a particular use, as distinguished from another, may itself depend on circumstances. We cannot say that it is always reasonable, in a 'hot and arid climate,' to elevate irrigation to the rank of primary uses, to which drinking usually belongs. If that should be adopted as the uniform rule, the upper proprietor might perhaps exhaust all the water for irrigation to the entire exclusion of those below him. 'A proposition inconsistent with the doctrine universally admitted that all proprietors have the same rights.' *Van Hoesen v. Coventry* (10 Barb. 518). The reasonable usefulness of water for irrigation is always relative. It does not depend on the convenience of or profitable results to the particular proprietor, but upon the reasonable use, reference being had to the needs of all the other proprietors on the stream. It depends, in other words, on all the circumstances."

3. *Lux v. Haggin*, 69 Cal. 255, 396.

nution, injured by not receiving the benefit in due proportion of the enjoyment to which he and the other proprietors are entitled." ¹

Relative Character.—The rule laid down on the subject is that "the reasonable usefulness of a quantity of water for irrigation is always relative. It does not depend on the convenience of or profitable results to the particular proprietor, but upon the reasonable use, reference being had to the needs of all the other proprietors on the stream. It depends, in other words, on all the circumstances." ²

Question of Degree Dependent on Circumstances.—In a more general discussion it is similarly said that what is a just and reasonable use of the waters of a stream by a riparian proprietor "may often be a difficult question, depending on various circumstances;" ³ and that it is "to a considerable extent a question of degree," but that "still the rule is the same; that each proprietor has a right to a reasonable use of it for his own benefit, for

1. *Lux v. Haggin*, 69 Cal. 255, 397, where it is further remarked: "It is obvious that the use of water for the purposes of irrigation always involves some loss by evaporation and absorption, and must often result in a sensible and clearly perceptible reduction of the quantity in the channel. An entire diversion of a water course by an upper riparian proprietor (or a diversion of a part of it) for irrigation, without restoring to the channel the excess of the water not actually consumed, is never allowed. Whether or not a diversion of water is reasonable, is a question not so much as mentioned by any writer or judge. The very proposition assumes the right of the proprietor above to use the water for his own purposes, to the exclusion of the proprietors below—a proposition inconsistent with the doctrine universally admitted that all proprietors have the same rights. *Van Hoesen v. Coventry*, 10 Barb. 518, 522."

2. *Lux v. Haggin*, 69 Cal. 255, 408. It is further said on this point in the opinion by McKINSTRY, J.: "We anticipate the objection that this is not an absolute rule at all, but . . . the very nature of the common right is such that a precise rule as to what is reasonable use by any one proprietor cannot be laid down. A stream may be so small that any use for irrigation may deprive all the others of any like use, and the same may be true of a larger stream, where the use is by several of a large number of proprietors. The

effect might be that while there might be sufficient water to supply several for irrigation, there would not be enough for all, and so all might be deprived of the benefit. But the private interests of all would, in most cases, if not in every case, lead to an avoidance of the supposed evil. It is not to be doubted that the riparian proprietors would settle by convention upon a plan by which each could secure a reasonable use for irrigation purposes, as by authorizing each to stay the flow at recurring periods, or otherwise distributing it for their mutual and common benefit." The foregoing matter from *Lux v. Haggin*, 69 Cal. 255, is also quoted, in connection with extracts from English cases, as if incorporated in the principal opinion in the note to *Tolle v. Correth*, 98 Am. Dec. 540, 544.

3. *Elliott v. Fitchburg R. Co.*, 10 Cush. 193; s. c., 57 Am. Dec. 85, 87, where it is further said on this point: "To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook, passing through many farms would be of great and manifest injury to those below who need it for domestic supply or watering cattle, and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former."

domestic use, and for manufacturing and agricultural purposes."¹

Test of Reasonable Use of Water Course.—In attempting to determine what is the test of a reasonable use, the question is stated in another way to be, where parties have a right to make a reasonable use of the water for irrigation, when does their use become unreasonable?²

The conclusion reached upon a review of various authorities³ is, "that the use which is unreasonable is such as works actual, material and substantial damage to the common right; not to an exclusive right to all the water in its natural state, but to the right which each proprietor has as limited and qualified by the precisely equal right of every other proprietor."⁴

10. Total Consumption—Not to Detriment of Adjoining Proprietors.—The inference must not be drawn "that in any case a riparian proprietor may take all the water of a stream for the purpose of irrigation, to the detriment of adjoining proprietors, for this is not the rule."⁵

Nor does the common law deprive all of the right to use, but, on the contrary, allows all riparian proprietors to use it in any manner not incompatible with the rights of others.⁶

Statements of Law Explained.—When it is said that a proprietor has the right to have a stream continue through his land, it is not intended to be said that he has the right to all the water, for that would render the stream, which belongs to all the proprietors, of no use to any; but what is meant is, that no one can absolutely divert the whole stream, but must use it in such manner as not to injure those below him.⁷

1. *Elliott v. Fitchburg R. Co.*, 10 Cush. 193; s. c., 57 Am. Dec. 85, 87. The requisites of reasonable use by mill owners are fully discussed in *Mason v. Hoyle*, 14 Atl. Rep. 786; s. c., 38 Alb. L. J. 212.

2. *Union Mill etc. Co. v. Dangberg*, 2 Sawy. 450; s. c., 28 Fed. Dec. 736, 739.

3. *Tyler v. Wilkinson*, 4 Mason 297; s. c., 28 Fed. Dec. 749, 751, where JUDGE STORY is said to have expressed the rule as clearly as it can be stated. *Embrey v. Owen*, 6 Ex. 353; *Howard v. Ingersoll*, 13 How. 326.

4. *Union Mill etc. Co. v. Dangberg*, 2 Sawy. 450; s. c., 28 Fed. Dec. 736, 740, where HILLYER, J., further says: "The rule leaves the common right equal in times of plenty and of scarcity. Because the river is low and there is not sufficient water to drive plaintiff's mill, the proprietors above can not be debarred from all use. They may still use the water, taking care to do no

material injury to the common right of plaintiff, having regard to the then stage of the river. And at all times every proprietor may, in the exercise of this common right, consume so much water as is necessary for his household and domestic purposes, and for watering his stock."

5. *Warren v. Quill*, 8 Nev. 218, as quoted in *Jones v. Adams*, 6 Pac. Rep. (Nev.) 442, 443.

6. *Vansickle v. Haines*, 7 Nev. 249.

7. *Vansickle v. Haines*, 7 Nev. 249, nearly as quoted in *Jones v. Adams*, 6 Pac. Rep. (Nev.) 242, 243, where it is further said: "In *Union M. & M. Co. v. Ferris* [2 Sawy. 176], where both the parties obtained the title in fee to their lands prior to the act of congress the question as to the rights of riparian proprietors on a stream was elaborately discussed. The defendant claimed that in a hot and arid climate like Nevada, the use of water for irrigation was a natural want; that the upper proprietor

11. Return of Surplus—Action for Failure to Return Surplus.—An action lies (see Pomeroy on Riparian Rights, section 144) where the owner of land through which a natural stream flows diverts the water for the purposes of irrigation without returning the surplus into the natural channel, whereby the owner of land below, entitled to use the water in the same manner, is deprived of his privilege.¹

Governing Principle.—For it is an ancient and well established principle that the water of a stream cannot lawfully be diverted unless it is returned again to its accustomed channel before it passes the land of a proprietor below; and the right of irrigation can be exercised only by returning what is not wanted for this purpose to its accustomed channel.²

12. Riparian Proprietors and Appropriators—Estoppel.—An upper riparian proprietor who enters into an agreement purporting to be a lease with a lower proprietor, whereby the latter grants to him for a certain term the right to the use of the waters of an adjoining stream for domestic purposes and for irrigation, is not, upon the expiration of the agreement, estopped from asserting his

on the stream might consume all the water for the purpose of irrigating his land; and that such use would be reasonable. The court, in considering this question, said: "To lay down the arbitrary rule contended for by the defendant, and say that one proprietor on the stream has so unlimited a right to the use of the water for irrigation, seems to us an unnecessary destruction of the rights of other proprietors on the stream, who have an equal need and an equal right." "What would be a reasonable amount of water for irrigation," says MCFARLAND, J., in a very recent case, "is a question that must depend upon the particular circumstances of each case in which it arises, and it is a question which will often be of difficult solution; but it is clear that in no case can he, for that purpose, as against a lower proprietor, use all the water of the stream. That could be done, if at all, only where the whole of the water was absolutely necessary for strictly domestic purposes, and to furnish drink for man and beast." Gould v. Stafford, 18 Pac. Rep. (Cal.) 879.

1. Anthony v. Lapham, 5 Pick. (Mass.) 175, 176, where the court said: "This case is to be supported, if at all, upon the authority of Weston v. Alden [8 Mass. 136.] The difference is that there the defendant took the water by small sluices over the land and returned it into the natural channel. Here the water was stopped by a dam. A great deal of

it was absorbed by the land or lost by evaporation and the surplus was not returned into the natural channel; so that the plaintiff was deprived of the privilege which belonged to him. Every man, through whose land water passes, may use it for watering his cattle or irrigating his land, but he must use it in this latter way so as to do the least possible injury to his neighbor who has the same right."

2. Blanchard v. Baker, 8 Me. 253, 266. So it is said of an upper riparian proprietor, diverting water for purposes of irrigation, that "he must see to it that the surplus after use be returned to the stream." Gould v. Stafford, 18 Pac. Rep. (Cal.) 879.

Waste Water.—"The disposition of waste water was considered where, in a former proceeding, plaintiff and others had been adjudicated to be the owners of the waste water of defendants' ranch, which was defined to be that portion of said waters which is not necessary to irrigate . . . ranch and for household purposes thereon." (Cave v. Crafts, 53 Cal. 135.) In an action by plaintiffs to restrain defendants from interfering with the use of the water in question, it was held, under the former decision, that the defendants were entitled to use the water only on their ranch, and only so much as was necessary for the immediate purposes clearly defined in the adjudication, and that testimony tending to show how much

right as a riparian proprietor to the use of the waters of the stream.¹

Extent of Use of Water from Spring.—The upper proprietor of land in which originates a spring forming a stream running through his land and into the land of another, may divert the stream and cause it to overflow and irrigate his land, provided it resumes its natural channel before it enters the land of the lower proprietor; and he is not liable for injury to such proprietor unless he wantonly and maliciously uses the stream and takes more water than is necessary for agricultural purposes.²

Prescriptive Right.—If one goes upon the public lands of the United States and appropriates water for a lawful purpose, and subsequently maintains a ditch to conduct water used for irrigation, watering stock, and other domestic purposes, and is permitted to continue in its adverse enjoyment and use for more than

water was required by defendants for these purposes, and how much had been diverted to other uses should have been admitted. *Byrne v. Crafts*, 15 Pac. Rep. 300; s. c., 73 Cal. 641.

1. *Swift v. Goodrich*, 70 Cal. 103.

Riparian Proprietors, etc.—The doctrine of estoppel has, however, been applied in an action by a party deriving title to the water of a canon from one who, while owner, represented to one of the defendants, who he knew was thinking of purchasing certain land, that the right to use water from said canon therefor was appurtenant thereto, thus inducing defendant to purchase the land. Subsequently plaintiff's grantors, in order to save waste, proposed to run a pipe across defendant's land. Defendant assented on condition that the pipe should be so laid that he would be enabled to use therefrom the quantity of water to which he had theretofore been entitled. This was done, and defendants used the same until the bringing of this action, for the purpose of irrigation, and for domestic and stock purposes. It was held that the plaintiff was estopped from interfering with the rights acquired by the defendants to the use of the pipe, and its appurtenances, so long as the same remained as conduit of the water over their land. *Alhambra Addition Water Co. v. Richardson*, 12 Pac. Rep. (Cal.) 343. The decision in bank, however, reported in 72 Cal. 598, discusses prescriptive right of diversion, etc. One who stands passively by and allows another to open out fields and irrigate them with water for sixteen years, under the belief that he has a vested right to an equal user thereof, is estopped from

subsequently denying this right. *Dalton v. Rentonia*, 15 Pac. Rep. (Ariz.) 37.

When Injunction Refused.—In an action for damages and for an injunction to restrain defendant from constructing and maintaining an irrigating ditch through plaintiff's land, the court will refuse to grant the injunction, and will assess nominal damages where it appears that defendant, with plaintiff's knowledge and consent, entered upon the land and commenced the construction of the ditch; that plaintiff then denied defendant's right, and forbade all further work; that the damage caused by constructing and maintaining the ditch will be merely nominal; that defendant is not insolvent and unable to respond in damages, and that plaintiff's remedy at law is ample and adequate. *Hoye v. Sweetman*, 12 Pac. Rep. (Nev.) 504; following *Thorn v. Sweeney*, 12 Nev. 251.

2. *Tolles v. Correth*, 31 Tex. 362; s. c., 98 Am. Dec. 540, 542, where *MORRILL, C. J.*, says, for the court, that the lower proprietor "is presumed to know that whoever owned the land above and adjoining his land had a right to use the water running through it and on it for irrigating the land," and that when such lower proprietor "erected his mill he could lessen" the upper proprietor's "vested rights," and that whatever damage the former "may sustain is *damnum absque injuria*." But in *Fleming v. Davis*, 37 Tex. 173, it is held that while the law of Texas recognizes the right of the riparian proprietor to appropriate water for the purpose of irrigation, still the owner of a head spring has no right to exhaust the water flowing from it, to the injury of the lower proprietor.

ten years, such appropriation ripens into a title which cannot be disturbed by one succeeding to the rights of the United States.¹

Vested Rights.—Appropriation of the use of water for mining and irrigation, under established customs in the arid regions, and the acts of congress,² is a vested right, and all subsequently acquired rights or titles are subject thereto.³

Allegation of Riparian Ownership.—In a suit brought to recover damages for diverting water claimed for irrigating purposes, and for an injunction, where defendant made no claim to be the riparian proprietor of the streams, but claimed the waters by prior appropriation and prescription, it was held that to support the claim for damages the material allegations in the complaint were prior appropriation of the water by the plaintiff and the diversion thereof by the defendant, and that it was unnecessary to aver riparian ownership in the plaintiff.⁴

Prior Appropriation.—Prior appropriation of all the waters of a stream, applied to irrigating purposes, gives the better right to the tributaries and all the direct and immediate sources of supply of the stream; and when this right once vests, it must be protected and upheld.⁵

Diversion of Water.—In an action to enjoin an upper riparian proprietor from diverting water from a creek for irrigating purposes, evidence that persons other than defendants have also diverted water from the stream is admissible only on the issue as to the amount of damages.⁶

Colorado Doctrine of Appropriation, etc.—One who has made an appropriation of the waters of a stream for irrigation acquires a prior right thereto in Colorado, as against a riparian owner who obtained a patent from the United States after such appropria-

1. Tolman v. Casey, 15 Oreg. 83, 88, concerning prescriptive right of diversion; see Water Co. v. Richardson, 72 Cal. 598.

2. Act of July 26th, 1866, confirming all water rights acquired by prior appropriation, and act of July 9th, 1870, declaring that all patents, etc., shall be subject to vested and accrued water rights.

3. Hill v. Lenormand, 16 Pac. Rep. (Ariz.) 266.

4. Jerrett v. Mahan, 17 Pac. Rep. (Nev.) 12.

5. Malad Val. Irr. Co. v. Campbell, 18 Pac. Rep. (Idaho) 52. This case also holds that rights cannot be acquired to the waters of springs situated along the channel of a stream, and which constitute its direct source of supply, by entering upon, cleaning out, and thereby increasing the water supply, as against prior appropriations, in good faith, of the whole of the waters of the stream. It is further questioned, but not decided,

whether one can bring water from another or independent source into a natural stream, whose waters have been appropriated, and use the channel of such stream to conduct the waters thus brought in to another point, to be then diverted and used.

Notice of Appropriation.—A person who gives notice of the appropriation of water has a reasonable time thereafter to complete his canal; and he exercises due diligence in perfecting his rights where he posts a notice of appropriation of water for the purposes of irrigation on December 12th, 1885, digs a ditch fifteen or twenty feet long, and lets water into it, and in that month and January, makes a survey, and does no more work until the latter part of February, because he is building a house on his land. Dyke v. Caldwell, 18 Pac. Rep. (Ariz.) 276.

6. Gould v. Stafford, 18 Pac. Rep. (Cal.) 879.

tion, and before the act of congress of July 9th, 1870, amending the act of July 26th, 1866, which amendment provides that patents thereafter issued shall be subject to any vested or accrued water rights. Furthermore, under the statutes of that State, the waters of a stream can be diverted by appropriation for purposes of irrigation, to the exclusion of any riparian owner, though the lands to be irrigated are not located on the banks or in the neighborhood of the stream.¹

Resumption by Appropriator After Abandonment.—Although one who has appropriated water for irrigating purposes abandons it, yet it seems that if no new comer enters upon the land and uses the right during his absence, he may, upon his return, resume his rights and avoid the effect of such abandonment.²

Subsequent Homestead Entry, etc.—The prior appropriator of the flow of any water over the public lands of the United States has, by a local custom which is recognized by the United States, a vested right therein which cannot be defeated by one who, having consented to such appropriation, subsequently files a homestead entry and obtains a patent for the land.³

The appropriation of the waters of a navigable stream

1. *Hammond v. Rose*, 19 Pac. Rep. 466, 467. *RISING, C.* said in this case: "Since the commencement of this action the questions presented have been passed upon by this court in *Coffin v. Ditch Co.*, 6 Colo. 443. In that case it was held that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use of it, is inapplicable to Colorado; and that the first appropriator of water from a natural stream for a beneficial purpose has, in the absence of express statutes to the contrary, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation; and that this right is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain; and it was further held that the right to water acquired by prior appropriation is not in any way dependent upon the locus of its application to the beneficial use designed."

2. *Tucker v. Jones*, 19 Pac. Rep. (Mont.) 571. *LIDDELL, J.*, quotes the opinion of the trial judge on this matter, partly as follows: "The appropriation of water, it would seem, stands upon the same footing and basis as the possessing right of land. So, when a party abandons his water right and ceases to

use it for some beneficial purpose, it does not become the property of his joint tenant by virtue of such abandonment but reverts to the government, and is thereafter subject to reappropriation just as much as abandoned land. If a stranger can appropriate this land, and gain the benefit of the labor of the original appropriator, why may not the latter return reappropriate and acquire all of his original rights? It seems to me that it is not a debatable question."

Interest in Irrigating Ditch.—Concerning the want of interest in an irrigating ditch on the part of the wife of an abandoning claimant on adjacent land, who had himself taken up an abandoned claim, on the ground that such interest was real property, and could therefore be acquired only in specified modes, and that at any rate her claim was subordinate to that of the owners of other contiguous claims, see *Burnham v. Freeman*, 19 Pac. Rep. (Colo.) 761.

3. *Tenem Ditch Co. v. Thorpe*, 20 Pac. Rep. (Wash. Ter.) 588.

In *Clough v. Wing*, 17 Pac. Rep. (Ariz.) 453; it is held that the common law rule does not apply to a non-navigable stream in Arizona, but that all the waters of the streams in the territory are to be applied to irrigation. The opinion contains an interesting account of artificial irrigation on various lands.

must be shown by an open and physical act, and for a valuable use, properly applied.¹

ISLANDS.

1. Title to Islands, 865.
2. Islands Belonging to the United States, 866.
3. Statutes, 866.
4. Minerals Under Islands, 867.
5. Islands in Unnavigable Rivers, 868.

1. **Title to Islands.**—New islands arising in the sea or in a navigable river *prima facie* belong, according to the common law, to the king in England, and in this country to the State. But this rule is not universal.²

1. *Clough v. Wing*, 17 Pac. Rep. (Ariz.) 453.

2. *Morris v. Brook* (Delaware C. P.), 53 Am. Rep. 215. "The right to the new islands and also to lands gained by alluvion or in dereliction (in cases where they are not gained by insensible degrees), all of which are governed by the same principles, follows the right to the soil which is covered with water. As the king is the proprietor in general of the soil covered with the sea or a navigable river, it is reasonable that he should have the soil where the water leaves it dry; and this stands on the ground of the prerogative. But where the right to the soil when covered with water belongs to a subject, he is entitled to all these increments (2 Bl. Com. 262; Hale *De Jure Maris*, ch. 4 and 6). This is illustrated by the law relative to islands arising in private rivers. If an island arises in the middle of such a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore. Yet this, says SIR WILLIAM BLACKSTONE (2 Com. 261), seems only to be reasonable where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is in the freehold of any one man, as it usually is wherever a several fishery is claimed, there it seems just (and so is the constant practice), that the lyotts, or little islands arising in part of the river shall be the property of him who owneth the piscary and the soil. The rules relative to the sea and navigable rivers are formed on the same principles.

"This subject is very satisfactorily explained by LORD HALE in his *Treatise De Jure Maris*, ch. 4 and 6, to the whole of which I generally refer for

the proof of the rule I have stated, that the right to a new island follows the right to the soil on which it was formed. This will be found from those chapters to be the rule with regard to all the maritime increments. I will state here particularly a few passages from them: 'If a subject hath had by prescription the property of a certain tract, or creek, or navigable river, or arm of the sea, even while it is covered with water by certain known metes and extends, though it should be relicted, the subject will have the propriety in the soil relicted.' Harg. *Law Tracts* 15. 'If a subject hath land adjoining the sea, and the violence of the sea swallows it up, but so that there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quality and bounding upon the firm land, the same can be known, though the sea leave the land again, or it be regained by art or industry, the subject doth not lose his propriety; and accordingly it was held by Cooke and Foster, M., 7 Jac. C. B., though the inundation continue forty years. If the marks remain or continue, or extent can reasonably be certain, the case is clear.' Cooke and Foster, M., 15 Jac. C. B.

The case of the Town of Shinbridge, in 18 H. 3, is stated in p. 16: 'The river of Severn had gained upon the town of Shinbridge so much that its channel ran over part of Shinbridge lands, and lost part thereof unto the other side (*Aure*), and then threw it back to Shinbridge. It shall not belong to Aure, neither was it claimed by the king, though Severn be in that place an arm of the sea; but was restored to Shinbridge as before. The property of the soil was not lost to the owners who had it before.' . . . 'The soil under the water must needs be of the

2. **Islands Belonging to the United States.**—The fact that persons are on an island belonging to the United States engaged in some particular enterprise and have been there for some time previously does not impair the right of others to land and engage in the like business, nor justify such persons in resisting the landing of others.¹

3. **Statutes.**—Islands, newly discovered by its citizens, belong to the United States, and until some exclusive rights are obtained in pursuance of the provisions of the act of congress passed in August, 1856, all the citizens of the United States possess equal rights to go there.²

The New York laws, 1878, ch. 190, making it a misdemeanor to remove sand, etc., from the shore of Staten Island, in Southfield, is constitutional and valid against one having title to the beach.³

same propriety as it is when it is covered with water. If the soil of the sea, while it is covered with water, be the king's, it cannot become the subject's because the water has left it. But when the land as it stood covered with water, did by particular usage or prescription belong to a subject then *recessus maris*, so far as the subject's particular interest went while it was covered with water, so far the *recessus maris vel brachii ejusdem* belongs to the same subject.' . . . 'As touching islands arising in the sea, or in the arms or creeks, or havens thereof, the same rule holds which is before observed touching acquets by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and *prima facie* it is true they belong to the crown, but where the interest of such *districtus maris*, or arm of the sea, or creek or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to a subject according to the limits and extent of such propriety, for the propriety of such a new accrued island follows the propriety of the soil before it came to be produced. This principle, so strongly supported by authority, and so evidently grounded on reason and justice, proves that Wilson's Bar is not to be considered as a new island belonging to the commonwealth and the subject of a grant from the commonwealth, but that it is a part of that island, and the property of the owner of that island. Though the surface of the lower part of that island was destroyed by the force of the winds and

waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining soil covered by the water. If it was regained either by natural or artificial means, it continued to belong to the original proprietor. He might embank it and thereby again exclude the waters if circumstances permitted. The earth deposited on it by the river became his by the right of alluviation, and of course this island formed on it by such deposit became his, and though it probably has now extended beyond the limits of the old island, the addition is plainly an alluvion, as it has arisen from gradual and imperceptible accretions.'" WILSON, J., in *Morris v. Brooke* (Delaware C. P.), 53 Am. Rep. 215.

1. *People v. Batchelder*, 27 Cal. 69.

2. Individuals cannot obtain a right to the exclusive possession of islands in the sea by virtue of discovery, irrespective of the statute. *American etc. Co. v. United States etc. Co.*, 44 Barb. (N. Y.) 23.

But where the plaintiffs, while an island remained in an unoccupied condition, by their agents went upon and expended money in erecting works and making improvements and mining guano, which they conveyed to the shore, it was *held*, that they were entitled to be protected by injunction in the enjoyment of such property, and in the possession of the guano so mined. *American etc. Co. v. United States etc. Co.*, 44 Barb. (N. Y.) 23.

3. *Hodges v. Perine*, 24 Hun (N. Y.) 516.

4. Minerals Under Islands.—A patent entitling the patentee to coal and minerals under the bed of a navigable river from low water mark on one shore to the same line on the other does not entitle him to the minerals under an island within the bounds of his patent, which was subject to application and sale under laws existing before the law under which his patent was granted, and still in force.¹

1. *Pennsylvania Coal Co. v. Winchester*, 109 Pa. St. 572; s. c., 58 Am. Rep. 740.

"The act of April 11th, 1848, of the legislature (Pa.) provided for application, survey and grant of a quantity not exceeding one hundred acres of the bed of any navigable river, beginning at a point designated in the application, at low water mark on the bank of said river and pursuing the course of said river at low water mark to a designated point; thence at right angles across said river to low water mark; thence along the shore at low water mark to a point opposite the place of beginning. A warrantee under this act has the 'right to dig and mine for iron, coal, limestone, sand and gravel, fire-clay and other minerals,' but he takes no title to the soil or sand or anything in the bed of the river. His grant is confined within the limits of low water mark, and this recognizes the principle that a grant of land by the commonwealth, bounded on one side by a large navigable river, vests in the grantee the entire land to the line of low water mark. The riparian owner has the right of soil to ordinary low water mark of the river, subject to the public right of passage for navigation, fishing and other proper use of the highway to the mark of ordinary high water. *Wood v. Appal*, 63 Pa. St. 210. Between high and low water mark, the title of the riparian owner is qualified, being subject to the right of navigation over it and improvement of the stream as a highway. *Wainwright v. McCullough*, 63 Pa. St. 66. In that case it was said that the land lying between the low water line of the island as fixed by the commissioners, and the top of the island bank, is a part of the island. And in *Hartley v. Crawford*, 32 P. F. S. 478, it was again remarked that the riparian rights of the owner of an island attached to the land between the bluff bank to which the survey came and the ordinary low water mark; and subject to the rights of the public, the owner of the island might use the sandy or pebbly beach or shore. Although the princi-

ple may not have been necessary to the decision in *Wainwright v. McCullough*, 63 Pa. St. 66, or in *Hartley v. Crawford*, 32 Pa. St. 478, and therefore not authoritatively ruled, its assertion shows how naturally it comes into view in considering the bounds of an island as defined in the statutes providing for sales of that kind of land. No difference is made in the laws providing for surveys and sales of land, respecting the shore of the main land and the shore of islands. It would be difficult to conceive a reason for a difference. In either case, the river being a bound, the grantee takes to low water mark, subject to the right of the public to use the river as a highway, but as to all below the surface, without clog or qualification. If the title to any of the land remained in the commonwealth, a grant of the minerals under the bed of a river, within the limits of low water mark, would be held as strictly within said limits as if all the land bordering on the river had been disposed of to purchasers. So also if the act of 1848 does not apply to minerals under islands in the river Susquehanna, then owned by the Commonwealth, said islands embrace all within the limits of low water mark.

"The act of 1848 contained no repealing clause, and repealed no prior statute by implication, unless there was such positive repugnancy between its provisions and the prior statute, that they cannot stand together or be consistently reconciled. It is general, applying to all navigable rivers, and the statutes relating to sale of islands in the river Susquehanna apply to no other; but the repugnancy between a local statute and a subsequent general statute must be as strongly marked, to say the least, to repeal by implication, as if both were general. *Sifted v. Commonwealth*, 104 Pa. St. 179; *Harrisburg v. Sheck*, 104 Pa. St. 53. No mention is made of islands in the act of 1848. On its face, the warrantee is entitled to the minerals under the bed of the river, without exception. Of course, it was not intended that he should have a right to dig and

5. **Islands in Unnavigable Rivers.**—An island in an unnavigable river (not legally appropriated otherwise), if on one side of the dividing line, belongs to the owner of the bank on that side; if in the middle of the river, the owners of the banks hold it in severalty, the dividing line running as if there was no island in the river. If there are several borders, the island is apportioned according to their lines on the main.¹

ISSUE—(See LEGACIES AND DEVICES; REMAINDERS AND EXECUTOR'S INTERESTS; VESTED AND CONTINGENT LEGACIES; WILLS).

- I. Definition, 869.
- II. Issue Construed; Children, 872.
 - 1. Issue Explained by Children and Vice Versa; Form of Peculiar Expressions, 872.
 - 2. Issue Correlative with Parent; *Sibley v. Perry*, 875.
- III. Whether Issue Is a Word of Purchase or Limitation, 876.
 - 1. In Deeds and Marriage Articles, 876.
 - 2. In Wills, 877.
 - a. General Principle—Issue Compared with Heirs of the Body, 877.
 - b. Limitation to A and His Issue—When No Gift Over, 879.
 - c. Limitations to A for Life, and After His Decease to His Issue—When No Gift Over, 886.

- (1) As to Realty, 886.
- (2) As to Personalty, 890.
- (3) Effect of Cy. Press Doctrine, 891.

IV. Dying Without Issue—When Referred to Prior Objects, 891.

- 1. In Default of Such Issue, 891.
- 2. In Default of Issue, 894.
 - a. As to Personalty, 894.
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V. Dying Without Issue—Definite and Indefinite Failure of Issue, 899.

- 1. General Rule, 899.
- 2. Without Having Issue—Before He Has Any Issue—Without Children—Issue Alive, Surviving, or, Who Shall Attain Twenty-one, 902.
- 3. Without Leaving Issue—With-

mine and carry away the minerals in the islands which had been already granted. The presumption is against an intent to invade vested rights of property. Then, the statute must be so construed that the bed of the river between the shores of the main land, shall not include land, called islands, which had been previously granted to purchasers under the laws of the State. It seems equally clear that by like construction, it shall not include islands which, under prior existing laws, were subject to application and sale. Those laws provided for the sale of land, without exception of any part thereof; the act of 1848 provided for the sale of minerals under a river bed—under land covered with water. The purpose of the former was a sale of the entire land; of the latter, a sale of only the minerals under the surface. Title to the surface remains in the commonwealth as to all grants under the act of 1848. There is no intent that said act shall apply to any land or island which were subject to sale under other laws. We are not

convinced that the court erred in any of the rulings set forth in the first six specifications of error.” *TRUNKY, J.*, in *Pennsylvania Coal Co. v. Winchester*, 109 Pa. St. 572; 8. c., 58 Am. Rep. 740.

1. *Hopkins' Academy v. Dickinson*, 9 Cush. (Mass.) 548; *Commonwealth v. Alger*, 7 Cush. (Mass.) 97; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268; *Pratt v. Lamson*, 2 Allen (Mass.) 284.

Where an island is so formed, in the bed of a river not navigable, as to divide the channel and lie partly on each side of the thread of the river, it will be divided between the riparian proprietors on the opposite sides of the river according to the original thread of the river. *Deerfield v. Arms*, 17 Pick. (Mass.) 41.

Islands in an unnavigable river, if altogether on one side of the dividing line, belong to him who owns the bank on that side; if formed in the middle of the river they are appropriated to the owners of the bank in severalty, according to their original dividing line, the *filum aquæ*, as it is where the waters

- out Leaving Issue Behind Him, 904.
4. With Leaving Issue at Time of Death, 906.
 5. Gift over Expressly Limited to Take Effect on, at, or After Decease of First Taker, 906.
 6. Effect of the Word "Then," 908.
 7. Die Under Twenty-one and Without Issue—Unmarried, or Before Marriage, and Without Issue, 909.
 8. Gift Over, if A Survives B and Dies Without Issue, or in Case the Issue Die Under Age, 911.
 9. Dying Without Issue in Lifetime of Person Living at Testator's Decease, or Before Possession or Period of Distribution, 912.
 10. Gift Over to Survivors or to Persons "Then Living," 912.
 11. Gift Over to Person Named, 915.
 12. Direction to Pay Money, 915.
 13. Personal Trust, 915.
 14. Gift Over for Life, 916.
 15. *Bequest of Perishable Goods; Original Estate Devised. Per Autre Vie*, 916.
 16. Effect of Power of Appointment, 917.
 17. Failure of Testator's Own Issue, 917.
 18. Effect of Alternative Limitations, 918.
 19. *Statutory Changes*, 918.
- VI. Dying Without Issue Referred to Death in Lifetime of Testator, 919.
- VII. Effect of Limitation Over Upon Preceding Limitation, 921.
1. Where the Failure of Issue Is Indefinite, 921.
 2. Where the Failure of Issue Is Definite, 924.

I. DEFINITION.—Issue, when a word of limitation, means lineal descendants indefinitely, and hence *heirs of the body*;¹ when a word of purchase uncontrolled by the context, lineal descendants in being at a specified time, and under a devise or bequest to the issue of A, all lineal descendants in being at the time the gift takes effect are entitled *per capita*.²

begin to divide. *Ingraham v. Wilkin-*
son, 4 Pick. (Mass.) 268.

Islands in rivers fall under the same rule as to the ownership of the soil and its incidents as the soil under water does; if not otherwise lawfully appropriated, they belong to the riparian proprietor on one side, or are divided in severalty between the proprietors on both sides according to the original dividing line, or *filum aquæ*, as it would run if the islands were under water. The *filum aquæ* is ascertained by measurement across from ordinary low water mark on one side to the same on the other side, without regard to the channel or depth of water. When the island is appropriated the boundary is then midway between that and the main land. *McCullough v. Wall*, 4 Rich. (S. Car.) 68.

1. 2 Jarman on Wills (5th Am. ed.) *411, § III. 2 a, n. (2); *Doe ex dem. v. Emaus*, Penn. (N. J.) 967, 971.

2. Wms. Exrs. *1112; Prior on Issue, § 7; LORD HARDWICKE in *Wythe v. Blackman*, 1 Ves. Sr. (Eng.) 200; *Davenport v. Hanbury*, 3 Ves. (Eng.) 257; *Freeman v. Parsley*, 3 Ves. (Eng.) 421;

Slater v. Dangerfield, 15 M. & W. (Eng.) 263; *Bernard v. Montague*, 1 Mer. (Eng.) 434; *Clay v. Pennington*, 7 Sim. (Eng.) 370; *Hall v. Nalder*, 22 L. J. Ch. (Eng.) 242; 17 Jur. 224; *South v. Searle*, 2 Jur. N. S. (Eng.) 390; *In re Jones's Trusts*, 23 Beav. (Eng.) 242; *Robinson v. Sykes*, 23 Beav. (Eng.) 40; *Maddock v. Legg*, 25 Beav. (Eng.) 531; *In re Corrie's Will*, 32 Beav. (Eng.) 426; *In re Corlass*, L. R., 1 Ch. D. (Eng.) 460; 45 L. J. Ch. (Eng.) 118; 24 W. R. (Eng.) 204; 33 L. T., N. S. (Eng.) 630; *Morgan v. Thomas*, 9 Q. B. D. (Eng.) 646; *Denio's Trusts*, 1r. Rep., 10 Eq. 86; *Ralph v. Carrick*, 11 Ch. D. (Eng.) 885; *Hobgen v. Neale*, L. R., 11 Eq. (Eng.) 48; *Ferril v. Talbot*, Ril. Ch. (S. Car.) 247; *Beckam v. Dessaus*, 9 S. Car. 546; *McPherson v. Snowden*, 19 Md. 197; MILLER, J., in *Goldsbrough v. Martin*, 41 (Md.) 488, 501; *Price v. Disson*, 2 Beas. (N. J.) 168, 177; *Weehawken Ferry Co. v. Sisson*, 2 Green (N. J.) 475; HOAR, J., in *Houghton v. Kendall*, 7 Allen (Mass.) 76. See Also *Edwards in Bibb*, 43 Ala. 666; *Kleppner v. Laverty*, 70 Pa. St. 70; *Wistar v. Scott*, 105 Pa. St. 200,

214; s. c., 51 Am. Rep. 197; Barry's Appeal (Pa.), 8 Cent. Rep. 131.

Where the word "issue," or the words "heirs of the body" are used in a devise, they must have one of two meanings, either the indefinite lineal succession of heirs of the body, or the particular individuals who at a given time answer the description of issue. Ferril v. Talbot, Ril. Ch. 247; STARRETT, J., in Wistar v. Scott, 105 Pa. St. 200, 214.

Issue Includes Descendants.—"The word issue includes all remote descendants of the person whose issue is spoken of, and the burden lies upon him who contends that it is to be restricted to a narrower signification." ROMILLY, M. R., in Ross v. Ross, 20 Beav. 649; Slater v. Dangerfield, 15 M. & W. (Eng.) 263; Leigh v. Norbury, 13 Ves. 344; JAMES, L. J., in Ralph v. Carrick, 11 Ch. D. (Eng.) 883; JESSEL, M. R., in Morgan v. Thomas, 9 Q. B. D. (Eng.) 646; South v. Searle, 4 W. R. (Eng.) 470; Harrison v. Symons, 14 W. R. (Eng.) 959; *Re Howard's Trusts*, 7 Ir. Ch. R. 344; Donoghue v. Brooks, Ir. R., 9 Eq. 487; Denio's Trusts, Ir. Rep. 10 Eq. 86.

In *Massachusetts*, a similar construction of the word issue as applied to the descent of estates is enforced by statute. Mass. Gen. Sts., ch. 3, § 7, cl. 9. Bigelow v. Morong, 103 Mass. 288, 289. But in *California* Civil Code, § 1386, *issue* is used in same sense as child. *In re Newman's Estate* (Cal.), 16 Pac. Rep. 887.

In *New York*, in Taft v. Taft, 3 Dem. (N. Y.) 86, it was held that the word *issue* in a will, where no light is thrown upon its meaning by the context or by extrinsic circumstances, must be construed to denote lineal descendants of the first degree to the exclusion of remoter kindred. This decision purports to be formed upon the statement of CHANCELLOR KENT, 4 Kent Com. *278, n. (d), and Palmer v. Horn, 84 N. Y. 516. See also Murray v. Bronson, 1 Dem. (N. Y.) 218, 230. The decisions in the two latter cases depend upon the principles explained in section II. CHANCELLOR KENT merely says: "The term *issue* is generally used by the testator as synonymous with child or children." In matter of Cornell, 5 Dem. (N. Y.) 88, the words "I give, devise and bequeath all my estate, real and personal, unto my brothers who shall survive me, and to the issue of such of my brothers as have heretofore died or may hereafter die," without anything

in the context restricting the meaning of the word "issue," were held to include the descendants of a deceased brother and not confined to their children. Palmer v. Horn, 84 N. Y. 516, was cited by counsel contending for the restricted construction. This would seem to establish that no new rule of construction was introduced by Palmer v. Horn, and that the statement of ROMILLY, M. R., in Ross v. Ross, is as applicable in New York as elsewhere. See also the earlier case of Kingsland v. Rapelje, 3 Edw. Ch. (N. Y.) 1.

Adopted Children.—The adoption of an illegitimate child by the father and his wife, under N. H. St., G. L. ch. 188, § 4, does not render such child his *issue* so as to defeat a remainder created by will, and made contingent upon his leaving no issue. Jenkins v. Jenkins, 64 N. H. 407. See *In re Newman's Estate* (Cal.), 16 Pac. Rep. 887; *In re Sessions' Estate* (Mich.), 38 N. W. Rep. 249.

Otherwise where an illegitimate daughter was legitimated by special act of assembly and made "capable to inherit and transmit any estate as fully as if born in lawful wedlock," and gift over was to take effect on death "without an heir." McGunnigle v. McKee, 77 Pa. St. 81.

Step Children.—The legal signification and meaning of the term *issue*, children or grandchildren, and every word of the like kind, when used in a will as descriptive of persons who are to take as devisees or legatees, applies to those only who are of the blood of the testator or person named as the parent and does not comprehend those who may have acquired the name or character of children by marriage." But the rule will yield where there is a clear or manifest intention to the contrary expressed in the will. Barnes v. Greenzabach, 1 Edw. (N. Y.) Ch. 41, 43, 44; Hussey v. Berkley, 2 Eden (Eng.) 194; s. c. *nom.* Hussey v. Dillon, Ambler (Eng.) 603. See Lawrence v. Hebbard, 1 Bradf. Sur. (N. Y.) 252.

Testator directed the remainder of his personal estate to be divided into six equal parts, and he bequeathed to his stepdaughter M, one share; to his daughter S, one share; to the children of his daughter E, one share; to the children of his daughter M, one share; to the children of his daughter B, one share; and to the children of his son J, one share: but if his said children or his said stepdaughter should die without issue, the share or portion which would

have gone to such issue to be divided equally among the survivors of his children or grandchildren. The daughter B died without issue; the stepdaughter M married and died leaving issue. *Held*, that the issue of M had no title to any part of B's share. *Barnes v. Greenzabach*, 1 Edw. Ch. (N. Y.) 41.

Issue Take per Capita.—Under a limitation in a deed or will to the "lawful issue of A," children and grandchildren take *per capita*. *Leigh v. Norbury*, 13 Ves. (Eng.) 340; *Freeman v. Parsley*, 3 Ves. (Eng.) 420. See *Morgan v. Thomas*, 9 Q. B. D. (Eng.) 646; *Denio's Trusts*, Ir. Rep. 10 Eq. 86; *Ralph v. Carrick*, 11 Ch. D. (Eng.) 883; *Louis v. Louis*, 9 Jur. N. S. 244; *Re Corrie's Will*, 32 Beav. (Eng.) 426.

Testator gave an annuity of \$10,000 for life and a power to dispose by will of one sixth of his residuary estate to each of his children. He also provided, in another item of the will, that if one son should have no other "issue or descendants" than a son who was then living, his power of disposition by will should be limited to \$50,000, and in default of appointment, that that sum should be held in trust for the grandson, with the further provision that, "if it shall happen that my said son shall leave other issue or descendants, living at his death, besides his said son, my grandson, then the foregoing provisions of my will are to apply to him as well as to my other children." The son left no other child than the grandson, who was a minor at the time of the testator's death, but was afterwards married and had children living at the time of the death of testator's son. *Held*, that the words "issue or descendants" include the children of the testator's grandson, and that, therefore, the contingency named in the will never happened, and the grandson was entitled to a share with the other children named in the will. *Barry's Appeal*; *Harrison's Estate* (Pa.), 18 Cent. Rep. 131.

Under a devise of a contingent remainder, upon the determination of a precedent life estate to "the male issue then living of testator's son R,"—R taking no interest, and the testator's intent being unexplained by the context—the words "male issue," etc., are words of purchase, designating a class of devisees, to wit: all the lineal descendants of R, who are males, living at the determination of the life estate, and such male lineal descendants take in equal shares, whether they be of the same

generation or not, and whether they trace descent from R through males or through females. *Wistar v. Scott*, 105 Pa. St. 200.

When Issue Take per Stirpes—Substitutional Gifts.—Where the gift to the issue is substitutional, they take *per stirpes*. *Minchell v. Lee*, 17 Jur., pt. 1 (Eng.) 727. See *Atwood v. Alford*, 4 W. R. (Eng.) 956; *L. R.*, 2 Eq. (Eng.) 479; *Rowland v. Gorsuch*, 2 Cox (Eng.) 189.

"A gift to issue is substitutional when the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue, and a gift to issue is an original gift when the share which the issue are to take is not by a prior clause expressed to be given to the parent of such issue." *KINDERSLEY, V. C.*, in *Lamphier v. Buck*, 2 Drew & Sm. (Eng.) 484, 494. See *Re Turner*, 2 Drew & Sm. (Eng.) 501. See further, as to the distinction, *In re Merrick's Trusts*, L. R., 1 Eq. (Eng.) 551; *Hurry v. Hurry*, L. R., 10 Eq. (Eng.) 346; *In re Woolrich*, *Harris v. Harris*, L. R., 11 Ch. D. (Eng.) 663; 48 L. J., Ch. (Eng.) 321; *Colthurst v. Carter*, 15 Beav. (Eng.) 421; *Cost v. Winder*, 1 Coll. (Eng.) 320; *Heasman v. Pearce*, L. R., 7 Ch. App. (Eng.) 660; *Mitcheson v. Buckton*, 23 W. R. (Eng.) 480; *Humphrey v. Humphrey*, 8 Jur., N. S. (Eng.) 500; s. c., 2 Drew & Sm. (Eng.) 49; *Alexander v. Jolly*, 55 L. T., Ch. (Eng.) 574; *Joseph v. Ulitz*, 34 N. J. Eq. 1; *McPherson v. Snowden*, 19 Md. 197; *Dexter v. Inches* (Mass.), 17 N. E. Rep. 551. See also **LEGACIES AND DEVISES**.

Issue Take Jointly.—At common law a gift to the issue of A, *simpliciter*, creates a joint tenancy. *Davenport v. Hanbury*, 3 Ves. (Eng.) 258.

Objections to Distribution per Capita.—The rule of distribution which allows grandchildren or great-grandchildren to share *per capita* with children in a devise or bequest to issue, is generally admitted to frustrate the intention of the testator. *CHANCELLOR KENT* was of opinion that issue is generally used by the testator as synonymous with child or children. 4 Comm. *278, n. (b). And in *Freeman v. Parsley*, 3 Ves. (Eng.) 420, *LORD LOUGHBOROUGH* expressed regret that there was no medium between total exclusion of grandchildren and allowing them to share equally with their parent. *Mr. Redfield* (2 Red. Wills, *42, *43) is of

II. ISSUE CONSTRUED; CHILDREN—1. **Issue Explained by Children and Vice Versa—Force of Peculiar Expressions.**—When the word issue in one part of the limitation is explained by the word *children* in another part, as when there is a gift over in case the *issue* or *children* die under twenty-one, the inference seems irresistible that the testator intends the word issue throughout to denote children.¹

opinion that most testators employ the term issue in the sense of descending heirs. Therefore it is submitted that the construction of a bequest to the issue of A, most consistent with the intention of the testator, would be to allow all children of A, living at the time of distribution, to share *per capita*, to the exclusion of more remote descendants, unless such descendants are the issue of a deceased child, in which case they should take a child's share, as representing their parent.

Title of Issue Under Statutes to Prevent Lapse.—See LEGACIES AND DEVISES.

Real Estate.—*Prima facie* under a devise to the issue of A, as purchasers, the intent indicated by the use of the word *issue*, to let in the whole line of descendants, can best be carried out by conferring an estate tail on that descendant of A who would be his heir in tail if he were dead. Such construction receives some color from the language of EYRE, C. J., in *Whitelock v. Heddon*, 1 Bos. & P. (Eng.) 243; but the weight of authority is decidedly against it; and since the passage of statutes enabling the tenant in tail to bar the entail at pleasure, the reasoning upon which it is founded appears inapplicable. But whatever may be the case when the word *issue* simply is used, if to a gift to issue as purchasers there be added any words denoting that they are to take as tenants in common, or in any other way inconsistent with an estate tail, the same rule will be applied as is adopted in the case of personality. *Mogg v. Mogg*, 1 Meriv. (Eng.) 6, 4.

In *Cook v. Cook*, 20 Vern. (Eng.) 545, it was held that under a devise to the issue of J S, children and grandchildren took concurrently an estate for life. In *Dalzell v. Welch*, 2 Sim. (Eng.) 319, real estate was devised to R D for life, remainder to and among his issue as he should appoint, remainder to his issue living at his death, in fee. Held, that an appointment to the

children, excluding the grandchildren, was invalid.

1. 2 Jarm. (5th Am. ed.) *440; *Ryan v. Cowley*, Ll. & Go. temp. Sug. 7; *Cursham v. Newland*, 2 Bing. N. C. 58; *Mandeville v. Lackey*, 3 Ridg. P. C. (Eng.) 352; *Marshall v. Weeding*, 8 Sim. (Eng.) 4; *Bradley v. Cartwright*, L. R., 2 C. P. (Eng.) 511; *Eastwood v. Anson*, 38 L. J., Exch. (Eng.) 74; 4 L. R., Exch. 141; 19 L. T., N. S. 834; *Livesay v. Walpole*, 23 W. R. 825; *Hedges v. Harpur*, 3 De G. & J. (Eng.) 129; *Bryan v. Mansion*, 5 De G. & S. (Eng.) 737, 743; *Baker v. Bayldon*, 31 Beav. (Eng.) 209; L. R., 9 Q. B. D. (Eng.) 643, 646; *Lippincott v. Warder*, 14 S. & R. (Pa.) 115; *Walker v. Milligan*, 9 Wright (Pa.) 178; *Riehl's Appeal*, 4 Smith (Pa.) 97; *Taylor v. Taylor*, 63 Pa. St. 481; *Hill v. Hill*, 74 Pa. St. 173; *King v. Savage*, 121 Mass. 303. See also *Bristow v. Warde*, 2 Ves. Jr. (Eng.) 336; *Hampson v. Brandwood*, 1 Mad. (Eng.) 381; *McNamara v. Lord Whitworth*, Coop. (Eng.) 241; *Horsepool v. Watson*, 3 Ves. (Eng.) 383; *Earl of Oxford v. Churchill*, 3 Ves. & B. (Eng.) 59; *Carter v. Bentall*, 2 Beav. (Eng.) 551; *Bradshaw v. Melling*, 19 Beav. (Eng.) 417; *Hill v. Hill*, 74 Pa. St. 173; *Price v. Sisson*, 2 Beas. (N. J.) 168, 177; *Arnold v. Brown*, 7 R. I. 188, 195; *Burleson v. Bowman*, 1 Rich. Eq. (S. Car.) 111; *Edwards v. Bibb*, 43 Ala. 666.

As to what words will be sufficient to restrict "issue" to children in an executed settlement, see *Re Denio*, Ir. Rep., 10 Eq. 81; *Re Heath*, 23 Beav. (Eng.) 193; *Marshall v. Baker*, 31 Beav. 608; *Re Meade's Trusts*, 7 L. R., Ir. 51; *Williams v. Jekyl*, 2 Ves. Sr. 681; *Hampson v. Brandwood*, 1 Mad. (Eng.) 381, 388; *Fitzherbert v. Heathcote*, cited, 4 Ves. (Eng.) 794; *Earl of Sussex v. Temple*, 1 Ld. Raym. 310.

Under the word "issue," in marriage articles, explained by the subsequent use of the word *children*, grandchildren cannot take. *Adams v. Law*, 17 How. (U. S.) 417.

As to construction applied to articles

for a settlement, *Campbell v. Sandys*, 1 Sch. & Lef. (Eng.) 281; *Stonor v. Curwen*, 5 Sim. (Eng.) 264; *Lester v. Tidd*, 29 Beav. (Eng.) 618.

A testator by his will gave a fund to trustees "in trust for the lawful issue of F H surviving him, equally to be divided between them if more than one.

And if but one, then for such only child," with a gift over "in default of issue of F H becoming entitled." The issue of F H who survived him were a son, a daughter, four children of the son and six children of the daughter. *Held*, that by the use of the word "child" the testator had himself interpreted the word issue and that the word issue must be restricted to children and the fund go in moieties between the surviving son and daughter. *In re Hopkins*, 9 L. R., Ch. D. 131, 134; 26 W. R. 629; 47 L. J., Ch. D. 672.

Bequest to S for life, and, after her death, to "the issue of S, to be equally divided amongst such issue, share and share alike, and their issue; and in case of only one child her surviving then to such only surviving child." *Held*, that the term "issue" meant children and that grandchildren of S whose parents were alive at her death were not entitled. "If the limitation over had been to the issue of S, share and share alike, without more, the grandchildren as well as the children would be entitled to take; but the limitation over to one child, in case S left but one surviving her, demonstrates, I think clearly, that in the use of the word issue she meant children; nor is it helped by the limitation over to the issue, and their issue, of S, for the issue of her issue are but lineal descendants, and are equally contracted and limited by the limitation over to her only surviving child, if she died leaving but one." *JOHNSON*, Ch., in *Burleson v. Bowman*, 1 Rich. Eq. (S. Car.) 111, 112.

For a case in which "issue, male and female," was construed sons and daughters, see *Crozier v. Crozier*, Dru. & War. (Eng.) 373. See also *Murray v. Addenbrook*, 4 Russ. (Eng.) 407.

"It is a well settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." *LORD CHANCELLOR SUGDEN*, in *Ridgway v. Munkettrick*, Dru.

& War. (Eng.) 84; *Peel v. Catlow*, 9 Sim. (Am. ed.) 372, 376, 377.

See the principle applied as to deeds in *Campbell v. Sandys*, 1 Sch. & Lef. (Eng.) 281; *Swift v. Swift*, 8 Sim. (Eng.) 168.

This rule of construction will be followed although an intestacy be the consequence. *Goldie v. Greaves*, 14 Sim. (Eng.) 348.

Where the limitation over is on failure of issue generally, but the testator, in another passage, refers to the same persons by the name of children, and thereby explains that by the word issue he means children, the effect is the same as if the limitation over were expressly on failure of children. *Smith Ex. Int.*, § 547. *Sheffield v. Lord Orrery*, 3 Aik. (Eng.) 282; *Fearne*, Cent. R. 471; *Deming v. Sherratt*, 2 Hare (Eng.) 14.

In *Ellis v. Selby*, 7 Sim. 352, testator bequeathed his funded property in trust for W R E for life, and after his death for his issue at twenty-one; and also his bank stock in trust after the death of F B for W R E for life; and after his death in trust for the child or children of W R E in such manner as he had directed respecting his funded property. *Held*, that issue in the first part of the will must be construed as children. See *Peel v. Catlow*, 9 Sim. (Eng.) 372; *Jennings v. Newman*, 10 Sim. (Eng.) 219; *Goldie v. Greaves*, 14 Sim. (Eng.) 348; *Benn v. Dixon*, 16 Sim. (Eng.) 21; *Bryan v. Mansion*, 5 De G. & S. (Eng.) 737; *Farrant v. Nichols*, 9 Beav. (Eng.) 327; *Edwards v. Edwards*, 12 Beav. (Eng.) 97; *Heath's Settlement*, 23 Beav. 193.

It is not, however, a necessary result of the word issue being used in the sense of children in one clause that it is to be similarly construed in another clause, where it is surrounded by a different context. *Carter v. Bentall*, 2 Beav. (Eng.) 551; *Hedges v. Harpur*, 9 Beav. (Eng.) 479; *Re Corrie's Will*, 32 Beav. (Eng.) 426; *Caulfield v. Maguire*, 2 Jo. & Lat. (Eng.) 176; *Louis v. Louis*, 9 Jur., N. S. (Eng.) 244; *Head v. Randall*, 2 Yo. & Coll. C. C. (Eng.) 231; *Williams v. Teale*, 6 Hare (Eng.) 239. See the principle applied to marriage settlements, *Re Warren's Trusts*, 26 Ch. D. (Eng.) 208; 53 L. J. Ch. (Eng.) 787; *Re Biron*, 1 L. R. Ir. 258. Still less can issue be restricted to children merely to make two different bequests correspond. *Waldron v. Boulter*, 22 Beav. (Eng.) 284.

Children Construed Issue.—The word

issue will not be cut down to *children* by the mere circumstance of the words *issue* and *children* being previously used synonymously if in those prior instances there was fair ground to conclude that both terms were used in the sense of *issue*. An estate was conveyed, after estates tail, to the use of four parties and their heirs, in trust, to sell, and the proceeds of the sale to be equally divided amongst these four parties or the *respective issues* of their bodies; in case they or any of them should happen to be dead at the time of the failure of the issue male to whom the estates tail were limited, share and share alike, namely to each of them or their *respective children*, one-fourth part thereof, provided, that if any of them should happen to be dead without issue, when there should be such a failure of issue, then to be equally divided among the survivors, or survivor, or their *respective children*, in case any of them should also be dead leaving issue of their bodies. *Held*, that issue was not restrained to children, but that all the children and grandchildren of each party took one-fourth *per capita*. The principal ground of the decision was that the testator had in view a time for the execution of the trusts which might be deferred till long after the death of all the children of the parties, the gift over, on the parties dying without issue, was also thought material. *Wythe v. Thurlstone or Wythe v. Blackman*, Amb. (Eng.) 555; 1 Ves. Sr. 196; 3 Ves. 258.

A remainder was limited to the "issue or children" of testator's daughters, on the death of the last surviving daughter, the property "to be equally divided among all such issue or children, share and share alike," etc. *Held*, that the word "issue" should be read as enlarging the scope of the limitation, and not as equivalent merely to "children," and that the issue of deceased children took by right of representation. *Hall v. Hall*, 140 Mass. 267. See also *Vollar v. Carter*, 4 El. & Bl. (Eng.) 173; 1 Jur., N. S. (Eng.) 279; 24 L. J., Q. B. (Eng.) 56.

In *Dalzel v. Welch*, 2 Sim. 319, testator, in a former bequest, had used the words *issue* and *children* indiscriminately and synonymously, and had made gift over, in default of issue living at death. He then bequeathed other estates to D for life, and after his decease among the issue of his body, as he should appoint; in default of appointment, among the issue living at his

death equally in fee; and in case he should die in the lifetime of B, without issue of his body living at the time of his death, over. *Held*, that children meant issue and that an appointment by D, in favor of children only, was invalid, on the ground of its excluding the donee's grandchildren and great-grandchildren, who were objects of the power as being included under the denomination of issue. *Compare* *Ryan v. Cowley, Ll. & Go.* (Eng.) 10; *Carter v. Bentall*, 2 Beav. (Eng.) 551.

In the leading case of *Gale v. Bennett*, Amb. (Eng.) 681, testator bequeathed personal property upon trust for his daughter H for life and for her *children* at twenty-one; and in default of such issue, in trust for his other daughters, who should be living at the time of the death and failure of issue of H, and the *child* or *children* of such as should then be dead, as tenants in common; such children only to take their parent's share, but if there should be none of his other daughters, nor any issue of his other daughters, then living, over. H died childless. *Held*, that the grandchildren of another daughter of the testator, who died in his lifetime, were entitled, the word *child* in that part of the bequest being used as synonymous with *issue*. This case can be distinguished from *Earl of Oxford v. Churchill*, 3 Ves. & B. (Eng.) 68, but seems inconsistent with *Swift v. Swift*, 8 Sim. (Eng.) 168. In the latter case, however, *Gale v. Bennett*, Amb. (Eng.) 681, was not cited, and cannot, therefore, be considered overruled. See *Horsepool v. Watson*, 3 Ves. (Eng.) 383; *Doe d. Simpson v. Simpson*, 5 Scott (Eng.) 770; 4 Bing. N. C. 333; 3 M. & Gr. (Eng.) 929; *Harley v. Mitford*, 21 Beav. (Eng.) 280.

Royle v. Hamilton, 4 Ves. (Eng.) 437; *Stonor v. Curwen*, 4 Sim. (Eng.) 264.

Lawfully Begotten by A.—These words are not *per se* enough to limit a bequest to the issue of A to his children. *Evans v. Jones*, 2 Coll. (Eng.) 516; *Caulfield v. Maguire*, 2 Jo. & Lat. (Eng.) 176; *Hayden v. Wiltshire*, 3 T. R. (Eng.) 372. *Compare* *Hampson v. Brandwood*, 1 Madd. (Eng.) 381; *Gordon v. Hope*, 3 De G. & D. (Eng.) 352.

Offspring.—As to when this word will be construed issue and *vice versa*, *Lister v. Tidd*, 29 Beav. (Eng.) 618; *Thompson v. Beasley*, 3 Drew. (Eng.) 7; *Bramble v. Billups*, 4 Leigh (Eng.) 90; *Allen v. Markle*, 36 Pa. St. 117.

2. Issue Correlative with Parent—Sibley v. Perry.—When the word issue is used in reference to the *parent* of that issue, as where the issue are to take the share of the deceased parent, it must mean *his children*, that is, the word *parent* confines the word *issue* to the children of the taker.¹

1. ROMILLY, M. R., in *Ross v. Ross*, 20 Beav. (Eng.) 645; 649, *Sibley v. Perry*, 7 Ves. (Eng.) 522; *Pruen v. Osborne*, 11 Sim. (Eng.) 132; *Hawk. Wills*, *88. See also *Ridgway v. Munketrick*, 1 Dru. & War. (Eng.) 84; *Crozier v. Crozier*, 3 Dru. & War. (Eng.) 386; *Edwards v. Edwards*, 12 Beav. (Eng.) 97; *Smith v. Horsfall*, 25 Beav. (Eng.) 628; *Maynard v. Wright*, 26 Beav. (Eng.) 285; *Rhodes v. Rhodes*, 27 Beav. (Eng.) 413; *Taylor v. Taylor*, 63 Pa. St. 481; *King v. Savage*, 121 Mass. 303; *Palmer v. Horn*, 84 N. Y. 516; *Murray v. Bronson*, 1 Dem. (N. Y.) 217; *Barstow v. Goodwin*, 2 Bradf. (N. Y.) 416; *King v. Savage*, 122 Mass. 303.

In *Sibley v. Perry*, 7 Ves. (Eng.) 522, on which the principle is founded, a testator having bequeathed a sum of stock to A and B, with a direction that if either died before him, her lawful issue were to take the share to which their *parents* would have been entitled, and another sum of stock "to C and his lawful issue, if he, the *parent*, shall then be dead," bequeathed £140 stock to each of the lawful issue of D, E and F, who should be alive at the time of his death. D, E and F were dead at the time the will was made. Each of their descendants living at the testator's death claimed the sum of £140. LORD ELDON held that the occurrence of the word "parent" in the former bequests showed that the issue there spoken of were children only, and the word being thus once used in a restricted sense, should receive the same interpretation in the subsequent bequests.

The rule is the same if the gift be to the children of A living at a given period, and the issue of such as shall be then dead such issue to take their *parent's* share, although the gift to issue is distinct from the direction as to taking the share of the parent. *Smith v. Horsfall*, 25 Beav. (Eng.) 628; *Maynard v. Wright*, 26 Beav. (Eng.) 285.

The rule applies to devises of real estate. *Bradshaw v. Melling*, 19 Beav. (Eng.) 417.

Also, where the direction is that the issue shall take their father's or moth-

er's share. *Buckle v. Fawcett*, 4 Hare (Eng.) 536. See *Taylor v. Taylor*, 63 Pa. St. 484.

Where the gift is "to the issue of A then living, and the child or children of such of them as shall then be dead," issue means children. *Fairchild v. Bushell*, 32 Beav. (Eng.) 158.

Where a gift is made to issue, and the testator proceeds to speak of "issue," of such former mentioned "issue," it is clear he did not in the first instance use the word issue in its most comprehensive sense; and if he has also called the first "parents" of the second, the sense to which the word is limited must be that of children. *Pope v. Pope*, 14 Beav. (Eng.) 593; *Williams v. Teale*, 6 Hare (Eng.) 239.

Nor does it seem to be absolutely essential to such construction that the testator should have referred to the first mentioned "issue" as parents of the second. See MAULE, J., in *Doe v. Rucastle*, 8 C. B. (Eng.) 880.

Exception—Ross v. Ross.—A gift over in case the original legatees die without leaving any issue affords strong grounds for retaining the primary and more extended meaning of the word *issue* in the preceding gift; since by construing it as children in both clauses, it is clear that though the gift would take effect, yet it would do so at the expense of the remoter issue, who would take nothing; or by giving the word "issue," in the gift over only, its natural acceptance; the gift over is prevented taking effect, and intestacy is the consequence. This construction is also aided by a distinct gift to the issue followed by a direction that the issue shall take only a parent's share, as distinguished from a case like *Sibley v. Perry*, where the only gift to the issue is contained in the direction that they shall take the shares which their respective parents would have taken if living. In *Ross v. Ross*, 20 Beav. (Eng.) 645, testator bequeathed personality upon trust for his niece, C R for life, with remainder to the children of C R, who should be living at her decease equally, and the "issue, if any, then living of such of her children as may have died in her lifetime, each of

III. WHETHER ISSUE IS A WORD OF PURCHASE OR LIMITATION—

1. In Deeds and Marriage Articles.—In a deed, the word issue is always a word of purchase.¹

her surviving children to take an equal share, and the *issue*, if more than one, of such of her children as may have died in her lifetime to take equally amongst them the part or share which their *parent* would have been entitled to if he or she had survived the said C R, and *if but one*, then to take a *child's* share." There was a gift over to residue on death of all testator's nieces, without leaving a *child* or *issue*. One of C R's children predeceased her, leaving no children, but only a grandchild, who survived C R. *Held*, that such grandchild took a child's share with C R's children. Assuming that upon the death of C R there was only a great-grandchild of C R alive, that great-grandchild, according to the construction contended for, could not take. "But then one of two things would follow, you must either cut down the meaning of the words of the gift over which I have just read, and then say that notwithstanding there was issue living of one of the nieces at the death of the survivor, or possibly a great many, thirteen or fourteen grandchildren, nevertheless, they should take nothing, and it should fall into the residue; or, if you give those words their natural acceptation, and say that that gift over does not take effect, you thus produce an intestacy, though there were a great number of grandchildren, who according to the construction of the word issue, of a child in the gift over, were objects of the testator's bounty. Now I find it extremely difficult to come to the conclusion that the testator could possibly, by the frame and scope of the will, have meant that. The whole thing is set right if you refer (which I admit is doing some violence to the language) in this part of the first gift to the issue, if more than one of them, such children to take equally amongst themselves that part or share which their parent would have been entitled to; if you refer the word parent there to such one of the children of the children of C R, that is, to the grandchildren of C R, who, if that parent had lived, would have taken the share which the child of C R, if that child had lived, would have taken; that is to say, it carries on the distribution

per stirpes, not merely through the first degree but extending it even to the second. That makes intelligible the subsequent expression, 'that if there be but one of such issue, then that one is to take a child's share, but not a parent's share.' Therefore . . . I am of opinion that the word *issue* in this case is confined to the *children* of the parent, but that the word *parent* here does not mean the children of C R, but may mean a grandchild of C R. This makes the expression "issue," in the first part of the will, consistent with the use of it in the gift over, and is the only way in which the various parts of the will can be made quite consistent." ROMILLY, M. R., pp. 652, 653.

See also *Pope v. Pope*, 14 Beav. (Eng.) 591, 594; *Anson v. Harris*, 19 Beav. (Eng.) 210; *Robinson v. Sykes*, 23 Beav. (Eng.) 40; *Rhodes v. Rhodes*, 27 Beav. (Eng.) 413; *King v. Savage*, 122 Mass. 303.

Deeds.—The doctrine of *Sibley v. Perry*, 7 Ves. (Eng.) 522, applies to deeds as well as wills.

Harrington v. Lawrence, cited, 11 Sim. (Eng.) 138; *Tatham v. Vernon*, 29 Beav. (Eng.) 604; *Barracough v. Shillito*, 53 L. J. Ch. (Eng.) 841; s. c., 32 W. R. (Eng.) 875. See also *Anderson v. St. Vincent*, 4 W. R. (Eng.) 304; 2 Jur., N. S. (Eng.) 607.

1. *Elphinstone on Deeds*, 318; Co. Litt. 20 b; *LORD HARWICKE*, in *Bagshaw v. Spencer*, 2 Atk. (Eng.) 582; *KENYON*, C. J., in *Doe v. Collis*, 4 T. R. 299; *Lewis v. Bowers' Case*, 11 Rep. 79 b; s. c., Tud. L. C., Real Prop. 37; *SUGDEN*, C., in *Rochefort v. Fitzmaurice*, 2 Dru. & War. (Eng.) 17; *Williams v. Jekyl*, 2 Ves. Sr. (Eng.) 681.

"In a deed no word, except the word 'heirs,' will pass an estate of inheritance, and hence the word issue cannot be a word of limitation. It is therefore a word of purchase in this case, because that is the only construction by which it can become operative, not because it is aptly a word of purchase." 2 *Fearne*, Cont. Rem. 249, § 509.

A limitation of real estate to issue gives life estates only. *Rochefort v. Fitzmaurice*, 2 Dru. & War. (Eng.) 17; *Barron v. Barron*, 8 Ir. Ch. R. 366;

2. In Wills—*a*. GENERAL PRINCIPLE—ISSUE COMPARED WITH HEIRS OF THE BODY.—Issue is *prima facie* a word of limitation, and means heirs of the body,¹ but may be construed a word of purchase if such is the intention of the testator to be collected from the will, and to show such intention requires a less demonstrative context than in the case of the more technical expression, heirs of the body.²

Fitzherbert v. Heathcote, cited in *Bayley v. Morris*, 4 Ves. (Eng.) 794.

It follows that a limitation to "A and his issue," there being no issue alive at the date of the deed, gives a life estate to A, and the issue take nothing, even if the limitation is in remainder, and issue are born before it takes effect. *Makepiece v. Fletcher*, 2 Com. Rep. (Eng.) 457; *Wheeler v. Duke*, 1 Cr. & Mee. (Eng.) 210; *Dawson v. Dawson*, 13 Ir. L. R. 472. See also *Rocheport v. Fitzmaurice*, 2 Dru. & War. (Eng.) 17; *Barron v. Barron*, 8 Ir. Ch. R. 366; *Fitzherbert v. Heathcote*, cited in *Bayley v. Morris*, 4 Ves. (Eng.) 794.

If there are issue at the date of the deed, such issue take *per capita* and jointly. *Leigh v. Norbury*, 13 Ves. (Eng.) 344; in *Davenport v. Hanbury*, 3 Ves. (Eng.) 257.

Executory Trusts—Marriage Articles.—Marriage articles are to be treated only as a memorandum of intentions which are to be carried out in such way as to effect the intention of the parties. But the court always carries out the executed settlement as it finds it. *PEARSON, J.*, in *re Warren's Trusts*, 26 Ch. D. (Eng.) 217. Compare *Re Dixon's Trusts*, 1r. Rep., 4 Eq. 12.

There is no difference between the construction to be put on an executory trust created by marriage articles and on an executory trust created by will except so far as the former, by its very nature, furnishes more emphatically the means of ascertaining the intention of those who created the trust. *Sackville West v. Holmesdale*, 4 L. R., H. L. Cas. (Eng.) 543; 39 L. J. Ch. (Eng.) 505.

In the case of an executory trust by marriage articles, in favor of a person *in esse*, and his issue, his children will take as purchasers, even in the absence of any indication that they should take by purchase; because they are considered as purchasers for valuable consideration; and in the case of an executory trust, the intent that the issue should take by purchase can be effectuated

without sacrificing the primary intent of admitting all the issue; for the conveyance to be made in pursuance of the trust can be so framed that all the descendants shall take, before the estate can revert, or go over. So that where it is agreed to limit lands in remainder to or for the issue of the tenant for life, a strict settlement will be directed to be made upon the first and other sons in tail, remainder to the daughters. *Smith Ex. Int.*, § 262.

Where the limitation to the ancestor, viewed by itself, would create a mere equitable estate, and the limitation to the issue a legal estate, or *vice versa*, the issue will take by purchase, in the same manner as the heirs of the body under similar circumstances. And if the issue cannot take by purchase, on account of the rule against perpetuities, the word issue will be construed a word of limitation, in cases where but for that rule it would be construed a word of purchase. *Smith Ex. Int.*, § 262. As to executory trusts by will, see § III, 2 b, *n*.

¹ *Roe d. Dodson v. Grew*, *Wilmot* (Eng.) 272; *Roddy v. Fitzgerald*, 6 H. L. Cas. (Eng.) 823; *Woodhouse v. Herrick*, 1 K. & J. (Eng.) 352; *Slater v. Dangerfield*, 15 M. & W. (Eng.) 263; *Bradley v. Cartwright*, L. R., 2 C. P. (Eng.) 511; *Guthrie's App.*, 37 Pa. St. 9; *Angle v. Brosius*, 43 Pa. St. 189; *Ogden's App.*, 70 Pa. St. 501; *Wistar v. Scott*, 105 Pa. St. 200, 214; *Reinvehl v. Shirk*, 119 Pa. St. 108; *King v. Savage*, 121 Mass. 303; *O'Byrne v. Feeley*, 61 Ga. 77; *Allen v. Craft* (Ind.), 7 West Rep. 512, 517. In the absence of explanations, words showing that the term *issue* was used in a restrictive sense it is to be construed a word of limitation. *Robins v. Quinliven*, 79 Pa. St. 335; *Carroll v. Burns*, 108 Pa. St. 386; 55 Am. Rep. 778; *Allen v. Craft* (Ind.), 7 West Rep. 512, 517.

² *Lees v. Mosley*, 1 Yo. & Coll. (Eng.) 606. See also LORD KENYON, in *Doe v. Collis*, 4 T. R. (Eng.) 294; SIR EDWARD SUGDEN, in *Ryan v.*

Cowley, Ll. & G (Eng.) 7; Hawkins on Wills, 192; Bradley v. Cartwright, L. R., 2 C. P. (Eng.) 511; *Re Wynch's Trusts*, 5 De G. M. & G. (Eng.) 188; s. c., 27 Eng. C. L. & Eq. Cas. 375; Smith Ex. Int., § 528; Wood, V. C., in *Kavanagh v. Morland*, Kay (Eng.) 24; 1 K. & J (Eng.) 362.

"Upon a careful examination of the authorities, we think that it may be safely laid down as a rule that in a devise, technical words or words of definite meaning shall always be construed according to their legal or definite effect, unless from other inconsistent words in the will it be quite clear that they are used in some other definite sense. Thus, if the words 'heirs of the body,' which are technical words, properly admitting only of one meaning, are used, it becomes necessary to show affirmatively that the testator meant clearly to use them as words of purchase, or more correctly, as words descriptive, not of all the descendants of the body, but of one definite class only of such descendants; it is not enough to raise a reasonable doubt whether he intended to use them as words of limitation, or to show a probable conjecture that he intended to designate children only by that phrase. Another instance of the application of the rule may be found in that class of cases in which 'sons' or 'children,' which in their proper sense are words of purchase, have been *held* to be words of limitation. There in like manner it must be demonstrated from the will, affirmatively and clearly, that by these expressions the testator meant all the descendants of the body to take as heirs.

"There is, however, a third class of cases, where a testator uses in his will an expression, in its ordinary use not of a technical nature and capable of more meanings than one. Now here the investigation takes a different course. It will be merely directed to the solution of the question in what sense the testator intends to use the expression, and to ascertain whether the evidence preponderates in favor of the one rather than the other meanings of the word in question, regard being always had to the *prima facie* sense, or to that in which the word is most ordinarily used, in weighing the evidence contained in the will upon which the court is ultimately to decide. The first point, therefore, to be considered is whether 'issue' be a word of this nature. Now we think that this sufficiently appears by

referring to the various authorities. The first is the statute *De Donis*, 13 Ed. I, ch. 1, in which this word is used, and in which it sometimes means children and sometimes all the descendants, according to the context in which it is found. Thus, after stating the cases of estates upon condition, etc., it proceeds thus: 'In all the cases aforesaid after issue begotten and born (*post prolem suscitata et exeuntem*) between them to whom the lands were given under such condition heretofore, such feoffees had power to alien.' There it is plain issue means child, for the power exists as soon as the child is born.

"Again, the statute speaks of land reverting to the donor: 'If issue fail, in that there is no issue at all; or if any issue be and fail by death, or heir of the body of such issue failing.' In this sentence the word is used in two senses; first, as intending all descendants; and secondly, as including the children only; and here, too, the Latin word used in the original is not '*proles*,' as before, but '*exitus*' throughout the sentence. This appears a decisive authority for its double meaning, and the books abound with others to the same effect. In all of them it is treated as a word capable of being used in different senses, either as including all descendants, in which case it is of course a word of limitation, or as confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense, and it therefore most frequently has the effect of giving an estate tail to the ancestor. It might even, perhaps, be conceded that this is *prima facie* its meaning. But the authorities clearly show that whatever be the *prima facie* meaning of the word 'issue,' it will yield to the intention of the testator to be collected from the will; and that it requires a less demonstrative context to show such intention than the technical expression 'heirs of the body' would do." ALDERSON, B., in *Lees v. Mosley*, 1 Yo. & Coll. (Eng.) 606. See also *Slater v. Dangerfield*, 15 M. & W. (Eng.) 263.

In *Roe v. Grew*, 2 Wils. (Eng.) 322, it was said that *issue* is a word of purchase or limitation, as will best effectuate the intention of the testator, and in *Ginger v. White*, WILLES, C. J., says: "It does not, *ex vi termini*, create an estate tail in a will as heirs of the body do in a deed, but only where it appears that the intent of the testator was that

b. LIMITATION TO A AND HIS ISSUE; WHEN NO GIFT OVER.—A limitation to A and his issue, there being no issue *in esse* at the time the limitation takes effect, in the absence of expressions indicating an unequivocal contrary intent, gives A an estate tail in realty,¹

the word should have that construction, or at least where it does not appear that the intent of the testator was otherwise." In *Mandeville v. Carrick*, 3 Ridg. P. C. (Eng.) 352, it was said that as *issue* cannot be used as a word of limitation in a deed, it is therefore even in a will technically a word of purchase. On the other hand, LORD THURLOW speaks of a devise to A and his issue as "the aptest way of describing an estate tail according to the statute." *Hockley v. Mawbey*, 1 Ves. Jr. (Eng.) 149. In other cases the word is said to be ambiguous. *Earl of Oxford v. Churchill*, 3 Ves. & Bea. (Eng.) 67; *Lyon v. Mitchell*, 1 Madd. (Eng.) 473; *Tate v. Clarke*, 1 Beav. (Eng.) 105; *Doe d. Gallini v. Gallini*, 3 Ad. & El. (Eng.) 340.

It is submitted that the only way in which these conflicting positions can be reconciled is by adopting the principle stated in the text and explained by ALDERSON, B., in *Lees v. Mosley*. The case of *Doe d. Cole v. Goldsmith*, 7 Taunt. (Eng.) 209; 2 Marsh. (Eng.) 517, can only be distinguished from *Hockley v. Mawbey* by the substitution of *issue* for *heirs of the body*. Compare the limitations in *Doe d. Davy v. Burnisall*, 6 T. R. (Eng.) 30; *Lees v. Mosley*, 1 Yo. & Coll. (Eng.) 589; *Merest v. James*, 1 Brod. & Bing. (Eng.) 484, with those in *Doe d. Strong v. Goff*, 11 East (Eng.) 668, so severely criticized by both LORD ELDON and LORD REDESDALE in *Jesson v. Wright*, 2 Bligh (Eng.) 1.

In the United States the position in the text is sustained by STRONG, J., in *Angle v. Brosius*, 43 Pa. St. 187; *Taylor v. Taylor*, 63 Pa. St. 481; *Kleppner v. Laverty*, 70 Pa. St. 70; *Wistar v. Scott*, 105 Pa. St. 200, 214; *Reinvehl v. Shirk*, 119 Pa. St. 108; *Chelton v. Henderson*, 9 Gill (Md.) 436; *McPherson v. Snowden*, 19 Md. 197, 228; *Estate of McDonnell*, Myr. Prob. (Cal.) 94; *O'Byrne v. Feeley*, 61 Ga. 77; *King v. Savage*, 121 Mass. 303.

In *Kingsland v. Rapelye*, 3 Edw. (N. Y.) Ch. 1, it was said that the words "lawful issue" have as extensive an import as "heirs of the body," and when used in a device, by which the imme-

diate devisee takes an unrestricted freehold, without any words to modify or restrict its meaning and application, it is a word of limitation and of the same effect with *heirs of the body*. This decision rests upon English authorities decided before *Lees v. Mosley*, 1 Yo. & Coll. (Eng.) and so far as inconsistent with the views expressed by BARON ALDERSON cannot be considered of value outside of New York. Moreover, the above expression is not really inconsistent with *Lees v. Mosley*, and only amounts to a statement of the *prima facie* meaning of the word.

When the word issue is manifestly used as descriptive of devisees, and is also restricted to such issue as shall be living at a specified time, it is always construed as a word of purchase embracing all lineal descendants of the person named, in being at the time specified, unless it clearly appears from the context that the testator intended otherwise. *STERRETT, J.*, in *Wistar v. Scott*, 105 Pa. St. 200, 215; *citing Hayton v. Wilshire*, 3 T. R. (Eng.) 372; *Hockley v. Mawbey*, 1 Ves. Jr. (Eng.) 150; *Freeman v. Parsley*, 3 Ves. (Eng.) 421; *Leigh v. Norbury*, 13 Ves. (Eng.) 340; *Wythe v. Thurlston*, Amb. (Eng.) 555; *Davenport v. Hanbury*, 3 Ves. (Eng.) 257; *Hawkins's Wills*, 187, 188; *Cook v. Cook*, 2 Vern. (Eng.) 545; *Bradshaw v. Melling*, 19 Beav. (Eng.) 417; *Ross v. Ross*, 20 Beav. (Eng.) 645.

1. *Wild's Case*, 6 Co. (Eng.) 16 b, 17 a; *Prior on Issue*, § 43; *Smith Ex. Int.*, §§ 503, 506; *Lyons v. Mitchell*, 1 Madd. (Eng.) 473; *Tate v. Clark*, 1 Beav. (Eng.) 100; LORD HALE, in *King v. Melling*, 1 Vent. (Eng.) 220; *Cook v. Cook*, 2 Vern. (Eng.) 545; *Broadhurst v. Morris*, 2 B. & Ad. (Eng.) 1. See *Davie v. Stevens*, 1 Doug. (Eng.) 321; *Searle v. Barter*, 2 Bos. & Pul. (Eng.) 485. The effect is the same where the limitation is to A and *his children*, there being no children *in esse* at the time the will takes effect. *Byng v. Byng*, 10 H. L. C. (Eng.) 178; *Wild's Case*, 6 Co. (Eng.) 16 b, 17 a; *Clifford v. Koe*, 5 App. Cas. (Eng.) 447; *Shearman v. Angel*, 1 Bailey Eq. (S. Car.) 351.

As to the application of the princi-

and an absolute interest in personality;¹ but if there are

ple see *Re Buckmaster's Estate*, 47 L. T. (Eng.) 514.

The rule which construes "issue" as a word of limitation in devises and executed trusts does not apply so strictly to a direction to settle lands by way of executory trusts. *Meure v. Meure*, 2 Atk. (Eng.) 265; *Lord Glenorchy v. Bosville, Cos. & Talb.* (Eng.) 3; *Parker v. Bolton*, 5 L. J., Ch., N. S. (Eng.) 98; *Hadwen v. Hadwen*, 23 B. 551. See observations of PEARSON, J., in *Re Warren's Trusts*, 26 Ch. D. (Eng.) 217. Compare CHRISTIAN, L. J., in *Re Dixon's Trusts*, Ir. Rep., 4 Eq. 12; *Smith Ex. Int.*, § 506.

The principle in the text is founded upon *Wild's Case*, 6 Co. (Eng.) 16 b, 17 a, and has been recognized in *Chrystie v. Phyfe*, 19 N. Y. 344, 354; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503; *Guthrie's App.*, 37 Pa. St. 9; 21; *Haldeman v. Haldeman*, 40 Pa. St. 29; *Angle v. Brosius*, 43 Pa. St. 187; *Wheatland v. Dodge*, 10 Met. (Mass.) 502; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Biggs v. McCarty*, 86 Ind. 352, 357; *Miller v. Hurt*, 12 Ga. 359; *Jackson v. Coggin*, 29 Ga. 403; *Hoyle v. Jones*, 35 Ga. 40; *Moon v. Stone*, 19 Gratt. (Va.) 130; *McCroan v. Pope*, 17 Ala. 612; *Mimmo v. Stewart*, 21 Ala. 682; *Van Zant v. Morris*, 25 Ala. 285; *Shearman v. Angel*, 1 Bailey Eq. (S. Car.) 351; *Parkman v. Bowdoin*, 1 Sumn. (U. S.) 359. Compare *Hilleary v. Hilleary*, 26 Md. 275; *Jones v. Jones*, 2 Beas. (N. J.) 236; *Gilpin v. Williams*, 25 Ohio St. 283.

In *Carr v. Estill*, 16 B. Mon. (Ky.) 309, the supreme court of Kentucky declined to follow *Wild's case*, and held that a devise to a woman and "her children," she being unmarried and having no children at the time, conferred an estate for life, with remainder to after-born children. See *Stonebraker v. Zollickoffer*, 52 Md. 155, 159. But compare *Benson v. Wright*, 4 Md. Ch. 278; *Shotts v. Poe*, 47 Md. 513.

Quere, whether the decision could have been the same if the limitation had been to A and her issue. *Wild's case* has never been followed in *Tennessee*. *Turner v. Ivie*, 5 Heisk. (Tenn.) 222.

Care must be taken to distinguish a limitation to A and his children from a limitation to the children after the decease of the parent. *Chrystie v. Phyfe*, 19 N. Y. 344, 354; *Akers Exrs. v.*

Akers, 8 C. E. Green (N. J.) 26; *Beacroft v. Strawn*, 67 Ill. 28, 33.

For further discussion see WILLS.

Child en Ventre sa Mere.—The fact that there is, at the time of the devise, a child of the devisee *en ventre sa mere*, does not take the case out of the rule. *Roper v. Roper*, L. R., 3 C. P. (Eng.) 32, 35. But see *Cleveland v. Spilman*, 25 Ind. 95.

1. Prior on Issue, § 43; Wms. Exrs. —, *1110; *Houston v. Ives*, 2 Eden (Eng.) 216; *Gawler v. Cadby*, Jal. (Eng.) 346; *Chandler v. Price*, 3 Ves (Eng.) 99; *Dorm v. Penny*, 19 Ves. Jr. (Eng.) 547; *Crawford v. Trotter*, 4 Madd. (Eng.) 361; *Parkin v. Knight*, 15 Sim. (Eng.) 83; *Martin v. Swannell*, 2 Beav. (Eng.) 249; *Beaver v. Nowell*, 25 Beav. (Eng.) 587; *Stokes v. Heron*, 12 Cl. & F. (Eng.) 161. See also *Lyon v. Mitchell*, 1 Madd. (Eng.) 467; *Gibbs v. Tait*, 8 Sim. (Eng.) 132; *Turner v. Capel*, 9 Sim. (Eng.) 158; *Butler v. Ommamney*, 4 Russ. (Eng.) 70; *Pearson v. Stephen*, 2 Dav. & Cl. (Eng.) 328; s. c., 5 Bligh 203; *Tate v. Clarke*, 1 Beav. (Eng.) 100; *Dick v. Lacey*, 8 Beav. (Eng.) 214; *Hedges v. Harpur*, 9 Beav. (Eng.) 479; s. c., 3 De G. & J. (Eng.) 129; *Prentice v. Brooke*, 5 L. R. Ir. 435, 453; *In re Stanhope's Trusts*, 27 Beav. (Eng.) 200; *Merryman v. Merryman*, 5 Munf. (Va.) 440.

So in *South Carolina*, if there is no bequest over. *Henry v. Archer*, *Bailey's Eq.* (S. Car.) 535, 545. See *Ferril v. Talbot*, *Riley* (S. Car.) 247.

So where the bequest was to A and his children. *Payne v. Hanklin*, 5 Sim. (Eng.) 458; *Read v. Willis*, 1 Coll. (Eng.) 86; *Scott v. Scott*, 15 Sim. (Eng.) 47; *Snowball v. Proctor*, 2 Yo. & Coll. (Eng.) 478; s. c., 7 Jur. (Eng.) 619; *Dougherty v. Dougherty*, 2 Strobh. (S. Car.) Eq. 63; *Shearman v. Angel*, 1 Bailey Eq. (S. Car.) 351; *Van Zant v. Morris*, 25 Ala. 285.

In some cases it has been laid down that under a bequest to A and his children, A takes for life only with remainder to his children, if any should be subsequently born. *Audsley v. Horn*, 26 Beav. (Eng.) 195; s. c., 1 De G. F. & J. (Eng.) 226. See also *Paine v. Wagner*, 12 Sim. (Eng.) 188; s. c., 2 Dr. & W. (Eng.) 107; *Bain v. Lescher*, 11 Sim. (Eng.) 397; *Armstrong v. Armstrong*, L. R., 7 Eq. Cas. 1018; *In re Owen's Trusts*, L. R., 12

issue *in esse*, they take concurrently with A as purchasers.¹

Eq. Cas. 316. MR. HAWKINS considers this untenable in the present condition of the law. Hawkins on Wills, app. II, p. *316. See *Re Parkinson's Trusts*, 1 Sim., N. S. (Eng.) 245. As to recognition of rule in Wild's Case in United States, see *ante*.

The position in the text is not affected by *Ex parte Wynch*, 5 De G. M. & G. (Eng.) 188, approving *Knights v. Ellis*, 2 Bro. C. C. (Eng.) 570, unless there is something to show that the word *issue* was intended as a word of purchase, or to confine the first taker to an estate for life. See § III, 2 c, (2). Still less can it be considered inconsistent with *Audsley v. Horn*, 1 De G. F. & J. 226, since in that case the bequest was to A and her *children*. Now as *children* is *prima facie* a word of purchase, while *issue* is a word of limitation, it is manifest that circumstances under which the former will be held a word of purchase cannot affect the construction of the latter. On the other hand it would seem to be equally clear that whenever the word *children* is construed a word of limitation, *a fortiori* would the word *issue* be so construed? See observations of ALDERSON, B., in *Lees v. Mosley*, § III, 2 a, note.

On the other hand, in Hawkins on Wills, *197, it is said: "The rule that *issue* is *prima facie* a word of limitation does not extend to bequests of personal estate. . . . On this point *Ex parte Wynch* establishes a distinction with respect to *issue* similar to that in *Forth v. Chapman*, 1 P. Wms. (Eng.) 663, with respect to 'die without leaving issue.' . . . And although it was formerly held that a bequest of personal estate to A and his issue was an absolute gift to A (*Parkin v. Knight*, 15 Sim. 83), it would appear that this construction would not now be adopted, even though, as was the case in *Parkin v. Knight* (but also in *Forth v. Chapman*), real and personal estate be given together by the same words. A gift of real estate to A and his issue of course confers an estate tail, but a bequest of personal estate to A and his issue would seem to be governed by the same rules (so far as the gift to the issue is concerned), as a bequest to the issue of A *simpliciter*. Thus, if the gift be immediate, A and his issue (if any), living at the testator's death, would take in joint tenancy, and if the gift

be deferred, issue subsequently born before the period of distribution would be admitted along with them, and if no issue had come into existence before the period of distribution, A would take the whole." No authority is cited in support of these views; they have, however, been approved in general terms in Myer's Appeal, 49 Pa. St. 111.

In this case, however, as in *Ex parte Wynch*, the preceding bequest was to A for life, and hence necessarily governed by different principles. § III, 2 c, (2).

MR. HAWKINS substantially agrees with the text when he says: "If no issue had come into existence before the period of distribution, A would take the whole." He differs, however, from the text, in inferring from *Ex parte Wynch* that the rule that *issue* is *prima facie* a word of limitation does not extend to bequests of personal estate. All that that case decided was that a gift expressly for life to the first taker rebutted the *prima facie* presumption. In the absence of such controlling expression it was expressly admitted that the *prima facie* meaning prevailed. See § III, 2 c, (2), note; Myer's Appeal, 49 Pa. St. 111, cannot be construed as going further. Compare *Smith's Appeal*, 23 Pa. St. 9; *Pott's Appeal*, 30 Pa. St. 168. See also LORD CHELMSFORD, in *Williams v. Lewis*, 6 H. L. C. (Eng.) *1013, *1020, *1021; *Prentice v. Brooke*, 5 L. R. Ir. 435, 453.

1. Wild's Case, 6 Co. (Eng.), 16 b, 17 a; *Clay v. Pennington*, 7 Sim. (Eng.) 370. See *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Biggs v. McCarty*, 86 Ind. 352, 357; *Jackson v. Coggin*, 29 Ga. 403; *Hoyle v. Jones*, 35 Ga. 40; *Mimmo v. Stewart*, 21 Ala. 682; *Van Zant v. Morris*, 25 Ala. 285; Hawkins on Wills, 197; *Hathaway v. Leary*, 2 Jones (N. Car.) Eq. 264; *Shearman v. Angel*, 1 Bailey Ch. (S. Car.) 361; *Johnson v. Johnson*, 1 McMull. (S. Car.) 345; *Cleveland v. Spilman*, 25 Ind. 95.

"If A devises his lands to B and to his children or issues, and he hath not any issue at the time of the devise. . . the same is an estate tail; for the intent of the deviser is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum*

natura, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation, *scil.* as much as children or issues of his body But if a man devises land to A and to his children or issue, and they then have issue of their bodies, there this express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case they shall have but a joint estate for life." *Wild's Case*, 6 Co. (Eng.) 16 b, 17 a.

That a gift to A and his issue or to A and his children confers a joint interest has never been doubted where the word used is "children." *Alcock v. Allen*, 2 Freem. (Eng.) 185; *Buffar v. Bradford*, 2 Atk. (Eng.) 220. See *Hathaway v. Leary*, 2 Jones Eq. (N. Car.) 264; *Shearman v. Angel*, 1 Bailey's Ch. (S. Car.) 362; *Johnson v. Johnson*, 1 McMull. (S. Car.) 345.

So as to personality, 2 Wms. Exrs. *1094; *De Witte v. De Witte*, 11 Sim. (Eng.) 41; *Paine v. Wagner*, 12 Sim. (Eng.) 184; *Beales v. Crisford*, 13 Sim. (Eng.) 592; *LORD CHELTENHAM in Crockett v. Crockett*, 2 Phill. C. C. (Eng.) 555; *Gordon v. Whieldon*, 11 Beav. (Eng.) 170; *Atcheson v. Atcheson*, 11 Beav. (Eng.) 485; *Mason v. Clarke*, 17 Beav. (Eng.) 130; see *Cunningham v. Murray*, 1 De G. & J. (Eng.) 366; *Combe v. Hughes*, L. R., 14 Eq. 415; *Newhill v. Newhill*, 12 Eq. Cas. 432; s. c., L. R., 7 Ch. App. 253; *Roper v. Roper*, L. R., 3 C. P. (Eng.) 35; *Annable v. Patch*, 3 Pick. (Mass.) 360; *Parker v. Converse*, 5 Gray (Mass.) 336, 339; *Biggs v. McCarty*, 86 Ind. 352, 357; *Jackson v. Coggin*, 29 Ga. 403; *Hoyle v. Jones*, 35 Ga. 40. But see *Audley v. Horn*, 1 De G. F. & J. 226. Otherwise of course where the word children has been explained by a preceding limitation to testator's "living heirs." *McKee's Appeal*, 104 Pa. St. 571.

Opinions have, however, been entertained that in a gift to A and his *issue*, the word *issue* is always a word of limitation; whether there be any issue or not, and that, therefore, under any circumstances, A takes an estate tail in realty and an absolute interest in personality. This is the effect of the judgment of *LORD HARDWICKE*, in *Lampley v. Blower*, 3 Atk. (Eng.) 397, and is sustained by *Jarman's Powell on De-*

vises, vol. 2, p. 508, and 2 *Jarman on Wills* (5th Am. ed.) *411. See also *Harvey v. Towell*, 7 Hare (Eng.) 231, 235. *LORD HARDWICKE* gets rid of the authority of *Wild's Case* by stating that when it was decided it had not been fully settled that "issue" was a word of limitation as strong as "heirs of the body," and it is on the same ground of an inflexible force in the word *issue* that *MR. JARMAN* founds his conclusion. That *issue* is not as fully a word of limitation as *heirs of the body* is evident from the judgment of *BARON ALDERSON*, in *Lees v. Mosley* (see III, 2 a, n), so that the foundation for the argument fails; but it is not a little singular that in *King v. Melling*, 1 Vent. (Eng.) 229, the only case cited by *LORD HARDWICKE* and *MR. JARMAN* to sustain their position, *LORD HALE*, apparently with a view to preventing the inference they draw from his decision expressly says: "If the devise were to B, and the issue of his body, *having no issue at the time*, it would be an estate tail; I agree, it would be otherwise if there were issue at the time." And that this is no mistake of the reporter appears by the same passage occurring in 3 Keb. (Eng.) 98. The judgment of *LORD WORTHINGTON*, in *Houston v. Ives*, 2 Eden (Eng.) 216, leads to the same result, for he comes to the conclusion that, in a joint gift to the ancestor and issue, "issue" was equivalent to "heirs of the body," expressly on the ground that there were no issue at the time. See *Clay v. Pennington*, 7 Sim. (Eng.) 370; *Prior on Issue*, §§ 45, 46.

In the case of personality since the decision in *Ex parte Wynch*, 5 De G. M. & G. 188, there would seem to be no room for doubt. *Hawkins on Wills*, *197, *ante*, note. Nevertheless it is said by *SERGEANT WILLIAMS* that "where personal estate is given in terms which, if applied to real estate, would create an estate tail, the property so bequeathed vests absolutely in the first taker, and consequently devolves at his death on his executors and administrators, whether he has issue or not." 2 Wms. Exrs. *1107, citing *Lyon v. Mitchell*, 1 Madd. (Eng.) 475; *Ward v. Bevil*, 1 Y. & Jerv. (Eng.) 525; *Byng v. Lord Strafford*, 5 Beav. (Eng.) 558; *Williams v. Lewis*, 6 H. L. Cas. *1013, *1020; *Bennett v. Bennett*, 2 Drew. & Sm. (Eng.) 226.

In none of these cases, with the exception of *Lyon v. Mitchell*, 1 Madd. 467, was the bequest to A and his issue

simpliciter. In that case the personal estate was directed to be divided equally amongst testator's four sons, share and share alike, as tenants in common, and to the issue of their several and respective bodies lawfully begotten, with a limitation over to survivors in case any of them died without issue living at time of his death. Testator died leaving four sons and two daughters. Whether or not he left any grandchildren, issue of the sons, does not appear (p. 468). There were none at time of making will (p. 473). *Held*, that the sons took absolute interests, but that on the death of any one of them without issue his share survived to his brothers. Much reliance was placed by PLUMER, V. C., upon the fact that the words of distribution were annexed to the bequest to the sons and not to that to the issue, "because if it had been intended that the issue were also to take with their parents the natural course would have been to give the property to J, E, B and G and their issue; to take as tenants in common, share and share alike, but by interposing the words share and share alike between the persons who are named and the issue it seems more natural the first persons named, namely, the four sons, are the persons who are to take share and share alike as tenants in common, and all that follows is only to express by words of limitation the *quantum* of interest they are to take." Much reliance was also placed upon the fact that the four sons, when the will was made, had no issue, and that therefore if the bequest to the issue of the sons was by words of purchase it was in favor of persons not existing. Subsequent cases hold this latter circumstance immaterial, provided there were issue *in esse* at the time the limitation to the ancestor takes effect (see *post*). Since, therefore, it does not distinctly appear that there were issue *in esse* at the time the will took effect, and the decision was expressly placed upon the ground that the words of distribution were annexed only to the gift to the ancestor, and that there were *no* issue *in esse* at the time of making the will, this case affords no support to the position that a bequest to A and his issue, *there being issue in esse at the time the gift takes effect* vest the absolute interest in A. All that can be inferred from it is that words of distribution annexed solely to the gift to the ancestor *prima facie* show that the word

issue is used as a word of limitation. In the absence of binding authority, it is submitted that the position taken in the text and sustained by Hawkins on Wills is more in accordance with the spirit of the decision in *Ex parte Wynch*, § III, c (2), and *Lees v. Mosley*, § III, 2 a, n. (3), than to vest the sole and absolute interest in the first taker. *Compare* 2 Wms. Exrs. *1110, n., *1114. See however *Prentice v. Brooke*, 5 L. R. Ir. 435, 453.

Cases like *Goodright v. Wright*, 1 P. W. (Eng.) 397, better reported 1 *Strange* (Eng.) 127, and *Ward v. Bevil*, 1 Y. & Jerv. (Eng.) 525, can generally be referred to the effect of a gift over upon indefinite failure of issue or explained upon the principle of substitution.

Thus where a testator bequeathed all his personal property not before disposed of by will to trustees in trust for his five sons "and their respective issue (if any), such issue to take *per stirpes* and not *per capita*, to be divided amongst them in equal shares and proportions, the shares of such of them as shall have attained the age of twenty-one to be paid them respectively forthwith after my decease, and the shares of such of them as shall be under the age of twenty-one years to be paid to them when and as they shall respectively attain such age," it was *held* by the house of lords, reversing the M. R., that the issue of the sons were intended to take no interest, but by way of substitution in the event of any one of the sons dying in the testator's lifetime, and hence the sons who survived that period took absolutely. *Pearson v. Stephens*, 2 Dow. & Cl. (Eng.) —; s. c., 5 Bligh, N. S. 203.

To this principle may be referred *Gibbs v. Tait*, 8 Sim. (Eng.) 132; *Donn v. Penney*, 19 Ves. Jr. 544; *Dick v. Lacey*, 8 Beav. (Eng.) 214; *Hedges v. Harpur*, 3 De G. & J. (Eng.) 129; 9 Beav. (Eng.) 479; *Butler v. O'maney*, 4 Russ. (Eng.) 70; *Prentice v. Brooke*, 5 L. R. Ir. 435. See *Re Stanhope's Trusts*, 27 Beav. (Eng.) 201; *Lampley v. Blower*, 3 Atk. (Eng.) 397.

To justify such a construction there must be something in the will to show that the issue were meant to take by substitution for their parents. As to what circumstances will be held sufficient for that purpose, each case must stand much upon its own footing. Prior on Issue, §§ 77, 78; *Re Stanhope's Trusts*, 27 Beav. (Eng.) 201, 204; *Bebb v.*

Beckwith, 2 Beav. (Eng.) 308; Slave v. Fooks, 9 Sim. (Eng.) 386; Prentice v. Brooke, 5 L. R. Ir. 435. For further discussion see LEGACIES and DEVISES.

In Audsley v. Yard, 1 De G. F. & J. 226, it was said that the proper construction of a bequest to A and her children was to A for life, with remainder to the children. But in that case there were no children *in esse* at time the bequest took effect. This case, of course, cannot be considered as deciding the nature of the corresponding limitation where the word *issue* is used. It does, however, afford ground for believing that slight circumstances will be considered sufficient to show that the testator intended the issue to take in remainder after the parent. Hawkins on Wills, *197; 2 Jarman on Wills (3rd Am. ed.), 240, n. (f).

Thus if there is a gift over in the event of A dying without issue living at his death, the issue will take as purchasers in remainder after the death of A. Henry v. Means, 2 Hill (S. Car.) 328; Cleveland v. Havens, 2 Beas. (N. J.) 101.

For analogous cases where the word *children* is used see Crawford v. Trotter, 4 Madd. (Eng.) 361; Morse v. Morse, 2 Sim. (Eng.) 485; Crocket v. Crocket, 2 Phill. C. C. (Eng.) 553; Vaughan v. Headfoot, 10 Sim. (Eng.) 639; De Witte v. De Witte, 11 Sim. (Eng.) 41; Dawson v. Bourne, 16 Beav. (Eng.) 29; Mason v. Clarke, 17 Beav. (Eng.) 126, 131; Cormack v. Copous, 17 Beav. (Eng.) 397; Sisson v. Seabrey, 1 Sumn. (C. C.) 242; Nebinger v. Upp, 13 S. & R. (Pa.) 68; Bridges v. Wilkins, 3 Jones Eq. (N. Car.) 342; Faribault v. Taylor, 5 Jones Eq. (N. Car.) 219; Goss v. Eberhart, 29 Ga. 546; Dunn v. Bank of Mobile, 2 Ala. 152; Furlow v. Merrill, 23 Ala. 705; Shearman v. Angel, 1 Bailey Eq. (S. Car.) 357.

A gift to the survivors of a class and the issue of such survivor, such issue to take their parents' share only, is a gift to the parents for life with remainder to their children, and not in substitution. Parsons v. Coke, 21 Drew. (Eng.) 296.

Time When Existence or Nonexistence of Issue Is Important.—Under the rule in Wild's Case, 6 Co. (Eng.) 16 b, 17 a, the existence or nonexistence of issue or children at the time the devise or bequest takes effect and not merely at the time it is made, is important as affecting the construction of the instrument. Such is not the literal language

of all the cases, but since the impossibility of giving the children or issue an estate jointly with their ancestor is the main reason for giving the ancestor an estate tail, and as this impossibility does not exist if there are children or issue living at the time of the testator's death, whatever might have been the case at the date of the will, the existence or nonexistence of issue at the death of the testator, if the gift be immediate, would seem to be the important point.

Thus in Buffar v. Bradford, 2 Atk. (Eng.) 220, a testator devised real and personal estate to A and the children of her body. A had no child at the time of making the will, but one was born in the testator's lifetime and A predeceased him. It was contended that A took an estate tail, and that therefore the devise lapsed, but LORD HARDWICKE held the child entitled. See Butler v. Ommaney, 4 Russ. (Eng.) 70; Donn v. Penny, 19 Ves. Jr. 544.

But in Goodright v. Wright, 1 Strange 25, 32, and Lyon v. Mitchell, 1 Madd. (Eng.) 467, the limitations were held to create estates tail expressly on the ground that the testator could not be "supposed to have had any particular affection for the issue, there being none *in esse* at the time of the devise."

If the gift be deferred, the ancestor will take jointly with children or issue living at the testator's death and with those subsequently born before the period of distribution. Hawkins on Wills, *197, *199; Cunningham v. Murray, 1 De G. & S. (Eng.) 366.

Devise to A and his issue living at his death creates an estate tail in A. University of Oxford v. Clifton, 1 Eden (Eng.) 473; Jenkins v. Hughes, 8 H. L. Cas. 571, 585.

In such case it is clear the issue cannot take as joint tenants with him, since the objects are not ascertainable until the death of the parent. It is only through him that they can become entitled, and the case falls, therefore, within the principle of the rule in Wild's case, namely, that the parent must take an estate tail in order to let in the other objects. Had the devise been to A for life with remainder to the issue living at his death, the case would have been different. All the objects might then have taken by purchase. 2 Jarman on Wills (5th Am. ed.), *413. See Lethrenhier v. Tracy, 3 Atk. (Eng.) 774, 784; s. c., Amb. (Eng.) 204, 220.

Words of Distribution and Limitation.—If there are issue *in esse* at the time the will takes effect, superadded words of limitation and distribution, annexed to the interest of both parents and issue, merely denote the quantity and quality of the estate devised.¹ Superadded words of distribution and limitation annexed to the interest of the issue alone, there being issue *in esse*, confer upon the ancestor an estate for life with remainder to the issue.² If there are no issue, neither words of distribution³ nor limita-

1. This is undoubtedly the case where the word used is *children*. Co. Litt. 9 a; Oates d. Hatterley v. Jackson, 2 Stra. (Eng.) 1172.

And if the position taken in Wild's Case, 6 Co. 16 b, 17 a, that issue in being at the time the devise takes effect take jointly with their parents, is correct, the decision in Oates d. Hatterley v. Jackson could have been the same had *issue* been the word used.

Effect of Superadded Words When No Issue in Esse.—The insertion of superadded words of tenancy in common or inheritance annexed to the interest of both parents and issue militates so strongly against the issue taking by descent from the ancestor, that it is apprehended they must at least render that construction untenable, even when there are no issue *in esse* at the time the will takes effect. Prior on Issue, § 58.

Superadded Words Annexed to Interest of Parent Alone.—Words importing tenancy in common annexed to the interest of the parent alone rebut the presumption that the issue take as purchasers. Lyon v. Mitchell, 1 Madd. (Eng.) 467, ante, § III, b, n. (3). See also Hawkins on Wills, *194; Smith Ex. Int., § 529; Prior on Issue, §§ 54, 57.

2. When the word used is *children*, they take as purchasers. When the gift is to issue, the limitation will be construed as if to A for life, and after his decease to his issue. See § III, 2. Whether the word employed is *issue* or *children*, the great difficulty is to determine whether the superadded words are annexed to the interest of the ancestor or the issue. Thus devise to A and to all and every the child and children, whether male or female, of her body lawfully issuing and unto his, her and their heirs and assigns forever as tenants in common. A died in lifetime of testator, leaving ten children, who survived her. Held, that A took an estate for life, with remainder to the children in fee. Jeffery v. Honeywood, 4 Madd. (Eng.) 398. But under

a devise to A and her children begotten by B her husband and their heirs forever, A and her children take a fee as joint tenants. Oates d. Hatterley v. Jackson, 2 Stra. (Eng.) 1172.

The only substantial difference between the cases seems to be the substitution of the words *his, her or their* in Jeffery v. Honeywood for the simple "their" of Oates v. Jackson, 2 Str. 1172, thereby showing the testator's idea that it was probable that only one, and that either male or female, might become entitled to his bounty, whereas, if he had intended the mother to take as tenant in common in fee with her children, in no case could his estate have gone to one male, for even if the mother had died in his lifetime, leaving one son, her share must, it is apprehended, have lapsed. In Oates v. Jackson, on the contrary, the testator intended more than one person to take in fee, and this raises an inference equally strong, that he meant to apply the word *heirs*, according to the natural purport of the sentence, to the mother as well as the children, especially as there was only one child at time of making his will. See also Gardner v. Pulteney, 2 Eden (Eng.) 323; Prior on Issue, § 54.

Superadded words of distribution alone, unless the fee or absolute interest were vested in the issue, would probably be insufficient. See Ogden's Appeal, 70 Pa. St. 501, 509; Roddy v. Fitzgerald, 6 H. L. Cas. (Eng.) 823.

As to superadded words of limitation alone, compare III, e.

3. Tate v. Clarke, 1 Beav. (Eng.) 100; Ogden's Appeal, 70 Pa. St. 501, 509. See LORD CRANWORTH'S comment upon Tate v. Clarke, in *Ex parte Wynch*, 5 De G. M. & G. (Eng.) 210.

"It is well settled that a devise to the lawful issue of the first taker is *prima facie* a limitation to the heirs of the body of the devisee, and therefore vests a fee tail; and this is the case even where the devise to the first taker is ex.

tion annexed to the interest of the issue will prevent an estate tail vesting in the ancestor,¹ but words of distribution and limitation together may have such effect.²

c. LIMITATION TO A FOR LIFE, AND AFTER HIS DECEASE TO HIS ISSUE; WHEN NO GIFT OVER—(1) *As to Realty*.—Under the rule in Shelly's case, a devise to A for life, and after his decease to his issue, vests in A an estate tail.³

pressly for life. It requires more than mere words of distribution to limit this *prima facie* effect of the phrase. The words "in equal shares," without something else to indicate the intention of the testator, will not reduce the inheritance to a mere life estate. Even the words 'as tenants in common' will not of themselves limit the entail." AGNEW, J., in Ogden's Appeal, 70 Pa. St. 509; Smith on Ex. Int., § 475.

1. Franklin v. Lacy, 6 Madd. (Eng.) 258; s. c., 2 Bligh (Eng.) 59, n. See Smith Ex. Int., § 516; LORD TALBOT, in Lord Glenorchy v. Bosville, Cas. Talb. (Eng.) 3.

Limitation to A and Particular Class of Issue.—In Franklin v. Lacy the limitation was to A, and the issue of his body lawfully to be begotten and to the heirs of such issue forever chargeable with a mortgage. Whether or not the result would have been the same if the limitation had been to a particular class of issue different from that which would have taken by descent may well be considered doubtful. In Lovelace v. Lovelace, Cro. Eliz. 40, a devise of gavelkind lands (Perot's Case, Moore (Eng.) 368, 371) to a man and his eldest issue male, was held to confer an estate for life only, though he had no child, and it was said that the construction would have been the same though he had a child. This decision was approved by LORD, C. J. EYRE, in Dobber d. Trollope v. Trollope, Ambler (Eng.) 453, 463, in a passage in which he distinguished it from a devise to a man and his eldest heir male. The authority of Lovelace v. Lovelace has been much impaired by Doe d. Garrod v. Garrod, 2 Barn. & Ad. (Eng.) *87; 22 E. C. L. 46.

The latter case may perhaps be distinguished from it by the fact that there was a gift over if the life tenant had no son. Compare § III, c. (1).

2. Doe d. Davy v. Burnalls, 6 Durn. & E. (Eng.) 30, 34; s. c., Burnalls v. Davy, Bos. & Pul. (Eng.) —; Doe d. Gilman v. Elvey, 4 East (Eng.) 313.

See Powell v. Board of Missions, 49 Pa. St. 46, 53. Under such a limitation the ancestor takes for life only, and the issue a remainder in fee, which will be vested or contingent according to the nature of the ulterior limitations.

Effect of Expressing an Implied Condition.—A limitation to A and his issue, *if he should leave any issue*, will not of itself create a contingent interest in favor of the issue by purchase, and prevent the ancestor from taking an estate tail, because the condition is necessarily implied.

Smith Ex. Int., § 518; Shaw v. Weigh, 2 Stra. (Eng.) 798; 2 Strange (Eng.) 798; s. c., 1 Eq. C. Abr. 184, pl. 28.

3. Jarman on Wills, *335; Shaw v. Weigh, 2 Stra. (Eng.) 798; Franks v. Price, 6 Scott 710; s. c., 5 Bing. N. C. 37; s. c., 3 Beav. 182; Roddy v. Fitzgerald, 6 H. L. C. (Eng.) 823. See LORD HALE, in King v. Mellings, 1 Vent. (Eng.) 229; ALDERSON, B., in Lees v. Mosley, 1 Yo. & Coll. (Eng.) 610; Goodright v. Wright, 1 Stra. (Eng.) 321. Roe v. Davis, 1 Yeates (Pa.) 332; Carroll v. Burns, 108 Pa. 386.

In Harrison v. Harrison, 7 M. & Gr. 938 (E. C. L. R., vol. 49) the testator devised his estates to his children as tenants in common, with remainder to their issue as tenants in common with no gift over; the words importing distribution among the issue being held to mean distribution *per stirpes* only. The children were held to take as tenants in common in tail. The case is thus an authority that under a devise to A for life, with remainder to his issue, if neither words of limitation nor distribution be annexed to the gift to the issue, A takes an estate tail, although there be no gift over on failure of his issue, and although the issue be capable of taking the fee as purchasers. Hawkins on Wills, *190. See Fearne 181, 182, 183, 184, 193; Kingsland v. Rapelye, 3 Edw. Ch. (N. Y.) 6; Paxson v. Leferts, 3 Rawle (Pa.) 59, 75; Rancel v. Creswell, 30 Pa. St. 158; Al-

Words of Distribution and Limitation.—Where there is a devise to one for life, with remainder to his issue *as tenants in common*, with a limitation to the *heirs general* of the issue, the issue take as purchasers in fee.¹ Words of distribution annexed to the gift to the issue, although unaccompanied by superadded words of limitation, produce the same effect if, by the terms of

len v. Markle, 36 Pa. St. 117; Angle v. Brosius, 43 Pa. St. 189; Robins v. Quinliven, 29 Smith (Pa.) 333; Buist v. Dawes, 4 Strobbh. Eq. (S. Car.) 37; Bramble v. Billups, 4 Leigh (Va.) 90.

In what States the rule is abolished, see ESTATES, 6 Am. & Eng. Ency. Law, 878; also rule in Shelly, LEGACIES AND DEVISES.

On the principle that under a gift to a class of persons after a life estate, no particular members of the class, whether born at the date of the will or living at the testator's death, are considered as favored objects of testator's bounty, to the exclusion of those who subsequently come into existence during the life estate, it would seem that the existence of issue at the time the will takes effect would not alter the construction. Prior on Issue, § 66.

There is a dictum to the contrary by BARON ALDERSON in Lees v. Mosley, 1 Yo. & Coll. (Eng.) 610, and also by LORD HALE in King v. Melling, 1 Vent. (Eng.) 229.

The fact that the first taker is given an equitable life estate with a legal remainder will not be enough to rebut the *prima facie* meaning of issue, and the estates will vest as soon as the trust is executed, or if it is held not to be enforceable. Kay v. Scates, 37 Pa. St. 31. See Ogden's Appeal, 2 P. F. S. (Pa.) 501; Dobson v. Ball, 10 P. F. S. (Pa.) 427; Yarnall's Appeal, 20 P. F. S. (Pa.) 335.

Effect of Power of Appointment.—The mere fact that the limitation to the issue is by power of appointment, as in a gift to A for life, with a power of appointment among any of the issue of his body, and in default of appointment, to such issue, with a gift over on death without having issue, does not prevent the operation of the rule. Kay v. Scates, 37 Pa. St. 31, 39.

But in this case an estate tail would have been implied from the gift over, even if there were no gift of a remainder directly to the issue of a class. "Among" was not regarded as a word of distribution. 39 Pa. St. 39 40.

Otherwise where the gift to the issue is "to be divided between and amongst them in such manner, shares and proportions as A should by will appoint." Crozier v. Crozier, 3 Dru. & War. (Eng.) 373, 383.

1. Per PARKE, J., in Slater v. Dangerfield, 15 M. & W. (Eng.) 273; Greenwood v. Rothwell, 5 Man. & G. (Eng.) (44 E. C. L. R.) 628; 6 Beav. (Eng.) 492; Lees v. Mosley, 1 Yo. & Coll. (Eng.) 589. See 2 Jarman on Wills (5th Am. ed.) 438, 439; Parker v. Clarke, 3 Sm. & G. (Eng.) 161. See Roddy v. Fitzgerald, 6 H. L. Cas. (Eng.) 83; Clifford v. Coe, L. R., 5 App. Cas. (Eng.) 447; Kavanagh v. Morland, Kay (Eng.) 16; Doe d. Gilman v. Elvey, 4 East (Eng.) 313; Golder v. Cropp, 5 Jur., N. S. (Eng.) 562; Parker v. Clarke, 6 De G. M. & G. (Eng.) 104; Bradley v. Cartwright, L. R., 2 C. P. 511; s. c., 15 W. R. (Eng.) 122; Smith Ex. Int., § 488; Fearne 154; Colclough v. Colclough, Ir. Rep., 4 Eq. 263; Abbott v. Jenkins, 10 S. & R. (Eng.) 296; Powell v. Board of Missions, 49 Pa. St. 46, 54; Robins v. Quinliven, 79 Pa. St. 333; Moore v. Parker, 12 Ired. L. (N. Car.) 123; *Contra*, Kingsland v. Rapelye, 3 Edw. Ch. (N. Y.) 1.

The result is the same whether the fee is given by the technical words "heirs and assigns," or by such words as "estate," "part," "share," etc., occurring in the description of the subject of the gift, or words imposing a pecuniary charge upon the issue, and whether the gift to the issue be direct or by implication, from a power to appoint them, and whether there is a gift over on general failure of the issue of the ancestor or not; and the same rule applies where the issue would take an estate tail. 2 Jarman on Wills (5th Am. ed.) *439; *citing* Greenwood v. Rothwell, 5 Man. & G. 628; Slater v. Dangerfield, 15 M. & W. 263; Golder v. Cropp, 5 Jur., N. S. 562; Crozier v. Crozier, 3 Dru. & War. (Eng.) 373; Bradley v. Cartwright, L. R., 2 C. P. 511; Montgomery v. Montgomery, 3 Jo. & Lat. 47; Lees v. Mosley, 1 Yo. &

the devise, the issue, taking by purchase, can take the fee.¹ Superadded words of limitation which do not enlarge the cause of descent, as a devise to A for life, with remainder to his issue, and the *heirs of their bodies*, or to his *issue male* and the *heirs male of their bodies*, annexed to the gift to the issue, unaccompanied by words of distribution, afford no ground for excluding

Col. (Eng.) 389; *Parker v. Clarke*, 6 D. M. & G. 104.

A devise was "unto my daughter for her natural life, and after her death to her issue and their heirs forever, in the proportions to which they would be entitled under the intestate laws of Pennsylvania, respectively, and free, clear and discharged from any estate claim or control of her present or any future husband." *Held*, that the daughter took an estate for life. *Robins v. Quinliven*, 79 Pa. St. 333.

In *Carroll v. Burns*, 108 Pa. St. 386, testatrix devised real estate "unto her three daughters, to have and to hold to them during their natural lives, and after their death then to the lawful issue of her said three daughters and the heirs and assigns of such issue. It was urged in argument that the case was indistinguishable from *Robins v. Quinliven*, since the words "in the proportion to which they would be entitled under the intestate laws of Pennsylvania," merely defined the term "heirs" in the intestate law of the State. *Held*, that words of distribution could be implied from the latter expression, and the daughters took an estate tail. *Compare Cockin's Appeal*, 111 Pa. St. 26.

1. *Montgomery v. Montgomery*, 3 Jo. & Lat. (Eng.) 47; *Crozier v. Crozier*, 3 Dru. & War. (Eng.) 373; *Hawkins on Wills*, *193; *Kavanagh v. Merland*, Kay (Eng.) 16; *Bradley v. Cartwright*, L. R., 2 C. P. (Eng.) 521. See 4 Kent *221, *229, *430; *Myers v. Anderson*, 1 Strobb. Eq. (S. Car.) 344; *Heather v. Winder*, 5 L. J. Ch. (Eng.) N. S. 41.

Devise to wife for life; remainder to her son and his issue lawfully begotten or to be begotten, to be divided among them as he should think fit, and in case he should die without issue over, *held*, that as the issue were to take the estate distributively in proportions to be fixed by the son, they took as purchasers. *Hockley v. Mawbey*, 1 Ves. (Eng.) 142.

Devise to A for life; should she die leaving her surviving any issue of her body, then to such issue, to be divided share and share alike. *Held*, A took

a life estate, remainder to the issue living at the time of her death as purchasers. *Estate of McDonnell*, Myr. Prob. (Cal.) 94.

"Thus if the devise be of an 'estate,' or of the testator's 'part' of lands to one for life, with remainder to his issue, or issue male, share and share alike (*Montgomery v. Montgomery*, 3 Jo. & Lat. (Eng.) 47), or if the devise be to A for life with remainder to his issue, to be divided amongst them as A should appoint, subject to the payment of an annuity by the persons becoming entitled under the devise (*Crozier v. Crozier*, 3 Dru. & War. (Eng.) 373), the issue take a constructive fee simple as purchasers. So if the devise be to A for life, with remainder to his issue as tenants in common with a gift over in the event of the issue dying under twenty-one (*Doe v. Burnsall*, 6 T. R. (Eng.) 30), the issue taking the fee by force of the gift over take as purchasers." *Hawkins on Wills*, *193, *194.

As to effect of gift over, see *post*, § VII.

The doctrine that words of distribution alone annexed to the gift to the issue would control the meaning of the word issue, though ineffectual with regard to the more highly technical words "heirs of the body," if the issue taking by purchase could take the fee, is founded upon *Hockley v. Mawbey*, 3 Bro. C. C. (Eng.) 82, and expressly laid down in *Montgomery v. Montgomery*, 3 Jo. & Lat. (Eng.) 47, and *Crozier v. Crozier*, 3 Dru. & War. (Eng.) 373, and recognized in *Kavanagh v. Merland*, Kay (Eng.) 16. See also *Roddy v. Fitzgerald*, 6 H. L. Cas. (Eng.) 823; *Bradley v. Cartwright*, L. R., 2 C. P. (Eng.) 521.

Since "heirs of the body" are more strongly words of limitation than issue (*Lees v. Mosley*, *ante*, p. —), wherever words of distribution have been held sufficient to control the former a *fortiori* will they control the latter; and in some instances they have been held sufficient to control even the technical meaning of "heirs of the body." *Miles v. Allen*, 6 Ired. (N. Car.) L. 88; *Cham-*

the rule, and the ancestor takes an estate tail,¹ whether or not superadded words of limitation which change the course of descent, unaccompanied by words of distribution, as a devise to A, and after his decease to his issue and *their heirs*, or the heirs of such issue, without a gift over on failure of issue of A, will vest the fee in the issue as purchasers, is a point upon which there is much conflict of authority. The better opinion appears to be that it will.²

bers *v. Payne*, 5 Ired. Eq. (N. Car.) 400; Myers *v. Anderson*, 1 Strobb. Eq. (S. Car.) 344.

Words of Distribution Referred to First Takers.—"Where the devise is not to one, but to several, as tenants in common for life, with remainder to their issue 'as tenants in common,' or 'equally to be divided,' the words of distribution may be referred to the first takers, so as to import distribution among the issue *per stirpes* only, and thus the first takers may be to take estates tail as tenants in common, although the issue might be capable of taking the fee as purchasers." Hawkins on Wills, *104; citing *Tate v. Clarke*, 1 Beav. (Eng.) 100; *Harrison v. Harrison*, 7 Man. & G. (Eng.) 938; s. c., 49 E. C., L. R. (Eng.); *Smith Ex. Int.*, § 529. See also *Lyon v. Mitchell*, 1 Madd. (Eng.) 467, 472.

1. *Roe v. Grew*, Wilmut (Eng.) 272. See *Hodgson v. Merest*, 9 Price (Eng.) 556; *Hamilton v. West*, 10 Ir. Eq. Rep. 75; *Parker v. Clarke*, 3 Smale & G. (Eng.) 161.

A devise to A for life, with remainder to his issue and their heirs, or heirs and assigns, followed by a gift over on failure of issue of A, vests in A an estate tail; the limitation to the heirs general of the issue being restrained to heirs of the body by force of the gift over, so as to reduce the devise to one, to A for life, with remainder to his issue and the heirs of their bodies. Hawkins on Wills, *195. See *Frank v. Stovis*, 3 East (Eng.) 348; *Denn v. Puckley*, 5 T. R. (Eng.) 299; *Franklin v. Lacy*, 6 Madd. (Eng.) 258. See *Paxson v. Lefferts*, 3 Rawle (Pa.) 59; *Taylor v. Taylor*, 63 Pa. St. 484.

2. In *Montgomery v. Montgomery*, 3 Jo. & Lat. (Eng.) 47, LORD ST. LEONARDS laid down the affirmative of the proposition, relying upon the authority of *Doe d. Cooper v. Collis*, 4 T. R. (Eng.) 294, where it was *held* that under a devise of one moiety of an estate to A and his heirs, and the other moiety

to B for life, and after his decease to his issue and their heirs, the issue took by purchase. A contrary view was expressed by LORD CRANWORTH, C., in *Parker v. Clarke*, 6 D. M. & G. (Eng.) 109, and the tendency of *Roddy v. Fitzgerald*, 6 H. L. C. (Eng.) 823, and later cases, to put *issue* on the same plane with "heirs of the body," so far as reconcilable with *Lees v. Mosley*, ante, III, 2 a, n., appears to favor his position.

As sustaining the position taken by LORD ST. LEONARDS, see *Hamilton v. West*, 10 Ir. Eq. Rep. 75; *Dodds v. Dodds*, 10 Ir. Ch. Rep. 476; *Morgan v. Thomas*, 51 L. J., Q. B., N. S. 289; *Daniel v. Whartherby*, 17 Wall. (U. S.) 639; *Shreve v. Shreve*, 43 Md. 382.

CHANCELLOR KENT says that if the limitation be to the issue and to *their heirs*, this constitutes them purchasers, as it shows an intention to give them an estate not inheritable from the first taker, but an original estate, inheritable from themselves as a new stock of descent. 4 Kent 221. So where the devise is to A for life, and if she leave lawful issue, to the issue in fee. *Timanus v. Dugan*, 46 Md. 402, 418.

In *North Carolina* it is *held* that the act of 1784, converting estates tail into estates in fee simple, has the effect of putting devises and bequests on the same footing in respect to the construction of gifts to A for life, with remainder to the heirs of his body, his issue, etc., so that any words which in a bequest of personalty would be construed words of purchase, will be so construed in a devise of realty made since that act. *Ward v. Jones*, 5 Ired. Eq. (N. Car.) 405.

In *South Carolina*, the fact that estates tail have never existed, has been *held* to produce the same effect upon the construction of such devises. *Buist v. Dawes*, 4 Rich. Eq. (S. Car.) 423. In the latter State, in a devise to A for life, remainder to his issue *forever*, it has been *held* that the words "*forever*," being equivalent to a limitation in fee

(2) *As to Personality.*—Under a bequest of personal estate or chattels, real to A for life, and after his decease to his issue, A takes for life only, and the issue take in remainder as purchasers.¹

to the issue, they take as purchasers. *Myers v. Anderson*, 1 Strobb. Eq. (S. Car.) 344; *M'Lure v. Young*, 3 Rich. Eq. (S. Car.) 559.

But in *Pennsylvania* a devise to A for life and, after his death, to his issue and the heirs and assigns of such issue, gives A an estate tail, which is converted into a fee simple by virtue of the act of April 27th, 1855. *Carroll v. Burns*, 108 Pa. St. 386. In this State the rule seems to be that the word *issue* in a will, "when used in reference to persons not then born, and not used in the singular number to describe a particular person, but in the plural number to point out the line of descent, is synonymous with the words *heirs of the body*, and that words of limitation engrafted on a devise to the issue of the devisee for life, never make the issue purchasers, though such words serve to limit a fee and not a fee tail. They have this effect only where they would carry the estate into a different channel from that in which it would flow by giving to the first taker an inheritance." *GIBSON*, C. J., in *Paxson v. Loefferts*, 3 Rawle (Pa.) 59, 65. See *Kleppner v. Laverty*, 70 Pa. St. 70, 73.

1. *Knight v. Ellis*, 2 Bro. C. C. (Eng.) 570, *Ex parte Wynch*, 5 De G. M. & G. (Eng.) 188; *Jackson v. Calvert*, 1 J. & H. (Eng.) 235; *Goldney v. Crabb*, 19 Beav. (Eng.) 338; *Myers's Appeal*, 49 Pa. St. 111, *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Edelen v. Middleton*, 9 Gill (Md.) 161. *Contra*, *Moore v. Paul*, 7 Rich. Eq. (S. Car.) 358.

Where the gift, after the gift to the first taker, is to the heirs of the body, the courts have held, on analogy to devises of real estates, that the words are so clearly words of limitation that even the express restriction of the first bequest to a life estate is not sufficient to exclude their *prima facie* meaning.

Where there is nothing to show that the word *issue* was not intended as a word of limitation, or an intention to confine the first taker to a life estate, it has been held to be a word of limitation when used with reference to personal estate equally with the words "*heirs of the body*." So again, where there is no express gift to the issue, but, after an indefinite gift, there is a gift over in default of issue of the first taker, then

the first taker, in the case of real estate, is considered, by implication, to take a gift to him and his issue, and the same rule has been adopted with regard to personality.

In all these cases the rule applied to real estates derived from principles of tenure has been made the foundation of the rule for construing bequests of personality, but in all either the technical words "*heirs of the body*" have occurred or there has been nothing to show that the words "*issue*," "*children*," and the like, have not been intended merely to define or explain the extent of the interest given to the first taker, and there is nothing in these decisions compelling the court to hold that where technical words are not used and where the interest of the first taker is expressly confined to the life estate, it is bound to act in the construction of the bequest as personality on principles derived from the law of tenure, and not resting on intention. Hence, under a bequest of an annuity to A "for her life and the issue from her body, lawfully begotten, on failure of which, to revert to my heirs," with request that B and C would act as trustees, so that it might be secured for her sole use and benefit, A takes for life only, with a gift, in the nature of a remainder, to her children. *Ex parte Wynch*, 5 De G. M. & G. (Eng.) 188, 204, 209. See *Myers's Appeal*, 49 Pa. St. 111; *Moore v. Paul*, 29 Grant (U. S.) Ch. 287.

In *Moore v. Paul*, 7 Rich. Eq. (S. Car.) 358, CHANCELLOR DURGAN considered *Knight v. Ellis* overruled by *Atty. Gen. v. Bright*, 2 Keen (Eng.) 57. This, however, is denied in *Ex parte Wynch*.

Even in *South Carolina*, however, under a bequest to a son for life and after his death to be equally divided between his two daughters during their lives, and after their deaths to be the absolute property of their issue, the daughters, after the son's death, take only a life estate and, on their deaths, their issue take as purchasers. *Myers v. Anderson*, 1 Strobb. Eq. (S. Car.) 344, 47 Am. Dec. 537.

For a general discussion of the rule that words which create an estate tail in realty create an absolute interest in personality, see WILLS.

(3) *Effect of Cy Pres Doctrine.*—Where a testator, by the frame of the original limitation, clearly expresses an intention that all the descendants of a certain party shall take, and that all or some generations of the issue shall take for life only, and the intention is frustrated by the rule against perpetuities, the court considering the paramount intention to be that all the descendants shall take, and the intention to give life estates only as subordinate thereto, confers estates for life upon as many of the parties designated (whether they constitute an entire generation of issue or certain members of a generation) as are born or in *ventre sa mere* in the testator's lifetime, and estates tail on their children and the unborn members of the same generation.¹ The doctrine does not extend to limitations in a deed.²

IV. DYING WITHOUT ISSUE—WHEN REFERRED TO PRIOR OBJECTS

—1. *In Default of Such Issue.*—The expression “in default of such issue” imports a definite or indefinite failure of issue according to the degree of comprehensiveness of the antecedent expressions to which the restrictive words “such issue” refer. If the antecedent expression is sufficiently comprehensive to comprise all the issue in general, or all the issue male or female, the words “such issue” refer to an indefinite failure as much as the word issue when standing unrestricted. But if the antecedent expression comprises some only of the issue in general, or of the issue male or female, the words “such issue” refer only to a failure of the particular issue before spoken of.³ Thus, with regard to per-

1. Prior on Issue, § 84. See *Humberstone v. Humberstone*, 2 Vern. (Eng.) 737; 1 P. Wms. (Eng.) 332; Puc. Ch. 455; Gilb. Eq. Cas. 128; 1 Eq. Cas. Ab. 207, Pl. 8; *Wollen v. Andrews*, 2 Bing. (Eng.) 126; *Mortimer v. West*, 2 Sim. (Eng.) 274; *Goodlit C. Cross v. Woodhull*, Willes (Eng.) 592; *Monkhouse v. Monkhouse*, 3 Sim. (Eng.) 119.

In order that the *cy pres* doctrine may be applied to the devise, the testator must show that he intended all generations of the issue to take. Prior on Issue, § 87; *Seward v. Willock*, 5 East (Eng.) 108; *Bennett v. Lowe*, 7 Bing. (Eng.) 535; *Bristowe v. Warde*. See also *Pitt v. Jackson*; *Nicholl v. Nicholl*, 2 W. Black. (Eng.) 1159.

On the authority of *Routledge v. Dorril*, 2 Ves. Jr. (Eng.) 356, the doctrine is said not to apply to personal estate. Prior on Issue, § 96.

Where the gift is of realty and personality combined, a construction which will give an analogous effect to the devise of each may be thought to be warranted by *Mogg v. Mogg*, 1 Mer. (Eng.) 654, in which freehold and leasehold estates were devised, in trust, for the

children of S M, and, after their decease, to their lawful issue as tenants in common, and in default of such issue, over. S M survived the testator, and it was held that her children took absolute interests in the leaseholds. No reason is given for the decision, but the argument in favor of the children taking an absolute interest proceeded to a great extent on the *cy pres* doctrine, and the only way in which the case can be reconciled with *Knight v. Ellis*, 2 Bro. C. C., is that it was impossible to give the issue an estate by purchase, as was done in the latter case, on account of the rule against perpetuities. Prior on Issue, §§ 96, 314. Compare *Ex parte Wynch*, 5 De G. M. & G. (Eng.) 188, 204, 209.

2. *Adams v. Adams*, Cowp. (Eng.) 651; *Brudenell v. Elwes*, 1 East (Eng.) 442; 17 Ves. Jr. (Eng.) 382.

3. *Smith Ex. Int.*, § 543. See also *King v. Stafford*, 7 East (Eng.) 521; *Goodright v. Lloyd*, 4 Man. & Sel. (Eng.) 88; *Foster v. Lord Romney*, 11 East (Eng.) 594; *Hay v. Lord Coventry*, 3 D. & E. (Eng.) 83; *Lady Dacre v. Doe*, 3 D. & E. (Eng.) 112; *Lewis d. Ormonde v. Waters*, 6 East (Eng.) 336.

sonal estate, it is clear that whatever be the class of issue included in the preceding gift, whether children, sons or daughters, and whatever the extent of interest given to those objects, the bequest over, *in default of such issue* is construed to mean in default of such *children, sons or daughters*.¹ With regard to real estate also, the words "in default of *such issue*," "for want of *such issue*," or "on failure of *such issue*," following an express devise to any particular class of issue, as *children, sons or daughters*, will be construed to mean in default of *such children, sons or daughters*, and being exclusively referential, will not enlarge or in any manner affect any of the prior estates.²

Thus, under a devise to A for life, and then to his issue and their heirs, and in case A should die without issue, or all such issue should die without issue, over, the words referring to A's dying without issue refer to his dying without children, but the words providing for the event of all such issue dying without issue, clearly show that by heirs of the issue the testator meant heirs of the body, and consequently that the children of A were intended to take an estate tail. So that there is a life estate with a contingent remainder over in tail, followed by a limitation which is to take effect either as an alternative, if there should be no children, or as a remainder after an estate tail in the children, and there should afterwards be a failure of issue. *Smith Ex. Int.*, § 542.

Where the word issue occurring in an express devise or bequest to issue is therein explained to mean *children*, the words *in default or for want of such issue*, immediately following are construed in default of such *children*. *Ryan v. Cowley*, 1 Ll. & G. (Eng.) 7. See *Gawler v. Cadby*, Jac. (Eng.) 346, 348; *Bryan v. Mansion*, 5 De G. & S. (Eng.) 737.

Under a devise to A for life without impeachment of waste, and if he have issue male, then to such issue male and his heirs forever; and if he die without issue male, then to B and his heirs forever, the words referring to the failure of the issue male, refer to the nonexistence of sons or a son, and the devise to the issue male is a contingent remainder to the eldest or only son in fee; and the devise over is a concurrent remainder as regards the estate of the prior taker, and an alternative limitation, in regard to the limitation, to the issue to take effect merely as a substitute for that limitation in the

event of no son being born. *Smith Ex. Int.*, § 540; *Lodington v. Kime*, 1 Salk. (Eng.) 224.

1. Jarman on Wills (5th Am. ed.), *454; *Maddox v. Staines*, 2 P. W. (Eng.) 421; s. c., Dom. Proc., 3 B. P. C. Toml. (Eng.) 108; *Stanley v. Leigh*, 2 P. W. (Eng.) 685; s. c., 3 Myl. & Cr. (Eng.) 153.

If the prior gift is confined to children who survive their parent, a gift over in default of such issue or (which is the same) in default of issue *becoming entitled*, means in default of children who survive their parent. *In re Hopkins' Trusts*, 9 Ch. D. (Eng.) 131.

2. Jarman on Wills (5th Am. ed.), *454; *Lethrenhier v. Tracy*, Amb. (Eng.) 204, 220; *Denn d. Briddon v. Page*, 11 East (Eng.) 603, n.; s. c., 3 Durn. & East (Eng.) 87, n.; *Hay v. Lord Coventry*, 3 Durn. & East (Eng.) 83; *Doe d. Comberbach v. Perryn*, 3 Durn. & East (Eng.) 384; *Goodtitle d. Sweet v. Herring*, 1 East (Eng.) 264. See *Wright v. Leigh*, 15 Ves. (Eng.) 564; *Parr v. Swindels*, 4 Russ. (Eng.) 283; *Bridger v. Ramsey*, 10 Hare (Eng.) 320; *Bevan v. White*, 7 Ir. Eq. Rep. 473; *Farrant v. Nichols*, 9 Beav. (Eng.) 327, 330, 331; *Re Arnold's Estate*, 33 Beav. (Eng.) 163; *Re Pollard's Estate*, 3 De J. & S. (Eng.) 541; *Allgood, et al. v. Blake*, 8 L. R. Exch. (Eng.) 160; 42 L. J. Exch. (Eng.) 101; 21 W. R. (Eng.) 599; 29 L. T. N. S. 331. So where the expression is "issue as aforesaid." *Walker v. Petchell*, 1 B. C. (Eng.) 652.

This is true whether the objects of the preceding devise take estates of inheritance or only estates for life. *Rex v. Marquis of Stafford*, 7 East (Eng.) 521; *Doe d. Tooley v. Gunnis*, 4 Taunt. (Eng.) 313; *Ashley v. Ashley*, 1 Dowl. & Ryl. (Eng.) 52; s. c., 5 B. &

Ald. (Eng.) 464; Hay v. Earl of Coventry, 3 Durn. & E. (Eng.) 83; Doe d. Phipps v. Lord Mulgrave, 5 Durn. & E. (Eng.) 320; Foster v. Romney, 11 East (Eng.) 594; Goodright v. Jones, 4 M. & S. (Eng.) 88; Purcell v. Purcell, 2 Dru. & War. (Eng.) 219, n.; Ryan v. Cowley, Ll. & G. Cas. temp. Sugd. 7. See Torrance v. Torrance, 4 Md. 11; Tongue v. Nutwell, 13 Md. 415; Edelen v. Middleton, 9 Gill (Md.) 161; Nebinger v. Upp, 13 S. & R. (Pa.) 65; George v. Morgan, 4 Har. (Pa.) 95; Walker v. Milligan, 9 Wright (Pa.) 178.

This is clearly the case where the prior limitations are in tail. Doe d. Phipps v. Lord Mulgrave, 5 T. R. (Eng.) 320.

So, where the prior limitations are to children and their heirs, a gift over in default of such issue means in default of such children. Doe d. Comberbach v. Perryn, 3 T. R. (Eng.) 484; Rex v. Marquess of Stafford, 7 East (Eng.) 521.

But if there is anything to show that the children were intended to take estates tail, the words *in default of such issue* may be referred to the word heirs so as to cut down the estates to estates tail.

Thus where the devise was to the testator's eldest son for life, remainder to a trustee to preserve contingent remainders, remainder to the first and other sons of the testator's eldest son and their heirs and for want of such issue to his second son B for life with similar remainders, it was held that the word *issue* in the limitation over referred to the heirs of the sons, and consequently that they took successive estates tail, which would effectuate the apparent intention of the testator to continue the estates in his family. Here the words *first and other* evidently imported that the sons were to take successively, and there was no mode of giving effect to that intention except to cut down the fee simple of the sons to an estate tail. Lewis d. Ormon v. Waters, 6 East (Eng.) 237. Compare Ginger d. White v. White, Willes (Eng.) 352.

So where the expression "such issue" is controlled by a subsequent clause showing an estate tail to have been intended. Biddulph v. Lees, 8 E. & B. (Eng.) 289.

"Even though the limitation be to children simply, so that they could only take for life, a gift over in default of such

issue will be construed referentially." Hay v. Earl of Coventry, 3 T. R. (Eng.) 83; Denn d. Breddon v. Page, 3 T. R. (Eng.) 87, n.; s. c., 11 East (Eng.) 603, n.; Ashley v. Ashley, 6 Sim. (Eng.) 358; Bridger v. Ramsay, 10 Ha. (Eng.) 320; Re Arnold's Estate, 33 B. 163.

So where the prior devise embraces a single child only the words "*for want of such issue*" are construed "*for want of such child*," and do not have the effect of conferring an estate tail on the parent of that child. Doe v. Carlton, 1 Scott N. R. (Eng.) 290; s. c., 1 Mann. & Gr. (Eng.) 429. See Foord v. Foord, 3 B. P. C. (Toml. ed.) 124.

"On the other hand, where there is a limitation to a first son without more, followed by limitations in default of such issue to the other sons in tail, the court will lay hold of small circumstances to give the first son also an estate tail. Thus in Evans d. Brooke v. Astley, 3 Burr. (Eng.) 1569, there was the circumstance that the testator referred to the earlier limitations as including the "parent and his descendants." In Clements v. Parke, 3 Doug. (Eng.) 384, the limitation to the first son was referred by the word *likewise* to other limitations in fee. Theobald on Wills (2nd ed.) 537. Compare Doe d. Harris v. Taylor, 10 Q. B. (Eng.) 718; Barnacle v. Nightingale, 14 Sim. (Eng.) 456; Galley v. Barrington, 2 Bing. (Eng.) 387; In re Denny's Estate, 1 Ir. R., 8 Eq. 427.

"Such" Rejected.—"The *prima facie* meaning of the word *such* is to refer the word with which it is coupled to earlier words, so that the latter word is only a compendious statement of the earlier limitations; it may, however, have a converse effect if there is anything upon the will to show that the testator used the earlier word in the sense of the later, and the word *such* may be rejected if the term with which it is coupled and that to which it refers are so inconsistent with each other that the testator cannot have meant the one as a mere compendious reference to the other. Thus, a devise to A and his heirs, and in default of such issue over would, perhaps, in a will cut down A's estate to an estate tail. See Jelle v. Cook, 1 P. Wms. 70. And in Parker v. Toofal, 11 H. L. (Eng.) 143, where the devise was to Thomas for life, remainder to the first son of the said Thomas in tail male lawfully begotten, severally and successively; and for want of such lawful issue either of

2. In Default of Issue—*a. As to Personality.*—In regard to personal estate, words denoting a failure of issue, following a bequest to *children*, refer to the objects of that gift.¹ It would also seem to be the better opinion that where the prior gift is expressly to “*issue*,” and that word is restricted by the context to issue of a particular class, or existing at a particular time, the words importing a failure of issue will be referred to such prior objects.²

Thomas or of James, over, the word *such* was practically rejected and Thomas took an estate tail.” Theobald on Wills (2nd ed.), 537.

1. 2 Jarman on Wills (5th Am. ed.), *448; Roper on Legacies, *1554; Pleydell v. Pleydell, 1 P. Wms. (Eng.) 748; Maddox v. Staines, 2 P. Wms. (Eng.) 421; Tucker v. Harris, 5 Sim. (Eng.) 538; Malcolm v. Taylor, 2 Russ. & M. (Eng.) 416, 421; Bradshaw v. Skilbeck, 2 Bing., N. S. (Eng.) 182; Trickey v. Trickey, 3 Myl. & K. (Eng.) 560; Ellicombe v. Gompertz, 3 Myl. & Cr. (Eng.) 127; Walker v. Petchell, 1 C. B. (Eng.) 652; Leming v. Sherratt, 2 Hare (Eng.) 14; Minter v. Wraith, 13 Sim. (Eng.) 52; Doe d. Lyde v. Lyde, 1 Durn. & E. (Eng.) 596; Salkeld v. Vernon, 1 Ed. (Eng.) 64; Vandergucht v. Blake, 2 Ves. Jr. (Eng.) 534; Farthing v. Allen, 2 Madd. (Eng.) 310; Robinson v. Hunt, 4 Beav. (Eng.) 450; Cormack v. Copous, 17 Beav. (Eng.) 307; *In re Wyndham's Trusts*, L. R., 1 Eq. 290; *In re Sander's Trusts*, L. R., 1 Eq. 675; Bryan v. Manson, 5 De G. & S. (Eng.) 737; Davies v. Merceron, L. R., 4 Ch. D. (Eng.) 182; 35 L. T., N. S. 701; Chism v. Williams, 29 Mo. 288. Compare Observations of Lord COTTENHAM in Ellicombe v. Gompertz, 3 Myl. & Cr. (Eng.) 127; TURNER, L. J., *Pride v. Fooks*, 4 Jur., N. S. (Eng.) 678; s. c., 3 De G. & J. (Eng.) 252; 4 D. M. G. (Eng.) 88.

“But where the prior gifts to the children are not vested, so that there may be issue who may not take under them,—for instance, children of children who die before the time of vesting,—it is less easy to admit the referential construction, and it seems that without some further indications to be collected from the will, it will not be adopted. *Pride v. Fooks*, 3 De G. & J. (Eng.) 252; *Walker v. Mower*, 16 B. 365.

“And the same is the case where the gifts to the children are only to arise upon a contingency, as for instance, if the legatee marries. *Andree v. Ward*, 1 Russ. (Eng.) 260. *Campbell v. Hard-*

ing, 2 R. & M. (Eng.) 390; 2 Cl. & Fin. (Eng.) 431; 8 Bl. (N. S.) 469.

“But if there is anything to assist the referential construction, it will be adopted. *Malcolm v. Taylor*, 2 R. & M. (Eng.) 416.

“And when there is elaborate provision made for the issue of children dying before the time of vesting and born within the limits of perpetuity, a gift over in default of issue may very well be referred to the prior limitations. *Ellicombe v. Gompertz*, 3 Myl. & Cr. (Eng.) 127; *Trickey v. Trickey*, 3 M. & K. (Eng.) 560.

“The referential construction will not be adopted where the bequest is in joint tenancy to A and her children, with a gift over in default of issue. In this case the whole is already disposed of, whether children are born or not, and in the absence of some further indication of intention there can be no reason for attempting to make the gift over valid in order to divest absolute interests. *Fisher v. Webster*, 14 Eq. (Eng.) 283.” Theobald on Wills (2nd ed.) 539, 540.

2. 2 Jarman on Wills (5th Am. ed.) *450; *Leeming v. Sherratt*, 6 Jur. (Eng.) 663; *Gawler v. Cadby*, Jac. (Eng.) 346, 348; *Bryan v. Manson*, 5 De G. & S. (Eng.) 737.

Contra, *Campbell v. Harding*, 2 Russ. & Myl. (Eng.) 390; s. c., *nom. Candy v. Campbell*, 8 Bligh, N. S. (Eng.) 79; *Andree v. Ward*, 1 Russ. 260. See also *K. BRUCE, V. C.*, in *Pye v. Linwood*, 6 Jur. (Eng.) 618; *BACON, V. C.*, in *Fisher v. Webster*, L. R., 14 Eq. (Eng.) 283.

Testator gave certain pecuniary legacies to his daughters respectively, one half to be invested and secured from the control of any husband, the interest to be paid to them in the meantime and the principal disposed of as they should direct to *their issue*, but in case they should die without issue, he gave the principal among the survivors of his children in equal shares. *Held*, that the first bequest was limited to issue living at the death of the children,

and the gift over on failure of issue referred to the same objects. *Leeming v. Sherratt*, 2 Hare (Eng.) 14.

Mr. Jarman is of opinion that *Andree v. Ward*, 1 Russ. (Eng.) 260, by reason of the strong tendency of recent cases towards the referential construction, would not now be followed. But in *Allanson v. Clitherow*, 1 Ves. (Eng.) 24 (an executory trust of realty), the words "die without issue" were held nonreferential under similar circumstances. See *Campbell v. Harding*, 2 R. & M. (Eng.) 390; 8 Bli., N. S. (Eng.) 469; 2 Cl. & Fin. (Eng.) 421; cited in *Pye v. Linwood*, 6 Jur., N. S. (Eng.) 618; *Fisher v. Webster*, L. R., 14 Eq. (Eng.) 283.

In *THEOBALD* on Wills these decisions are classed as an exception to the general principle on the ground that the gift to the children was contingent. *Theobald on Wills* (2nd ed.), 534, 540.

The general principle in the text is thus stated by LORD COTTENHAM in *Ellicombe v. Gompertz*, 3 Myl. & Cr. (Eng.) 127: "Provision is made for certain members of a class answering a particular description, and then a gift over is made on failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend on the failure of the whole class, will be construed to take place upon the failure of that description of the class who were to take; and, on the other hand, if it appeared that all the class were intended to take, although some only are enumerated and the gift over be upon the failure of the whole class, the court will adopt such a construction as will extend the benefit, in the best way the law will admit to the whole class." Hence held that the words "from and immediately after the decease of all the sons and grandsons of" A were confined to such sons and grandsons as were included in the preceding gifts.

Bequest to daughter A for life and after her decease to her children at twenty-one; and in case any of such children should die under twenty-one and have one or more children *who should survive A*, and live to attain the said age, the last mentioned children should be entitled to their parent's share; provided that in case any child of A should die under twenty-one, his, her or their share, or shares, should go to the survivors of the said children, and the issue of any deceased child or children who should marry and die under the

said age; provided further that *if there should be no child of A, or, there being any such, no one child living to attain the age of twenty-one years, nor leave any issue who should attain thereto, then over*. Held, that the gift over must be intended to take effect on the failure of the former gifts; and such former gifts were confined to those grandchildren who should survive the daughter and must therefore have been born in her lifetime: the gift over was valid. *Trickey v. Trickey*, 3 M. & K. (Eng.) 560.

Bequest to each of testator's two daughters for life, and after her death unto and equally among all and every such child and children she might happen to leave at her decease, and in case she should die without issue, then to such persons and in such manner as she should by will appoint. The will then contained a gift of the residue to testator's son. The daughter died leaving grandchildren, but no children living at her death. Held, that "die without issue" meant such issue as was before mentioned, *i. e.*, children living at the daughter's decease, and there being none, the power of appointment had arisen. *In re Mercedon's Trusts*, L. R., 4 Ch. D. (Eng.) 182.

See also *Hillersdon v. Lowe*, 2 Hare (Eng.) 355; *Cardigan v. Curzon*, How. L. R., 9 Eq. 358.

When Failure of Issue Is Restricted to Failure at Ancestor's Death.—*Westwood v. Southey*. "The ground on which the court has used violence with the words, and interpolated the word 'such,' is this, that if there were no restriction on the generality of the words 'dying without issue,' the limitation over would be void. But where the dying without issue is either in terms, or, by the proper construction, limited to dying without issue living at the death, there is no reason for interpreting the words as meaning 'such issue as before mentioned'. . . Such a construction might in fact wholly defeat the testator's intention; for the tenant for life might have an only child, who might attain twenty-one, marry and have children, and die before the tenant for life, and then the child and issue of that child would be excluded." *KINDERSLEY, V. C.*, in *Westwood v. Southey*, 2 Sim. (Eng.) N. S. 192, 202. See also *Walker v. Mower*, 16 Beav. (Eng.) 365; *Madden v. Ikin*, 2 Dr. & Sm. (Eng.) 213; *PARKER, V. C.*, in *Bryan v. Mansion*, 5 De G. & S. (Eng.)

b. As to Realty.—MR. JARMAN, after an elaborate examination of the English authorities, comes to the conclusion:¹ 1. That the words *in default of issue*, or expressions of a similar import, following a devise to children *in tail* or *in fee simple*, mean in default of *children*.² This is free from all doubt. 2. That these words following a devise to all the sons successively in tail male, and daughters concurrently in tail general, are also to be construed as signifying *such issue*, even in the case of an executory trust.³ 3. That words devising over the property on a failure of issue *male* following a devise to the whole line of sons successively in tail male, are also referential to those objects;⁴ but not where such sons take for life only, in which case the words in question raise an implied estate tail in the parent.⁵ 4. That where there is a prior devise to a *definite number of sons only* in tail male, with a limitation over in case of default of issue, or issue male of the parent, an estate tail will be implied in the parent

737; *In re Biron*, 1 L. R., Ir. 258. But in *Pride v. Fooks*, 4 Jur. N. S. (Eng.) 678, s. c., 3 De G. & J. (Eng.) 252, TURNER, L. J., declined to express any opinion upon *Westwood v. Southey*. MR. THEOBALD considers this principle applicable to devises of realty. See § IV, 2 b, *.

1. 2 Jarman on Wills (3rd Am. ed.) *398, (5th Am. from 4th Eng. ed.) *483.

2. *Goodright v. Dunham*, Doug. (Eng.) 764. See also *Ginger d. White v. White*, Willes (Eng.) 348, *Malcolm v. Taylor*, 2 Russ. & Myl. (Eng.) 416; *Doe v. Selby*, 2 B. & C. (Eng.) 926; *Doe v. Duesbury*, 8 M. & W. (Eng.) 514; *Baker v. Tucker*, 3 H. L. Cas. (Eng.) 106; s. c., 14 Jur. (Eng.) 771; *Smith Ex. Int.*, §§ 541, 581, 582, 583; *Daly v. Koons*, 90 Pa. St. 246; *Lawrence v. Lawrence*, 105 Pa. St. 335, 341.

"If, after a prior devise to the ancestor, the property is devised to his unborn sons, daughters or children and *their heirs*, the words in default of issue, etc., of the ancestor will be construed to refer simply to the sons, daughters or children, instead of being referred also to their heirs and of being regarded as showing that the heirs meant are heirs of the body, as they would where the property is devised to the ancestor and his heirs, with a devise over in default of issue, without any intermediate devise to the sons, daughters or children; in which case, as has already been shown, the word *heirs* means *heirs of the body*. But if the object of the intermediate devise is to create a perpetual succession of life

estates, it will be disregarded and the ancestor will take an estate tail in possession." *Smith Ex. Int.*, §§ 582, 583.

Where property is devised to a person and his heirs, with a devise over if he should die without having issue, or, having such issue, such issue should die under twenty-one without issue, the failure of issue which is meant is a failure of issue of the children of the prior taker, at the death of such children under age; so that the failure of issue is definite, and the limitation over good as an executory devise. *Smith Ex. Int.*, § 552, pp. 279, 280. See *Berg v. Anderson*, 22 P. F. S. (Pa.) 87, 91; *Nicholson v. Bettie*, 7 P. F. S. (Pa.) 384, 387.

Mr. Jarman is of opinion that the introduction of the word *leaving* would not vary the construction, since the words "without issue" and "without leaving issue" are indistinguishable in regard to their importing an indefinite failure of issue in reference to real estate. 2 Jarman on Wills (5th Am. ed.) *462.

3. *Blackborn v. Edgley*, 1 P. W. (Eng.) 600; *Morse v. Marquess of Ormonde*, 5 Madd. (Eng.) 99; s. c., 1 Russ. 382; *Peyton v. Lambert*, 8 Ir. Com. L. Rep. 485.

4. *Barnfield v. Popham*, 1 P. W. (Eng.) 54, 760; 1 Eq. Cas. Ab. (Eng.) 183; 2 Vern. (Eng.) 427, 449.

5. 2 Jarman on Wills (3rd ed.) *398; *Wright v. Leigh*, 15 Ves. (Eng.) 464. Later cases establish that the estate tail in the parent is subject to the children's life estate. *Theobald on Wills* (2nd ed.) 539; 2 Jarman on

in order to give a chance of succession to the other sons.¹ 5. That in the case of executory trusts, words importing a dying without issue, following a devise to the first and other sons of a particular marriage in tail male, authorize the insertion of a limitation to the parent in tail general in remainder expectant on those estates.² 6. That such words (whether they refer to issue or issue male) succeeding a devise to the eldest son in tail are not referable to such son exclusively, but create in the parent an implied estate tail,³ in remainder expectant on the estate tail of the son;⁴ and which rule also, it seems, applies where the children take estates tail.⁵ 7. That the circumstance of the preceding devise to children, etc., being subject to a contingency, is rather unfavorable to the construction which reads words importing a failure of issue to refer to a failure of the objects of such preceding limitation.⁶

Wills (5th Am. ed.) *483; *Doe v. Gallini*, 3 A. & E. (Eng.) 340; *Parr v. Swindels*, 4 Russ. (Eng.) 283, LORD KINGSDOWN, in *Towns v. Wentworth*, 11 Moo. P. C. C. 546.

1. *Langley v. Baldwin*, 1 P. W. (Eng.) 759; 1 Ves. Sr. (Eng.) 26; *Atty. Gen. v. Sutton*, 1 P. W. (Eng.) 754; s. c., in *Dom. Proc. (Eng.)* 3 B. P. C. Toml. (Eng.) 75.

2. *Allanson v. Clitherow*, 1 Ves. Sr. (Eng.) 24.

3. *Stanley v. Lennard*, 1 Ed. (Eng.) 87; *Key v. Key*, 4 De G. M. & G. (Eng.) 73. This rule applies whether the eldest son takes for life or in tail. 2 *Jarman on Wills* (5th Am. ed.) *483.

4. *Doe d. Bean v. Halley*, 8 Durn. & E. (Eng.) 5. So where the eldest son takes for life only. 2 *Jarman on Wills* (5th Am. ed.) *483.

5. *Doe v. Gallini*, 5 Br. & Ad. (Eng.) 621; 3 Ad. & E. (Eng.) 340.

6. *Doe v. Lucraft*, 1 M. & Scott (Eng.) 573; *Franks v. Price*, 6 Scott (Eng.) 710; s. c., 5 Bing. N. C. (Eng.) 37; 3 Beav. (Eng.) 182; *Alexander v. Alexander*, 16 C. B. (Eng.) 59; *Doe v. Gallini*, 3 Br. & Ad. (Eng.) 621; 3 A. & E. (Eng.) 340. See LORD CRANWORTH, in *Jenkins v. Hughes*, 8 H. L. Cas. (Eng.) 593.

The following classification of cases has also been suggested:

"1. If the devise is to A for life, then to his children, so that they take vested estates in fee or tail, and in default of issue of A, over, issue means the issue before mentioned, and A's estate will not be enlarged. *Foster v. Hayes*, 2 E. & B. (Eng.) 27; s. c., 4 E. & B. (Eng.) 717; *Towns v. Wentworth*, 11 Moo. P.

C. (Eng.) 526; *Smyth v. Power*, 10 Rep., 10 Eq. 192.

"And this is the case though the children included under the prior limitations may be sons only, and not daughters, and though the prior estates may be in 'ail male. *Turk v. Frenchman*, 2 Dyer (Eng.) 171; *Baker v. Tucker*, 11 Ir. Eq. 104; s. c., 3 H. L. Cas. 106.

"*Quare* whether it makes any difference in the construction of the gift over in default of issue that the ancestor has children living at the date of the devise. See *Doe d. Todd v. Tuesday*, 8 M. & W. (Eng.) 514, commented on in *Foster v. Hayes*, 4 E. & B. (Eng.) *730 (E. C. L. R., vol. 82).

"2. If however, the prior limitations include less than the whole number of sons the referential construction will not be adopted. *Langley v. Baldwin*, 1 Eq. Ab. (Eng.) 185, pl. 29, cit. 1 P. W. (Eng.) 759; *Atty. Gen. v. Sutton*, 1 P. W. (Eng.) 753; s. c., 3 B. P. C. (Eng.) 75; *Stanley v. Lennard*, Amb. (Eng.) 355; 1 Ed. (Eng.) 87; *Key v. Key*, 4 De G. M. & G. (Eng.) 173.

"The referential construction is, however, more readily adopted where the limitations are to some of the issue at twenty-one, and there is a gift over in default of issue who attain twenty-one. *Sanders v. Ashford*, 28 Beav. (Eng.) 6-9.

"3. If the failure of issue is restricted to a failure at the death of the parent, the referential construction will not be adopted, as it might have the effect of divesting the interests of children who had died before the tenant for life leaving children. *Westwood v. Southey*.

Devise of Reversion.—Where a testator, having a reversion in fee expectant on estates tail in the sons or other partial issue of some person other than the testator himself, devises the estates in the event of that person dying without issue, the question arises whether these words refer to the determination of the subsisting estates, so that the testator shall be considered as devising his reversion, or to an indefinite failure of issue, rendering the limitation over void for remoteness.¹ In such cases it appears to be

2 Sim. (Eng.) N. S. 192; *Ex parte Hooper*, 1 Dr. (Eng.) 264; *Re Tookey's Trust*, 21 L. J., Ch. 402; *In re Biron*, 1 L. R. Ir. 258.

"4. If the gift is to A for life, then to such issue as he should appoint by will, and if A dies without issue over, issue in the gift over is held to refer to the issue before mentioned; that is to say, issue living at the death of A. *Target v. Gaunt*, 1 P. W. (Eng.) 432; *Hockley v. Mawbey*, 1 Ves. Jr. (Eng.) 143; s. c., 3 B. C. C. (Eng.) 82; *Leeming v. Sherratt*, 2 Ha. (Eng.) 14; *Hanan v. Drew*, 10 Ir. Eq. 333; *Eastwood v. Airson*, L. R., 4 Ex. (Eng.) 141.

"5. When the limitations to issue are contingent upon attaining a certain age, it seems the referential construction would not be adopted. *Doe d. Rew v. Lucraft, M. & Sc.* (Eng.) 573; s. c., 8 Bing. (Eng.) 386, *Franks v. Price*, 6 Scott (Eng.) 710; s. c., 5 Bing. N. C. (Eng.) 37; 3 Beav. (Eng.) 182.

"6. In wills, before the Wills act, where the devise to children is without words of limitation, so that they only take estates for life, the referential construction will not be adopted, but the parent will take an estate tail in remainder after the life estates. *Parr v. Swindels*, 4 Russ. (Eng.) 283; *Bennett v. Lowe*, 5 M. & Pay (Eng.) 485; 7 Bing. 535, is not inconsistent with this rule, since the gift over was not upon an indefinite failure of issue. And *Wright v. Leigh*, 15 Ves. (Eng.) 564, which conflicts with the latter branch of this rule, would probably not now be followed."

The principle of this classification is that where the intention is to benefit all the issue, notwithstanding the incomplete enumeration of them under the special limitation, the gift over in default of issue will give the parent an estate tail, but where the issue intended to be benefited are sufficiently indicated by the special limitations, the failure of issue will be construed to mean such issue as before mentioned. *Theobald on Wills* (2nd ed.) 538.

No classification upon the subject should be accepted without great caution. In *Key v. Key*, 4 De G. M. & G. (Eng.) 73, 88, *TURNER, L. J.*, says: "It is obvious no general rule can be laid down upon a subject on which the testator's intention, expressed by the will, must, in each case, be the only guide." This view, if adopted, would relegate the whole question to the individual discretion of the presiding judge. All that need be said on the subject is that the above classifications have been suggested, and would seem to be sustained in the main by the authorities, and in the absence of a contrary intent appearing in the instrument, would probably be followed by the courts, when applicable.

1. 2 *Jarman on Wills* (5th Am. ed.) *489; *Theobald on Wills* (2nd ed.) 546, 547; *Sugd. Law of Prop.* *351 (Law Lib., vol. 64; *Eno v. Eno*, 6 Hare (Eng.) 171. See *SHADWELL, V. C.*, in *Ingerton v. Jones*, 3 Sim. (Eng.) 409; *Jones v. Morgan*, Butl. Fea. App. (Eng.) 578; s. c., 3 B. P. C. (Toml. ed.) 322; *Trafford v. Boehm*, 3 Atk. (Eng.) 442; *Lytton v. Lytton*, 4 Bro. C. C. (Eng.) 441.

"If the event upon which the reversion is expressed to be devised is larger than and includes the event upon which it comes into possession, the devise will be good if in effect the two events are the same, and the intention is merely to devise the reversion. If, for instance, the reversion falls into possession on failure of issue by a particular wife of the testator, and the testator devised it upon a general failure of issue, the devise is good, as the birth of issue by a second marriage would revoke the will. *Jones v. Morgan*, *Fearne C. R. App.* 577; 3 B. C. C. (Eng.) 322; *Lytton v. Lytton*, 4 Bro. C. C. (Eng.) 441.

In the same way if the testator recites that he is entitled to the reversion of certain estates on the death of a son without issue generally, and then devises the reversion on failure of such

a sound rule of construction that whenever it may be collected from the general context of the will that it is the testator's intention to dispose of his reversionary interest expectant on the subsisting estates tail, such intended disposition will not be defeated by his neglect to adapt his language with precision to the events upon which the reversion will fall into possession.

V. DYING WITHOUT ISSUE—DEFINITE AND INDEFINITE FAILURE OF ISSUE¹—1. **General Rule.**—In the absence of express legislation, words referring to the death of a person without issue, whether the terms be "*if he die without issue*," "*if he have no issue*," or "*for want*" or "in default of" issue, unexplained by the context, are construed to mean a general indefinite failure of issue; *i. e.*, a failure at the death or at any time afterwards.² The rule ap-

issue, the devise is good, the intention being clear to devise the reversion. *Lewis v. Templar*, 33 Beav. (Eng.) 625; *Theobald on Wills* (2nd ed.) 547.

On the other hand, it has been held that where a testator, who has the reversion in fee by settlement, expectant on estates in tail male in his sons, and estates in tail general in his daughters, devises the estate in default of issue generally, the words "in default of issue" will not be referred to the issue who take under the settlement, so that the testator shall be considered as devising his reversion, but will be construed in their indefinite sense, although thereby the limitations in the will are rendered void from remoteness. *Lanesborough v. Fox*, Cas. temp. Talb. (Eng.) 262; *Banks v. Holme*, 1 Russ. (Eng.) 394. *n.*; *Bristow v. Boothby*, 2 Sim. & Stu. (Eng.) 465.

Mr. Prior is of opinion that this view is the more correct. Prior on Issue. §§ 230, 231; 2 Jarman on Wills (5th Am. ed.) *490. But Mr. Jarman clearly shows that the decision in *Lanesborough v. Fox*, Cas. temp. Talb. 262, may be referred to the fact that the testator had made the limitation over dependent upon failure of issue of the third person and also "for want of heirs male" of his own body, and that therefore unless the words could be held to refer to issue living at the decease of the testator (§ 5.17), which could not have been done without difficulty, as the testator had a son living, the devise was void.

In *Morse v. Lord Ormonde*, 1 Russ. (Eng.) 406, LORD ELDON spoke of *Banks v. Holme* as a "very strong decision," and it cannot be reconciled with *Jones v. Morgan*, 3 Brown P. C. (Toml. ed.) 323.

But in *Bristow v. Boothby*, 2 Sim. &

St (Eng.) 465 under a limitation by marriage settlement to the husband and wife for life, remainder to the sons in tail male, remainder to the daughters in tail general, with a power to charge the estates in case all the children of the marriage died without issue, the court refused to confine the latter expression to the issue who were comprised in the limitations of the estate and held the power void. This case, therefore, sustains Mr. Prior's position, unless the principle upon which it was decided is to be shaken by LORD ELDON's criticism of the analogous case of *Banks v. Holme*, 1 Russ. 394. *n.*

1. "A definite failure of issue is where a precise time is fixed by the will for the failure to occur, as in the case of a devise to A, but if he dies without lawful issue living at the time of his death, then over to B; an indefinite failure of issue means a failure whenever it shall happen sooner or latter, without any fixed period within which it must happen—the time when the issue of the first taker shall become extinct." WOODWARD, J., in *Vaughan v. Dickes*, 8 Harr. (Pa.) 509, 513.

2. 2 Jarman on Wills (5th Am. ed.) *498; *Hawkins on Wills* *205; *Theobald on Wills* (2nd ed.) 541; *Everest v. Gell*, 1 Ves. Jr. (Eng.) 286; *Chandless v. Price*, 3 Ves. Jr. (Eng.) 99; *Rawlins v. Goldfrap*, 5 Ves. Jr. (Eng.) 440; *Crooke v. De Vandes*, 9 Ves. Jr. (Eng.) 197; *Boehm v. Clarke*, 9 Ves. Jr. (Eng.) 580; *Barlow v. Salter*, 17 Ves. Jr. (Eng.) 479; *Donn v. Penny*, 1 Mer. (Eng.) 20; *Doe v. Richard Owens*, 1 B. & Ad. (Eng.) 318; *Crane v. George Roch*, 7 Bing. (Eng.) 226; *Lepine v. Ferard*, 2 R. & My. (Eng.) 378; *Campbell v. Harding*, 2 R. & My. (Eng.) 390; *Burley v. Evelyn*, 16 Sim. (Eng.) 290;

Caulfield v. Maguire, 2 Jo. & Lat. (Eng.) 176; *Fisher v. Webster*, L. R., 14 Eq. (Eng.) 283; *Lees' Case*, 1 Leon. (Eng.) 285.

To ascertain the intention every part of the will may be examined. *Lucas v. Duffield*, 6 Gratt. (Va.) 456.

In the middle States the rule has been followed and recognized in *Williamson v. Daniel*, 12 Wheat. (U. S.) 568; *Parkman v. Bowdoin*, 1 Sumn. (U. S.) 359; *Lillibridge v. Adie*, 1 Mason (U. S.) 224; *Osborne v. Shrieve*, 3 Mason (U. S.) 391; *Pinckney v. Pinckney*, 1 Bradf. (N. Y.) 269, 274; *Tator v. Tator*, 4 Barb. (N. Y.) 431; *Ferris v. Gibson*, 4 Edw. (N. Y.) 707; *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 64; *Jackson v. Billinger*, 18 Johns. (N. Y.) 368; *Miller v. Macomb*, 26 Wend. (N. Y.) 229; *Coe v. De Witt*, 22 Hun (N. Y.) 428; *Guernsey v. Guernsey*, 36 N. Y. 267; 271; *Haynes v. Witmer*, 2 Yeates (Pa.) 400; *Amelong v. Dorneyer*, 16 Ser. & R. (Pa.) 323; *Heffner v. Knopper*, 6 Watts (Pa.) 18; *Eichelberger v. Barntz*, 9 Watts (Pa.) 447; *George v. Morgan*, 16 Pa. St. 95; *Vaughn v. Dickes*, 20 Pa. St. 509; *Wynn v. Story*, 38 Pa. St. 166; *Covert v. Robinson*, 46 Pa. St. 274; *Allen v. Henderson*, 49 Pa. St. 333; *Mengel's Appeal*, 61 Pa. St. 248; *Gast v. Baer*, 62 Pa. St. 37; *Kleppner v. Laverty*, 70 Pa. St. 70; *Greenawalt v. Greenawalt*, 71 Pa. St. 483; *Ingersoll's Appeal*, 86 Pa. St. 240; *Riggs v. Sally*, 15 Me. 408; *Fisk v. Keene*, 35 Me. 349; *Hall v. Chaffee*, 14 N. H. 219; *Ladd v. Harvey*, 21 N. H. 514, 526; *Pinkham v. Blair*, 57 N. H. 227; *Brattleboro v. Mead*, 43 Vt. 556; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Hall v. Priest*, 6 Gray (Mass.) 18; *Allen v. Trustees etc.*, 102 Mass. 262, 264; *Dart v. Dart*, 7 Conn. 251; *Burrough v. Foster*, 6 R. I. 534; *Arnold v. Brown*, 7 R. I. 188; *Hull v. Eddy*, 14 N. J. L. 169; *Rowe's Exrs. v. White*, 16 N. J. Eq. 411; 84 Am. Dec. 169; *Den v. Small*, *Spencer*, (N. J.) 151; *Moore v. Rake*, 2 Dutch. (N. J.) 574; *Condict v. King*, 2 Beas. (N. J.) 375; *Hollett v. Pope*, 3 Harr. (Del.) 542; *Davis v. Abbott*, 3 Ired. (N. Car.) 137; *Newton v. Griffith*, 1 Harr. & G. (Md.) 111; *Torrance v. Torrance*, 4 Md. 11; *Jackson v. Dashiell*, 3 Md. Ch. 257; *Huxford v. Milligan*, 5 Md. 542; *Dickson v. Satterfield*, 53 Md. 317; *Tinsley v. Jones*, 13 Gratt. (Va.) 289; *Thomason v. Andersons*, 4 Leigh (Va.) 118; *Williamson v. Ledbetter*, 2 Munf. (Va.) 521; *Sydners v. Sydners*, 2 Munf. (Va.) 263; *Carter v. Tyler*, 1

Call (Va.) 163; *Hill v. Burrow*, 3 Call (Va.) 342; *Norton v. Fripp*, 1 Speers (S. Car.) 250; *Cox v. Buck*, 5 Rich. (S. Car.) 604; *Presley v. Davis*, 7 Rich. (S. Car.) 105; *McCorkle v. Black*, 7 Rich. (S. Car.) 407; *Lyons v. Walker*, 8 Rich. (S. Car.) 307; *Curry v. Sims*, 11 Rich. (S. Car.) 489; *Cruger v. Hayward*, 2 Dessaus. (S. Car.) 94; *Mazyck v. Vanderhurst*, 1 Bailey Eq. (S. Car.) 48; *Postell v. Postell*, 1 Bailey Eq. (S. Car.) 390; *Mangum v. Piester*, 16 S. Car. 316; *Rice v. Satterwhite*, 1 Dev. & Bat. Eq. (N. Car.) 69; *Bailey v. Davis*, 2 Hawks (N. Car.) 108; *Matthews v. Daniels*, 1 Murph. (N. Car.) 42; *Brantly v. Whitaker*, 5 Ired. L. (N. Car.) 225; *Moye v. Moye*, 5 Jones Eq. (N. Car.) 359; *Lillibridge v. Ross*, 31 Ga. 730; *Moody v. Walker*, 3 Ark. 198; *Robinson v. Bishop*, 23 Ark. 378; *Watkins v. Quarles*, 23 Ark. 179; *Bramlet v. Bates*, 1 Sneed (Tenn.) 554; *Randolph v. Wendell*, 3 Sneed (Tenn.) 647; *Bowman v. Tucker*, 3 Humph. (Tenn.) 650; *Kirk v. Ferguson*, 6 Coldw. (Tenn.) 479; *Randolph v. Wendell*, 4 Sneed (Tenn.) 646; *Chism v. Williams*, 29 Mo. 288; *Voris v. Sloan*, 68 Ill. 588.

In *Kentucky* and *Ohio* the rule has been rejected and the words "die without issue," or "without leaving issue," or "heirs of the body," "die without children," or other words of similar import, are to be interpreted, according to their plain, popular and natural meaning, as referring to the time of the person's death, unless the contrary intention is plainly expressed in the will or is necessary to carry out its undoubted purposes. *SWAN, J.*, in *Parish v. Ferris*, 6 Ohio St. 563, 578; *Niles v. Gray*, 12 Ohio St. 320; *Collins v. Collins*, 40 Ohio St. 355; *Daniel v. Thompson*, 14 B. Mon. (Ky.) 533; *Sale v. Crutchfield*, 8 Bush (Ky.) 636. See also *Birney v. Richardson*, 5 Dana (Ky.) 424.

In *Connecticut*, such expressions have the effect of enlarging an estate for life or an indefinite devise to a fee tail, which is in that state an estate for life in the first donee, with remainder in fee to his issue living at his death; but a devise to A and his heirs, and in case A die without "issue," or "children or their legal representatives," over, is in the first instance an estate in fee simple in A, defeasible upon the event of his dying without issue, children or their legal representatives, living at the time of his death; but upon his subsequent marriage and the birth of a child the estate becomes at once absolute alien-

plies both to real and personal property,¹ with this distinction, that in the case of personalty, words *prima facie* importing an indefinite failure of issue yield more readily to expressions and circumstances in the will tending to restrict them to the sense to dying without issue *living at the death*.²

able and infeasible. *Hudson v. Wadsworth*, 8 Conn. 358; *Bullock v. Seymour*, 33 Conn. 289. But see *Clarke v. Terry*, 34 Conn. 176.

Compare *Holmes v. Williams*, 1 Root (Conn.) 335; 1 Am. Dec. 49, *Williams v. Dickerson*, 2 Root (Conn.) 191; 1 Am. Dec. 66.

This construction is analogous to that placed upon a conditional fee at common law before the statute *De Donis*, 13 Edw. 1.

As to the effect of the statute abolishing estates tail upon the practical application of the rule, see *Dennett v. Dennett*, 43 N. H. 499, 501; *Moore v. Moore*, 12 B. Mon. (Ky.) 651, 660; *SWAN, J.*, in *Parish v. Ferris*, 6 Ohio St. 563, 578.

See also *Doe v. Allaire*, *Spencer* (N. J.) 6, 27; *Morehouse v. Cotheal*, 2 Zab. (N. J.) 430; *Blair v. Vanblarcum*, 71 Ill. 290; *Eaton v. Shaw*, 18 N. H. 321; *Goodell v. Hibbard*, 32 Mich. 47.

In *Georgia* the tendency is to reject the rule and lay hold of slight circumstances to exclude its operation. *Harris v. Smith*, 16 Ga. 548, *Griswold v. Greer*, 18 Ga. 550; *Sheftall v. Roe*, 30 Ga. 453; *Lillibridge v. Ross*, 31 Ga. 730, 735.

As to effect of special statutes, see *post*.

1. *Hawkins on Wills*, *206; 2 *Jarman on Wills* (5th Am. ed.) *498; *Beauclerk v. Dermer*, 2 Atk. (Eng.) 313; *Candy v. Campbell*, 2 Cl. & F. (Eng.) 421. See *Moody v. Walker*, 3 Ark. 147; *Randolph v. Wendel*, 4 Sneed (Tenn.) 647; *Usitton v. Usitton*, 3 Md. Ch. 36; *Davidge v. Chaney*, 4 Har. & M. (Md.) 393; *McGraw v. Davenport*, 6 Port. (Ala.) 319; *Cox v. Buck*, 5 Rich. (S. Car.) 604; *Chism v. Williams*, 29 Mo. 209; *Hall v. Priest*, 6 Gray (Mass.) 22; *Moffatt v. Strong*, 10 Johns. (N. Y.) 14; *Condict v. King*, 2 Beas. (N. J.) 375; *Fairchild v. Crane*, 2 Beas. (N. J.) 105.

In *Pennsylvania*, it was said in *Eachus's Appeal*, 91 Pa. St. 105, 108, that in gifts of personalty the phrase "die without issue" meant die without issue living at the death of the person the failure of whose issue is spoken of. This position is said to be founded upon the English decisions before the statute

1 Vict., ch. 26, § 29, and *Still v. Spear*, 3 Grant (Pa.) 306. Thus broadly stated it is submitted that it cannot be sustained. The English decisions above cited support the text. In *Still v. Spear* the words were "without leaving issue." *Smith's Appeal*, 23 Pa. St. 9; *Pott's Appeal*, 30 Pa. St. 168, and *Mengel's Appeal* 61 Pa. St. 248, which were not cited, sustain the text.

"There is perhaps no case in which the limitation over of personal estate, after an indefinite dying without issue, whether the first limitation were indefinite or expressly for life, has *ex vi termini* been confined to a dying without issue at the time of the death, but the courts have seized with avidity on any circumstance, however trivial, denoting an intent to fix the contingency at that period." *GIBSON, C. J.*, in *Seibert v. Butz*, 9 Watts (Pa.) 494. See *Eichelberger v. Barnitz*, 17 S. & R. (Pa.) 293, 295; *Ingersoll's Appeal*, 86 Pa. St. 240; *Snyder's Appeal*, 95 Pa. St. 174, 183.

2. 2 *Jarman on Wills* (5th Am. ed.) *504, *505.

"The rule [*i. e.* above distinction] may have been arrived at in the case of personal estate from the circumstance that it is not necessary to construe limitations over to be remainders; and unless some period is limited, the apparent intention of the testator will be entirely defeated in the event of the legatee not leaving any issue living at his death; whereas, in the case of real estate, the limitation, if construed as a remainder, would not fail altogether, but would take effect upon the determination of the estate, the e being nothing to prevent this in the rule against perpetuity, and the construction being assisted by the rule that in such cases the limitation must be construed as a remainder, if possible, instead of an executory devise." *PAGE WOOD, V. C.*, in *Parker v. Birks*, 1 K. & J. (Eng.) 160, 163.

"In relation to executory bequests of personal estates, these words may be restricted to mean a dying without issue living at the death of the party, by any clause or circumstance in the will that

2. Without Having Issue—Before He Has Any Issue—Without Children—Issue Alive, Surviving, or, Who Shall Attain Twenty-one.—The words “if he die without leaving issue,”¹ or “before he has any issue,”² or “without children” (where the context shows that the word children is used in the sense of issue)³ import an

can indicate or imply such intention in the testator; and in order to support the limitation over, if they can, courts generally incline to lay hold on any expression or circumstance in the will that seems to afford a ground for such construction.” BUCHANAN, C. J., in *Biscoe v. Biscoe*, 6 Gill & J. (Md.) 232, 237.

See also *Woodland v. Wallis*, 6 Md. 151; *Budd v. State*, 22 Md. 48; *Wallis v. Woodland*, 32 Md. 101; *Clogett v. Worthington*, 3 Gill (Md.) 83; *Edelen v. Middleton*, 9 Gill (Md.) 161; *Davidge v. Chaney*, 4 H. & M. (Md.) 393; *Usiton v. Usiton*, 3 Md. Ch. 36; *Allender v. Sussan*, 33 Md. 11; *Morehouse v. Cotheal*, 2 Zab. (N. J.) 430; *Brummet v. Barber*, 2 Hill (S. Car.) 543, 551; *De Treville v. Ellis*, 1 Bailey Eq. (S. Car.) 40; *Cudworth v. Thompson*, 3 Dessaus. (S. Car.) 256; *Clifton v. Haig*, 4 Dessaus. (S. Car.) 330; *Porter v. Ross*, 2 Jones Eq. (N. Car.) 196.

In *North Carolina*, since the act of 1784, abolishing entails, executory limitations of land and chattels are to be construed alike upon the presumption that the intention of the testator is that in each case the estate should go over on the same event. Hence a devise over of land upon the death of the first taker “without leaving issue,” or a limitation to survivors, will be good. *Jones v. Spaight*, 1 Car. L. Repos. (N. Car.) 544; *Zollicoffer v. Zollicoffer*, 4 Dev. & B. (N. Car.) L. 438, 441. See *Clapp v. Fogleman*, 1 Dev. & B. Eq. (N. Car.) 468; *Smith v. Chapman*, 1 H. & M. (Va.) 240; *Flinn v. Davis*, 18 Ala. 132; *Forman v. Troup*, 30 Ga. 496.

1. *Hawkins on Wills*, *206; *Lees' Case*, 1 Leon. (Eng.) 335; *Cole v. Goble*, 13 C. B. (Eng.) 445; E. C. L. R., vol. 76; *Eastwood v. Lockwood*, L. R., 3 Eq. Cas. (Eng.) 487, 495. See *Vaughan v. Dicks*, 20 Pa. St. 509; *Davidson v. Davidson*, 1 Hawks (N. Car.) 163; *Newton v. Griffith*, 1 Har. & G. (Md.) 111; *Arnold v. Brown*, 7 R. I. 188, 197.

But where there is a devise to A for life, “and if he has issue to A in fee, but if he die without issue then to B,” the restricted construction has been

adopted. *Shriver's Lessee v. Lynn*, 2 How. (U. S.) 43; *Clagett v. Worthington*, 3 Gill (Md.) 83; *Sheftall v. Roe*, 30 Ga. 453. *Contra*, *Waddell v. Rettew*, 5 Rawle (Pa.) 231; *Arnold v. Brown*, 7 R. I. 188; *Collis v. Kemp*, 11 Gratt. (Va.) 78. So as to personalty, where the gift is to A indefinitely. *Badger v. Harden*, 6 Rich. Eq. (S. Car.) 148.

2. *Newton v. Bernardine*, Moore (Eng.) 127, pl. 275; *Arnold v. Brown*, 7 R. I. 188, 197.

In some cases the words “die before having issue” are read “die without having had any issue,” and the estate becomes absolute on the birth of issue. *Sadler v. Wilson*, 5 Ired. Eq. (N. Car.) 296; *Marshall v. Rives*, 8 Rich. L. (S. Car.) 88; *Dashell v. Dishell*, 2 Har. & G. (Md.) 127; *Ray v. Euslin*, 2 Mass. 562.

3. *Raggett v. Beatty*, 5 Bing. (Eng.) 243; *Doe v. Webber*, 1 B. & Ald. (Eng.) 713; *Parker v. Birks*, 1 K. & J. (Eng.) 156.

The words “child” or “children” have not the technical force of the word *issue* in a limitation over, and generally refer to the time of the death of the first taker. *Morgan v. Morgan*, 5 Day (Conn.) 517; *Barney v. Arnold*, 1 N. Eng. R. 138; *Richardson v. Noyes*, 2 Mass. 56, 61; *Smith v. Hunter*, 23 Ind. 580; *Sherman v. Sherman*, 3 Barb. (N. Y.) 385, 387; *Hull v. Eddy*, 14 N. J. L. 169, 175. Compare *Bullock v. Seymour*, 33 Conn. 289.

The real distinction running through the cases appears to be that “children” is a word of personal description; *issue proprio vigore* indicates succession. Children will not be construed to mean issue unless the context of the will affirmatively shows that the testator intended to use it in that sense, and the inclination of the court against such construction is greater in the case of personal than in that of real estate. *STRONG, J.*, in *Bedford's Appeal*, 40 Pa. St. 18, 22; *citing Stone v. Maule*, 2 Sim. (Eng.) 490. See also *Brummet v. Barber*, 2 Hill (S. Car.) 543; *Mathis v. Hammond*, 6 Rich. Eq. (S. Car.) 399, 402, 403; *Sherman v. Sherman*, 3

indefinite failure of issue.¹

Barb. (N. Y.) 385; Doe v. Webber, 1 B. & Ald. (Eng.) 713; Parker v. Birks, 1 K. & J. (Eng.) 156.

Thus the words die "without leaving issue" or "children," in bequests of personalty, in the absence of controlling context, have been held to import a definite failure of issue. Clapp v. Fogleman, 1 Dev. & B. Eq. (N. Car.) 466; Boone v. Barnes, Rich. Eq. Cas. (S. Car.) 357.

But where there was a gift of real and personal estate to A for life, with gift over in case of his death "without leaving any child, or children, or their descendants," it was held that the gift over was upon an indefinite failure of issue in order to carry out the manifest intention that the issue should take, by raising an estate tail, by implication. Addison v. Addison, 9 Rich. Eq. (S. Car.) 58.

Devise to A, his heirs and assigns forever, but if A should die without leaving any child or children, to B, C, D, E and F, their heirs and assigns forever as tenants in common, with a limitation over to survivors in case any of them died under age and without issue. The testator, in a certain event, devised other property, subject to the same mode of distribution among the five devisees over as the before mentioned property given to A "in case he died without issue." Held, that the testator had, by the latter clause, expressly declared the meaning of the prior devise to be, if the first taker should die without issue. Doe v. Simpson, 5 Scott (Eng.) 770; 4 Bing. N. C. (Eng.) 333; 3 M. & G. (Eng.) 929. See also Beson v. Cosby, 4 De G. & S. (Eng.) 261; Egan v. Morris, 2 Ll. & Goo. (Eng.) 297.

Under a devise to A and her heirs, if she has any child; if not, after the death of herself and her husband, over, it has been held that A took an estate tail. Doe v. Banister, 7 M. & W. (Eng.) 292; Goodtitle v. Woodhull, Willes (Eng.) 592.

Words which would restrain the meaning of dying without issue to a dying at the death *a fortiori* have such restraining effect upon the phrase "dying without children." Thus, under a devise to A to hold "to her and her children forever," with a limitation over, if she should die leaving no children, the children take by purchase. Hannan v. Osborn, 4 Paige (N. Y.) 336.

So under a devise to A and her children, "the children taking their mother's share." Smith's Estate, 9 Phila. (Pa.) 348. Compare § II, 2.

Or to A "and such children as shall at her death be living and attain twenty-one. Tayloe v. Gould, 10 Barb. (N. Y.) 388. Or simply be *then living*. Huber's Appeal, 80 Pa. St. 348. Or if she leaves any at her death. Dougherty v. Dougherty, 2 Strobb. Eq. (S. Car.) 63. Or at her death to be equally divided between her children share and share alike. Bool v. Mix, 17 Wend. (N. Y.) 119; Moon v. Stone, 19 Gratt. (Va.) 130; Bowers v. Bowers, 4 Heisk. (Tenn.) 293; Stubbs v. Stubbs, 11 Humph. (Tenn.) 43; Williams v. Sneed, 3 Coldw. (Tenn.) 533. Or as tenants in common. Chew's Appeal, 37 Pa. St. 23.

Where the whole of a fund is given to the same persons and the limitation over of one moiety is thus explained to be intended to take effect on failure of children, instead of an indefinite failure of issue, but the limitation over of the other moiety on failure of issue of the prior taker, or on his decease without issue, is not so explained, the limitation over of the latter moiety will be construed to be intended to take effect on an indefinite failure of issue, though there may appear to be no reason for supposing but that both were intended to go over in the same event. Smith Ext. Int., § 548; Carter v. Bentall, 2 Beav. (Eng.) 551; Kirkpatrick v. Kirkpatrick, 13 Ves. (Eng.) 476.

"Issue Alive," "Surviving," or "Who Shall Attain Twenty-one."—A bequest over on the death of A "without issue alive," or "without surviving issue," imports a failure of issue at his death. Den v. Schenk, 3 Hals. (N. J.) 29; Nicholson v. Bettie, 57 Pa. St. 386; Kleppner v. Lavery, 70 Pa. St. 70.

A bequest over on death of A "without issue who shall attain twenty-one," means "an immediate defect consequent on the death of all A's issue before reaching their majority," an event which must take place, if at all, within twenty-one years after his own decease. Westenberger v. Reist, 13 Pa. St. 594, 601. See Manice v. Manice, 43 N. Y. 303.

1. Theobald on Wills (2nd ed.) 541; 2 Jarman on Wills (5th Am. ed.) *498; Hawkins on Wills, *213; Forth v. Chapman, 1 P. W. (Eng.) 663; Doe d.

3. Without Leaving Issue—Without Leaving Issue Behind Him.—

With regard to real estate, the words "die without leaving issue," or "leaving no issue," import an indefinite failure of issue;¹ but with regard to personalty, a failure at the death of the person spoken of.² The distinction exists although the words in ques-

Cadogan v. Ewart, 7 Ad. & El. (Eng.) 636; s. c., 3 Nev. & P. (Eng.) 197; *Doe d. Todd v. Duesbury*, 8 M. & W. (Eng.) 530; *Barnford v. Lord*, 14 C. B. (Eng.) 708; *Bias v. Smith*, 2 H. & N. (Eng.) 105; *Frakes v. Stanley*, 24 Beav. (Eng.) 485.

1. See *Allen v. Trustees*, 102 Mass. 262; *Kelley v. Meins*, 135 Mass. 231; *Malcolm v. Malcolm*, 3 Cush. (Mass.) 472; *Hawley v. Northampton*, 8 Mass. 38; *Whitford v. Armstrong*, 9 R. I. 394; *Ferris v. Gibson*, 4 Edw. Ch. (N. Y.) 707; *Foley v. Foley*, 17 Hun (N. Y.) 235; *Miller v. Macomb*, 26 Wend. (N. Y.) 229; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Kay v. Scates*, 37 Pa. St. 31; *Wynn v. Story*, 38 Pa. St. 166; *Haldeman v. Haldeman*, 40 Pa. St. 29; *Middleswaith's Admr. v. Blackmore*, 74 Pa. St. 414, 419; *Reinvehl v. Shirk*, 119 Pa. St. 108; *Moorehouse v. Cotheal*, 2 Zab. (N. J.) 430; *Chetwood v. Winston*, 40 N. J. L. 337; *Newton v. Griffith*, 1 Harr. & G. (Md.) 111; *Tongue v. Nutwell*, 13 Md. 415.

"Yet when used in connection with other words naturally meaning descendants of the first generation, and other issue representing children, or by the statute of distributions, *leave*s would retain its proper signification and be adequate as to any estate to restrict the failure of issue within the recognized limits of entailment." *WARDLAW, Ch.*, in *Addison v. Addison*, 9 Rich. Eq. (S. Car.) 28, 61. See *Whitworth v. Stuckey*, 1 Rich. Eq. (S. Car.), 404; *Perry v. Logan*, 5 Rich. Eq. (S. Car.) 202; *Carr v. Jeannerett*, 2 McCord (S. Car.) 66; *Cudworth v. Thompson*, 3 Dessaus. (S. Car.) 256; *Robards v. Jones*, 4 Ired. L. (N. Car.) 53; *Jones v. Speight*, 1 Car. L. R. 544.

Thus the words die "without leaving lawful issue surviving," or "leaving no issue or child," have been held to create a definite failure. *Nicholson v. Bettle*, 57 Pa. St. 386; *Hill v. Hill*, 74 Pa. St. 173; *Clapp v. Fogleman*, 1 Dev. & B. Eq. (N. Car.) 466. So "if he should leave no children." *Wight v. Barry*, 7 Cush. (Mass.) 105; *Van Dyke v. Vanderpool*, 1 McCarter (N. J.) 198; *Fairchild v. Crane*, 2 Beas. (N. J.) 105;

Hull v. Eddy, 14 N. J. L. 169. Or "leaving no lawful issue surviving then living." *Manice v. Manice*, 43 N. Y. 303. See *Westenberger v. Reist*, 13 Pa. St. 594.

See further, as to what words or circumstances will restrain the meaning of the phrase "leaving no issue" to a definite failure, *Eaton v. Straw*, 18 N. H. 320; *Dunn v. Bray*, 1 Call (Va.) 338; *Goodell v. Hibbard*, 32 Mich. 47; *Shiver's Estate*, 9 Phila. (Pa.) 354; *Bentley v. Naufman*, 3 W. N. C. (Pa.) 352; *Middleswarth v. Blackmore*, 74 Pa. St. 414.

In *Georgia and Alabama* it is held that the words "die without leaving issue" import a definite failure of issue in devises of realty as well as bequests of personalty. *Griswold v. Greer*, 18 Ga. 550. See *Flinn v. Davis*, 18 Ala. 132; *Edwards v. Bibb*, 43 Ala. 666, 675.

2. *Roper on Legacies*, *551; *Forth v. Chapman*, 1 P. W. (Eng.) 663; *Atkinson v. Hutchinson*, 3 P. W. (Eng.) 258; *Sabbarton v. Sabbarton*, Cas. temp. Talb. (Eng.) 55, 245; *Sheppard v. Lessingham*, Amb. (Eng.) 122; *Gordon v. Adolphus*, 3 B. P. C. (Toml. ed.) 306; *Taylor v. Clarke* (2nd ed. Eng.) 202; *Daintry v. Daintry*, 6 T. R. (Eng.) 307; *Radford v. Radford*, 1 Kee. (Eng.) 486; *Mansel v. Grove*, 2 Y. & C. C. C. (Eng.) 484; *Daniel v. Warren*, 2 Y. & C. C. C. (Eng.) 290; *Heather v. Winder*, 5 L. J. (N. S.) Ch. 41; *Hawkins v. Hamerton*, 16 Sim. (Eng.) 421; *Barnford v. Chadwick*, 2 W. R. (Eng.) 530; *Atkinson v. Hutchinson*, 3 P. Wms. (Eng.) 258; *Taylor v. Clarke*, 2 Eden (Eng.) 202; *Forth v. Chapman*, 1 P. W. (Eng.) 663; *Sheffield v. Lord Orrery*, 3 Atk. (Eng.) 288; *Lampley v. Blower*, 3 Atk. (Eng.) 396; *Stafford v. Buckley*, 2 Ves. Sr. (Eng.) 180. See *Southby v. Stonehouse*, 2 Ves. Sr. (Eng.) 616; *Daintry v. Daintry*, 6 T. R. (Eng.) 307; *Martin v. Long*, Prec. Ch. (Eng.) 15; *Goodtitle v. Pegden*, 2 T. R. (Eng.) 720; *Read v. Snell*, 2 Atk. (Eng.) 642, 646; *Mansell v. Grove*, 2 Yo. & Coll. (Eng.) 484; *Ladd v. Harvey*, 21 N. H. 514, 527; *Downing v. Wherrin*, 19 N. H. 9; *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Hall v. Priest*, 6 Gray

tion are applied to both descriptions of property in the same sentence.¹ The words *behind him*, in the phrase "die without leaving issue behind him," or "leaving no issue behind him," create a definite failure of issue whether applied to real or personal estate.²

(Mass.) 18; Theological Seminary v. Kellogg, 16 N. Y. 83; Rathbone v. Dyckman, 3 Paige (N. Y.) 9; Still v. Spear, 3 Grant (Pa.) 306; Eichelberger v. Barnitz, 9 Watts (Pa.) 447; Bedford's Appeal, 40 Pa. St. 18; Nicholson v. Bettie, 57 Pa. St. 386; Biscoe v. Biscoe, 6 Gill & J. (Md.) 232; Usitton v. Usitton, 3 Md. Ch. 36; Edelen v. Middleton, 9 Gill (Md.) 161; Allender v. Sussan, 33 Md. 11; Robert v. West, 15 Ga. 123; Moore v. Howe, 4 T. B. Mon. (Ky.) 199; Newman v. Miller, 7 Jones (N. Car.) 516; Robarós v. Jones, 4 Ired. (N. Car.) 53; Miller v. Williams, 2 Dev. & B. (N. Car.) 500; Perry v. Logan, 5 Rich. Eq. (S. Car.) 202; Mazyck v. Vanderhurst, 1 Bailey Eq. (S. Car.) 48; Flinn v. Davis, 18 Ala. 132; Bethea v. Smith, 40 Ala. 415.

The restrictive force of the word *leaving*, as applied to either real or personal estate, was at one time denied. Porter v. Bradley, 3 T. R. (Eng.) 146; Patterson v. Ellis, 11 Wend. (N. Y.) 259. But is now firmly established as to personality. Crook v. De Vandes, 9 Ves. 197, 203; Elton v. Eason, 19 Ves. 77; Daintry v. Daintry, 6 T. R. (Eng.) 314; 2 Jarman on Wills (5th Am. ed.) *499.

Real estate directed to be converted is for the purpose of this distinction regarded as personality. 2 Jarman on Wills (5th Am. ed.) *498. See Farthing v. Allen, 2 Mad. (Eng.) 310; Hawkins v. Hamerton, 16 Sim. (Eng.) 410.

The principle applies to bequests of leaseholds as well as personal chattles. Forth v. Chapman, 1 P. W. (Eng.) 663; Allender v. Sussan, 33 Md. 11.

1. Forth v. Chapman, 1 P. W. (Eng.) 663; Nazyck v. Vanderhurst, 1 Bailey Eq. (S. Car.) 48.

In *Alabama*, it seems that the words "without leaving issue," in a gift of realty and personality together, will be construed to import a definite failure of issue. Edwards v. Bibb, 43 Ala. 666. See Also Clapp v. Fogleman, 1 Dev. & Bat. (N. Car.) Eq. 466; Jenkins v. Jenkins, 64 N. H. 407, 408.

See further, as to the distinction between real and personal estate. Crook v. De Vandes, 9 Ves. (Eng.) 203; Radford

v. Radford, 1 Kee. (Eng.) 486; Doe v. Ewart, 7 Ad. & El. (Eng.) 636.

Supplying the Word Leaving.—Where the testator in one part of the will uses the phrase "without leaving issue" and in another "without issue," the latter expression will be construed to correspond with the former where the general plan of the will seems to authorize it. 1 Jarman on Wills (5th Am. ed.) *487, *531, *532; 2 Jarman on Wills (5th Am. ed.), *500, n.; Sheppard v. Lessingham, Amb. (Eng.) 122; Radford v. Radford, 1 Kee. (Eng.) 486. See also Albee v. Carpenter, 12 Cush (Mass.) 382; Arnold v. Brown, 7 R. I. 188; Dumond v. Stringham, 26 Barb. (N. Y.) 104; Norris v. Beyea, 13 N. Y. 273.

Thus where the limitation was to testator's brothers, E and C, or the heirs of their bodies, but if either brother should die *leaving* lawfully begotten heirs of his body, then the share or portion of such brother should descend to such lawfully begotten heirs; but if one brother should die without *lawful issue* then to the surviving brother, and in case both brothers should demise *without issue lawfully begotten*, over, *held*, that the gift over was good. "The first contingency is expressly on either brother dying *leaving* lawfully begotten heirs of his body. Then come the words, 'but if one brother shall die without *lawful issue*'—evidently meaning without *leaving* lawful issue at the time of his death—and last comes the contingency of 'both brothers demise without issue lawfully begotten,' by a *natural* if not *necessary* implication meaning without *leaving* issue at the time of their death." Greenway v. Greenway, 2 De G., F. & J. (Eng.) 128, 137.

But if there is anything in the limitations of the will to indicate that the testator intended each expression to have its individual force, the word *leaving* will not be supplied. Particularly will this be so where the effect of supplying the word is to divest the interest of a child who happened not to survive its parent. Pye v. Linwood, 6 Jur. (Eng.) 618.

2. Sheffield v. Lord Orrery, 3 Atk.

4. **Without Leaving Issue Living at Time of Death.**—If the gift over is expressly limited to take effect on the preceding devisee dying without leaving issue *living at the time of his death*, a definite failure of issue is created.¹

5. **Gift Over Expressly Limited to Take Effect On, At or After Decease of First Taker.**—In regard to personality, in the absence of controlling context, a gift over if A die without issue, expressly limited to take effect *on, at or after* his decease, restrains the indefinite meaning of the phrase “die without issue” to a failure of issue at A’s death.² So with regard to real estate where the words are *at or on*,³ and it is immaterial whether A takes the fee or only a

(Eng.) 282, 287; *Porter v. Bradley*, 3 T. R. (Eng.) 143; *Eichelberger v. Barritz*, 9 Watts (Pa.) 447; *Nicholson v. Bettle*, 57 Pa. St. 384, 387.

1. *Doe d. Barnfield v. Welton*, 2 B. & P. (Eng.) 324. See *Verulam v. Bathurst*, 13 Sim. 374; *WOODWARD, J.*, in *Vaughan v. Alicks*, 8 Harr., 20 Pa. St. 513; *Henry v. Means*, 2 Hill (S. Car.) 328. *A fortiori* then is this true of personality, and it is immaterial whether the gift be of the subject itself or only of the use. *Cleveland v. Havens*, 2 Beas. Ch. (N. J.) 101. Nevertheless, if words of the preceding limitation are such as would create an estate tail in realty, or an absolute interest in personality, the restricted construction will not affect the nature of the preceding estate. See *post*, § VII, 2.

2. *Nichols v. Hooper*, 1 P. W. (Eng.) 198; *Pinkbury v. Elkin*, 1 P. W. (Eng.) 563; *Trotter v. Oswald*, 1 Cox (Eng.) 317; *Wilkinson v. South*, 7 T. R. (Eng.) 555; *Brackshaw v. Vile*, 1 S. & St. (Eng.) 604; *Dunk v. Fenner*, 2 Russ. & My. (Eng.) 557; *Strafford v. Powell*, 1 Ba. & Be. (Eng.) 1; *Smith Ex. Int.*, § 557; *Roper on Legacies*, *1549; *Fea. C. R.* (10th ed.) 471.

In regard to personal estate LORD HARDWICKE seemed to be of opinion that “on” and “after” were equivalent. *Beauclerk v. Dormer*, 2 Atk. (Eng.) 309, 313. It is quite probable, though, that the latter word is not quite so strong. Such is the case in regard to real estate. *PAGE WOOD, V. C.*, in *Parker v. Birks*, 1 K. & J. (Eng.) 165.

In *Dorm v. Penny*, 19 Ves. 548, 1 Mer. 22, SIR WM. GRANT intimated a doubt whether the word *after* was rightly held restrictive in *Pinbury v. Elkin*. See also *Barlow v. Salter*, 17 Ves. (Eng.) 483. But after *Trotter v. Oswald*, 1 Cox (Eng.) 312, and *Wilkinson v. South*, 7 T. R. (Eng.) 555, Mr.

Jarman thinks its authority must be considered established. 2 Jarman on Wills (5th Am. ed.) *525.

“Immediately after” is stronger than “after,” on account of the greater definiteness of the expression. 2 Jarman on Wills (5th Am. ed.) *523, 525; *Stratton v. Payne*, 3 B. P. C. (Toml. ed.) 99, cited in *Read v. Snell*, 2 Atk. (Eng.) 647.

3. *Parker v. Birks*, 1 K. & J. (Eng.) 156; *Ex parte Davies*, 2 Sum. N. S. (Eng.) 114; *Coltsman v. Coltsman*, L. R., 3 H. L. (Eng.) 121; *Doe d. Smith v. Webber*, 1 B. & Ald. (Eng.) 713; *Doe d. King v. Frost*, 3 B. & Ald. (Eng.) 546; *Heard v. Horton*, 1 Denio (N. Y.) 165; s. c., 43 Am. Dec. 659; *Jones v. Jones*, 20 Ga. 701.

So if the devise to A is in terms sufficient to give a *constructive* (though not an express) fee simple, as if the devise be to A, he paying £50 with a gift over if A die without issue, to take effect on the death of A. *Hawkins on Wills*, *207; *Blinston v. Warburton*, 2 K. & J. (Eng.) 400.

After.—There seems no reason to doubt that in the case of realty the words “after his decease” would *prima facie* mean immediately after, and receive the same construction as in the case of personality. Such was, in fact, the construction of a gift of all the residue, “both real and personal.” *Trotter v. Oswald*, 1 Cox (Eng.) 317. So where property was devised to B after the death of A. *Theological Seminary v. Kellogg*, 16 N. Y. 84. See *Downing v. Wherrin*, 19 N. H. 9; *Atwell v. Barney*, *Dudley* (Ga.) 207.

The distinction between the words *on* and *after* appears to be that the latter indicates a *punctum temporis* somewhat less exactly than the former, and hence is not quite so strong. *PAGE WOOD, V. C.*, in *Parker v. Birks*, 1 K. & J.

life estate owing to the absence of words of limitation.¹

(Eng.) 165. See *Walter v. Drew*, Com. Rep. (Eng.) 373; *Doe d. Cock v. Cooker*, 1 East (Eng.) 229; *Jones v. Ryan*, 9 Ir. Eq. Rep. 249. Compare *Ex parte Davies*, 2 Sim., N. S. (Eng.) 114, where the word was *at*. *Olivant v. Wright*, 24 W. R. (Eng.) 84.

At and On.—There is no distinction between *at* and *on*. *KINDERSLEY, V. C.*, in *Ex parte Davies*, 2 Sim., N. S. (Eng.) 114.

Context may of course show that the recognized construction of *on* or *at* was not intended. *Peyton v. Lambert*, 8 Jr. Com. L. Rep. 485.

1. *Theobald on wills* (2nd ed.) 543; *Coltsman v. Coltsman*, L. R., 3 H. L. (Eng.) 121.

"Where the preceding devisee would take the fee, the convenience is all on the side of the restricted construction, which renders such fee defeasible on his not leaving issue at his death, and places the estate out of the power of the first taker, who might, if he were tenant in tail (as he would be if the words were construed to mean an indefinite failure of issue), defeat the ulterior estate. To prevent this consequence, the courts have generally, in such cases, lent a willing ear to the arguments in favor of the restricted (and which we have seen to be the popular) interpretation of these words. On the other hand, where the first devise would confer an estate for life only, the restricted construction imputes a very improbable intention to the testator; for, as it raises no estate tail in the first devisee, nor (it should seem) an implied estate by purchase in the issue, the land goes absolutely from the devisee at his death, whether he leave issue or not; and that event is material only as bearing on the right of the ulterior devisee; for, although the property ceases to belong to the prior devisee, whether he leave issue surviving him or not, yet it is to pass over to the remainder man only in case the prior devisee do not leave issue, which it is hard to suppose could have been really meant." 2 *Jarman on Wills* (5th Am. ed.) *519, *520.

Accordingly the rule, extracted from the earlier cases, is: "That when there is nothing in the will to give an estate to the issue, or to give the ancestor more than a life interest, words in the limitation over not directly expressing, but which in the generality of cases

would be considered as intimating, an intention on the part of the testator that the failure of issue should be confined to a limited period, shall not have this effect; but that, on the contrary, the gift over shall, if possible, be construed as taking effect on an indefinite failure of issue, for the purpose of creating an estate tail in the ancestor and thereby securing a dissolution of the property to his issue. Prior on Issue, § 104. Approved by *PAGE WOOD, V. C.*, in *Blinston v. Warburton*, 2 K. & J. (Eng.) 400, 405. This construction is supported by *Simmons v. Simmons*, 8 Sim. (Eng.) 22; *Wyld v. Lewis*, 1 Atk. (Eng.) 432; s. c., *West's Rep.* 311; *Butt v. Thomas*, 2 Ex. (Eng.) 235; 1 H. & N. (Eng.) 109; *Hawkins on Wills*, *207; 2 *Jarman on Wills* (5th Am. ed.), *520; *Hellem v. Severs*, 24 Grant Ch. (U. C.) 320, 327.

From *LORD HARDWICKE's* memorandum, added to his own note to *Wyld v. Lewis*, *West's Rep.* 311, it appears that the prevailing idea in his mind was to put such construction upon the will as would secure the estate to the testator's grandchildren. Nor will the restricted construction be adopted where the gift to the first taker standing alone, would confer an estate tail. *Hawkins*, *207; *Hellem v. Severs*, 24 Grant Ch. (U. C.) 320, 327; *Riggs v. Sally*, 3 Shep. (Me.) 408, 411.

The preceding estate tail would not be cut down by a gift over on definite failure of issue, under any circumstances. See *post*, § VII, 2. Otherwise where the devise to the first taker is a constructive fee. *Blinston v. Warburton*, 2 K. & J. (Eng.) 400.

Such, then, being the preceding state of the law, what construction is to be placed upon *Coltsman v. Coltsman*? Are the above distinctions entirely abolished, or only modified? In this case testator devised and bequeathed to his son, *John Coltsman*, "all those my *property*, lands, tenements and premises at and about *Flesk Castle*," and also "my lands, tenements and premises at *Dick's Grove*." He afterwards made a codicil, in which he said: "If it should happen that my son, *John Coltsman*, die without heirs of his body, lawfully, etc.; in that case, and in default of such heirs, I do hereby devise and direct that my lands, etc., at *Flesk Castle* . . . and also my lands at *Dick's Grove*," all subject to an annuity to his wife, and

6. **Effect of the Word "Then."**—In the absence of controlling context, the word "*then*" in a gift to A, and if A die without issue, *then* to B, is a particle of reference connecting the consequence with the premises, meaning *in that event*, or *if that happens*, rather than an adverb of time, and does not affect the construction either in regard to real or personal estate.¹

with reasonable provision for his son's wife, "shall, *at my son's death*, descend and be transferred to my grandson, D. C." *Held*, that, as to both devises, the words "at my son's death" restrained the words "die without heirs of the body" to a failure of issue at the son's death; that, as to *Flesk Castle*, the word *property* carried the fee, and the effect of the will and codicil together was to create an executory devise over in the event of John Coltsmann dying without heirs of his body living at his death; but, as to *Dick's Grove*, the words of limitation over, being the same, must be construed in the same way and, as under the words of the will, as the law then stood, John Coltsmann took an estate for life only; the gift over took effect as a contingent remainder, in the event of John Coltsmann dying without heirs of his body living at his death.

Mr. Theobald seems to be of opinion that this decision has abolished the distinction laid down by Mr. Prior.

[In 2 Jarman on Wills (5th Am. ed.) *520, *521, it is suggested that] The English editor of the 4th London edition of Jarman on Wills seems to be of opinion that Coltsmann v. Coltsmann may be reconciled with the view taken by Mr. Prior and Mr. Jarman by restraining its application to cases in which the fee simple and the life estate are both devised to the same person, with a gift over if he die without issue, and afterwards both given over in one and the same sentence *at his death*. 2 Jarman on Wills (5th Am. ed.) *520, 521.

This position is strengthened by the fact that it was unnecessary to decide whether the estate of John Coltsmann was for life only, with contingent remainder to D. C., or enlarged to a fee tail by the gift over; as in one case his disentailing deed destroyed the contingent remainder and in the other barred the entail, and in either gave him the fee. This view is also strengthened by the fact that *Wylde v. Lewis*, West's Rep. 311, was not cited.

On the other hand, it should be observed that the position that the words

"*at my son's death*" in the limitation over should have the same construction as to *Dick's Grove* that they had in the case of *Flesk Castle* (see p. 132) is inconsistent with the position that John Coltsmann's estate could be enlarged by the limitation over, to an estate tail; for those words in the case of *Flesk Castle* created a definite failure of issue, and a gift over on definite failure of issue has no effect on the preceding limitation. Moreover, the opinion of LORDS CRANWORTH and CHELMSFORD was express that John Coltsmann took an estate for life only, with contingent remainder to D. C. (see pp. 134, 136).

The case was not cited in *Hillem v. Severs*, 24 Grant Ch. (U. C.) 320, and the court does not appear to have been aware of its decision.

1. *Beauclerk v. Dormer*, 2 Atk. (Eng.) 308; *Stanley v. Lennard*, 1 Ed. (Eng.) 87; *LORD BROUGHAM*, in *Campbell v. Harding*, 2 Ry. & My. (Eng.) 411; *Pye v. Linwood*, 6 Jur. (Eng.) 619; *Gill v. Barrett*, 29 Beav. (Eng.) 372; *Peyton v. Lambert*, 8 Ir. Com. L. Rep. 485; *Thomas v. Mann*, 3 Har. & J. (Md.) 238; *Royall v. Eppes*, 2 Munf. (Va.) 479; *Mathews v. Page*, 1 Mur. (N. Car.) 42; *Bryson v. Davidson*, 1 Mur. (N. Car.) 143; *Porter v. Ross*, 2 Jones Eq. (N. Car.) 196; *Clifton v. Haig*, 4 Dessaus. (S. Car.) 330.

In some cases in regard to personal estate the words "then and in that case," when somewhat aided by the context have been *held* sufficient to restrain the words "dying without issue" to the death of the person spoken of, but it seems that they have no appreciable effect upon a devise of realty. *Diehl v. King*, 6 S. & R. (Pa.) 29, 32; *Lawrence v. Lawrence*, 105 Pa. St. 335. See *Royall v. Eppes*, 2 Munf. (Va.) 479; *Timberlake v. Graves*, 6 Munf. (Va.) 174; *Josetti v. McGregor*, 49 Md. 202, 313.

But unless aided by context it can have no restraining effect even in case of personality. *Bryson v. Davidson*, 1 Mur. (N. Car.) 143; *Chism v. Williams*, 29 Mo. 288, 296; *Thomas v. Mann*, 3 Har. & J. (Md.) 238.

7. Die Under Twenty-one and Without Issue—Unmarried, or Before Marriage, and Without Issue.—Where the dying without issue is combined with an event personal to the devisee, as where the devise is to A and his heirs with a limitation over if he die under twenty-one and without issue,¹ or die without issue and unmar-

The *Georgia* cases manifest such a clear intent to evade the indefinite construction, that they cannot be relied upon outside the State. See *Harris v. Smith*, 16 Ga. 550; *Griswold v. Greer*, 18 Ga. 550.

The phrase "then after his decease," "then upon his death," has a restraining effect when uncontrolled by the context, by reason of the "on" or "after," rather than the word "then." *Wilkins v. South*, 7 T. R. (Eng.) 555; *Payton v. Lambert*, 8 Ir. Com. L. Rep. 485.

But in *Snyder's Appeal*, 95 Pa. St. 174, 183, "then" was held an adverb of time and sufficient by itself to create a definite failure of issue.

1. 2 Jarman on Wills (5th Am. ed.) *506, 507; Hawkins on Wills, *212; *Smith Ex. Int.*, §§ 549, 551, 552; *Hinde v. Lyon*, 3 Leon (Eng.) 64; *Price v. Hunt*, Pollex. (Eng.) 645; *Hanbury v. Cockerill*, 8 Vin. Ab. Dev. 2. (a), pl. 4; *Anon Dyer*, 124 a, 354 a; *Eastman v. Baker*, 1 Taunt (Eng.) 174; *Toovey v. Bassett*, 10 East (Eng.) 460; *Right v. Day*, 16 East (Eng.) 67; *Glover v. Monckton*, 3 Bing. (Eng.) 13; s. c., 2 E. C. L. R.; *Doe d. Johnson v. Johnson*, 8 Ex. (Eng.) 81; *Gwyne v. Berry*, Ir. Rep., 9 C. L. 494; *Morris v. Morris*, 17 Beav. (Eng.) 198; *Beachcroft v. Broome*, 4 D. & E. (Eng.) 441; *Glover v. Monckton*, 3 Bing. (Eng.) 15; *Bell v. Scammon*, 15 N. H. 381; *Downing v. Wherrin*, 19 N. H. 9; 49 Am. Dec. 139; *Ray v. Euslin*, 2 Mass. 554; *Parker v. Parker*, 5 Met. (Mass.) 154; *Jackson v. Blansham*, 3 Johns. (N. Y.) 54; *Norris v. Beye*, 13 N. Y. 273; *Welsh v. Elliott*, 13 S. & R. (Pa.) 205; *Hauer v. Sheetz*, 3 Yea. (Pa.) 205; *Holmes v. Holmes*, 5 Binn. (Pa.) 253; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Thornton's Exrs. v. Krepps*, 37 Pa. St. 391; *Doebler's Appeal*, 64 Pa. St. 9; *Berg v. Anderson*, 72 Pa. St. 87; *Beltzhoover v. Costen*, 7 Barr (Pa.) 13. See also *Holcomb v. Lake*, 1 Dutch. (N. J.) 605; *Brogdon v. Walker*, 2 Harr. & J. (Md.) 285; *Chew v. Weems*, 1 Harr. & M. (Md.) 463; *Dallam v. Dallam*, 7 Harr. & J. (Md.) 172; *Watkins v. Sears*, 3 Gill (Md.) 172; *Neal v. Cosden*, 34 Md. 421;

Carpenter v. Boulden, 48 Md. 122; *Adams v. Chaplin*, 1 Hill (S. Car.) 265; *Rivers v. Fripp*, 4 Rich. Eq. (S. Car.) 276; *Perry v. Logan*, 5 Rich. Eq. (S. Car.) 202; *Carr v. Jeannerett*, 2 McCord (S. Car.) 66; *Massie v. Jordan*, 1 Lea (Tenn.) 646.

Where the gift over is to take effect in case the first taker "die under twenty-one and without issue," or "in his minority and without issue," or "under twenty-one or without issue" (or being read *and*), both contingencies must occur to enable the gift over to take effect. *Hauer v. Sheetz*, 3 Yeates (Pa.) 205; *Holmes v. Holmes*, 5 Bin. (Pa.) 253; *Welsh v. Elliott*, 13 S. & R. (Pa.) 205; *Beltzhoover v. Costen*, 7 Barr (Pa.) 13; *Thornton's Exrs. v. Krepps*, 37 Pa. St. 391; *Neal v. Cosden*, 34 Md. 421.

If the first taker dies without issue after having attained twenty-one, his estate is not defeated. *Grimball v. Patton*, 70 Ala. 626; *Williams v. Dickerson*, 2 Root (Conn.) 191; *Neal v. Cosden*, 34 Md. 421.

Where the gift over was to take effect in case the testator's son should not live to attain twenty-one, or *in case, he should live to attain such age, but should afterwards die without lawful issue*, and the son attained twenty-one, it was held that he took a fee with an executory devise over, in the event of his dying without having issue living at his death. *Glover v. Monckton*, 3 Bing. (Eng.) 13.

So where the words were, "if he die without issue, either before or after coming of age." *Booker v. Booker*, 5 Humph. (Tenn.) 508.

Bequest to A, "when he shall arrive at twenty-one years of age," and "if he should die without issue," over. *Held*, if A should attain his majority, receive the estate, and then die without issue, the limitation over will be good. *Sims v. Conger*, 39 Miss. 231; 77 Am. Dec. 671.

Where Devise to First Taker Is in Tail.—Where the devise to the first taker is an estate tail, a gift over, if such first devisee dies under age and without issue, takes effect as a contingent remainder dependent upon the

ried, or before marriage, or without leaving a husband or wife¹—

double contingency of the first taker dying under the specified age and without issue. *Grey v. Pearson*, 6 H. L. Cas. *60, 61. See *Marshall v. Grime*, 28 Beav. (Eng.) 375.

This necessarily follows from the fact that a gift over, or definite failure of issue, has no effect upon the preceding limitation. See *post*, § VII, 2.

Or Construed And.—If the gift over be in case A die under twenty-one, *or* without issue, *or* will be construed *and*, "to avoid the mischief which would otherwise happen of carrying over the estate if the first devisee died under the age of twenty-one, though he had left issue, when it was the apparent intention of the deviser that both events should happen, the dying under twenty-one *and* without issue, before the estate should go over." *ELLENBOROUGH, C. J.*, in *Right v. Day*, 16 East (Eng.) 67, 68. See also *Arnold v. Buffum*, 2 Mas. (U. S.) 208, 222; *Ray v. Euslin*, 2 Mass. 554; *Parker v. Parker*, 5 Met. (Mass.) 134, 136; *Hunt v. Hunt*, 11 Met. (Mass.) 88; *Jackson v. Blansham*, 3 Johns. (N. Y.) 54; *Hauer v. Sheetz*, 3 Yeates (Pa.) 203; *Rapp v. Rapp*, 6 Barr (Pa.) 45; *Beltzhoover v. Costen*, 7 Barr (Pa.) 13; *Holcomb v. Lake*, 1 Dutch. (N. J.) 605; *Abrahams v. English*, 2 Harr. (N. J.) 280; *Doe v. Mugway*, 3 Green (N. J.) 330; *Doe v. Roe*, 1 Harr. (Del.) 476; *Brogdon v. Walker*, 2 Harr. & J. (Md.) 285; *Dallam v. Dallam*, 7 Harr. & J. (Md.) 172; *Watkins v. Sears*, 3 Gill (Md.) 492; *Chew v. Weems*, 1 Harr. & M. (Md.) 463; *Witsell v. Mitchell*, 3 Rich. (S. Car.) 289; *Carr v. Jeannerett*, 2 McCord (S. Car.) 66; *Perry v. Logan*, 5 Rich. Eq. (S. Car.) 202; *Munroe v. Holmes*, 1 Brevard (S. Car.) 319; *Bostick v. Smith*, 1 Spears (S. Car.) 258. The fact that the devisees were of full age at the time the will was made does not affect the construction. *Beltzhoover v. Costen*, 7 Barr (Pa.) 13.

But if the devise to the first taker, instead of being to A and his heirs forever, or to A for life, and after his death to his heirs (which confers a fee under rule in Shelly's case), is to A and *the heirs of his body*, or in any other words which vest an estate tail in the first taker, *or* will retain its natural construction. *Mortimer v. Hartley*, 6 Ex. (Eng.) 46, 60, 62. See *Grey v. Pearson*, 6 H. L. Cas. (Eng.) *60, *61. *Contra*,

Ward v. Waller, 2 Spears (S. Car.) 786.

For further discussion of changing words in testaments, see WILLS.

And Construed Or.—Where the limitation over was to take effect in case the legatees or devisees *die unmarried and without issue*, the clause has been sometimes construed in the disjunctive, and the gift over *held* to take effect on the death of one married but without leaving issue. *Wilson v. Bayly*, 3 B. P. C. (Toml. ed.) 195; *Hepworth v. Taylor*, 1 Cox (Eng.) 112; *Maberly v. Strode*, 3 Ves. (Eng.) 350; *Bell v. Phynn*, 7 Ves. (Eng.) 459; *Mackenzie v. King*, 12 Jur. (Eng.) 787; 17 L. J. Ch. (Eng.) 448.

But where the limitation over was to take effect if the devisee died "under the age of twenty-one and without issue," and the devisee attained twenty-one, but died without issue; *held*, that the words must be read in their ordinary sense as written, and that the limitation over depended upon the double event of the devisee dying under twenty-one and without issue, which, not having happened, the limitation over did not take effect, but the estate descended to the heir at law of the testator. *Grey v. Pearson*, 6 H. L. Cas. (Eng.) *60, *61.

This case has been considered as overruling *Bell v. Phynn*, 3 Ves. (Eng.) 350; and *Maberly v. Strode*, 7 Ves. (Eng.) 459, by *SIR J. ROMILLY*, in *Seecombe v. Edwards*, 28 Beav. (Eng.) 440; *L. R.*, 1 Eq. 680. See also *Dillon v. Harris*, 4 Bligh, N. S. (Eng.) 329.

1. 2 Jarman on Wills (5th Am. ed.), *507; *Doe d. Johnson v. Johnson*, 8 Ex. (Eng.) 81; *Doe d. Everett v. Cooke*, 7 East (Eng.) 269; *Doe d. Baldwin v. Rawding*, 2 B. & Ald. (Eng.) 441; *Jones v. Sotheron*, 10 Gill & J. (Md.) 126; *Downing v. Wherrin*, 19 N. H. 9; 49 Am. Dec. 139; *Garland v. Watt*, 4 Ired. (N. Car.) L. 287; *Schultz v. Schultz*, 10 Gratt. (Va.) 358.

Contra, *O'Donohoe v. King*, 8 Ir. Eq. Rep. 185.

Where the devise was to S and his heirs, but in case S should die before attaining twenty-one, or after having attained that age should die unmarried, or having been married should die without lawful issue, then over, it was *held* that S took an estate in fee with

which is the meaning of unmarried in this connection¹—the indefinite meaning of the words *die without issue* is restrained to a dying under the given age and leaving no issue surviving, or unmarried, before marriage, or without leaving a husband or wife.² The principle applies with even greater force to bequests of personality.³

8. Gift Over if A Survives B and Dies Without Issue, or in Case the Issue Die Under Age.—If the event with which the dying without issue is associated is not personal to the devisee, as where the gift over is to take effect if A survives B (a preceding devisee)

an executory devise over on the happening of any of the three specified events, and that the last event was his death without leaving issue surviving him. *Doe d. Johnson v. Johnson*, 8 Ex. (Eng.) 81. Compare *Gleated v. Gleated*, 26 Beav. (Eng.) 621; *Deihs v. King*, 6 S. & R. (Pa.) 32. But in *O'Donohoe v. King*, 8 Ir. Eq. Rep. 191, the court considered the principle of *Glover v. Monckton*, 3 Bing. (Eng.) 13, inapplicable to a gift over, "if A died unmarried and without issue," unless assisted by the context. It should also be observed that the construction in *Doe v. Johnson* was somewhat aided by the context. It is believed, however, that the weight of authority is decidedly in favor of the position in the text.

In Pennsylvania, the words "unmarried and without issue," were said to be sufficient to create a definite failure of issue. *SERGEANT, J.* in *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447.

But later cases hold that the indefinite construction will be retained, in devises of realty, unless the restricted force of the word "unmarried" is aided by the context. *Matlack v. Roberts*, 54 Pa. St. 148.

But see *McCullough v. Fenton*, 65 Pa. St. 418, 427. On the other hand, a devise over on death *before marriage* is itself restrictive. *Jessup v. Smuck*, 16 Pa. St. 327.

In regard to personality, the words "*unmarried and without issue*," are in themselves sufficient to create a definite failure of issue.

Deihs v. King, 6 S. & R. (Pa.) 32; *Rapp v. Rapp*, 6 Pa. St. 49.

1. 2 Jarman on Wills (5th Am. ed.) *507.

"The word *unmarried* means either never having been married or not having a husband or wife at the time. The former is the ordinary signification and it

was so used in the cases stated above (*i. e.* *Wilson v. Bayly*, 3 B. P. C. Toml (Eng.) 195; *Hepworth v. Taylor*, 1 Cox (Eng.) 112; *Maberly v. Strode*, 3 Ves. (Eng.) 450; *Bell v. Phynn*, 7 Ves. (Eng.) 459; *Mackenzie v. King*, 12 Jur. 787; s. c., 17 L. J. Ch. (Eng.) 448), where, however, the effect of such construction was to render the word inoperative. But the sound rule in such cases would seem to be to construe the expression as used in the latter, being its less accustomed sense, which has the two-fold advantage that it removes the necessity of changing the particle *and* to *or*, and gives effect to all the testator's words." 1 Jarman on Wills (5th Am. ed.) *521.

2. Thus where there was a gift over in case the devisee "should die under the age of *twenty-one years, unmarried and without lawful issue*," another devisee died under age and without issue, but leaving a husband surviving, it was held the gift over failed. *Doe d. Baldwin v. Rawding*, 2 B. & Ald. (Eng.) 441. See also *Doe d. Everett v. Cooke*, 7 East (Eng.) 269; *Re Sanders' Trusts*, L. R., 1 Eq. 675; *Mangham v. Vincent*, 9 L. J., N. S., Ch. (Eng.) 329; s. c., 4 Jur. (Eng.) 452. Compare *In re Thistlewayte's Trust*, 31 Eng. L. & Eq. 547; *Radford v. Willis*, L. R., 7 Ch. (Eng.) 7.

For further discussion of meaning of word *unmarried* in wills and marriage settlements, see LEGACIES AND DEVISES, AND WILLS.

3. *Martin v. Long*, 2 Vern. (Eng.) 151; *Pawlett v. Doggett*, 2 Vern. (Eng.) 86; *Bradshaw v. Skelbeck*, 2 Bing. N. S. (Eng.) 182; *Morris v. Morris*, 17 Beav. (Eng.) 198; *Deihs v. King*, 6 S. & R. (Pa.) 28; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Rapp v. Rapp*, 6 Pa. St. 45; *Grimball v. Patton*, 70 Ala. 626; *Sims v. Conger*, 39 Miss. 231; s. c., 77 Am. Dec. 671.

and dies without issue,¹ or if A should die without issue, or such issue should die under the age of twenty-one years,² the preceding principle has no application, and A takes an estate tail.

9. Dying Without Issue in Lifetime of Person Living at Testator's Decease, or Before Possession or Period of Distribution.—Where the dying without issue is restricted to some definite period collateral to the devisee, as where the gift over is to take effect in case he should die without issue in the lifetime of some person living at the testator's decease,³ or before the time fixed for possession or distribution,⁴ the failure of issue is restrained within the prescribed period.

10. Gift Over to Survivors or to Persons "Then Living."—In regard to personal estate, *prima facie*, a bequest over to the survivor or survivors of two or more persons after the death of one without issue, affords the presumption that an indefinite failure of issue could not have been intended.⁵ But in regard to devises of

1. *Fekes v. Standley*, 24 Beav. (Eng.) 485.

2. 2 Jarman on Wills (5th Am. ed.) *508; SHADWELL, V. C., in *Grimshawe v. Pickup*, 9 Sin. (Eng.) 596. But see *Booker v. Booker*, 5 Humph. (Tenn.) 505.

The contingency of the issue dying under age is comprised in the contingency expressed by the preceding words, and therefore superfluous. But see *Smith Ex. Int.*, § 260.

3. 2 Jarman on Wills (5th Am. ed.) *508; *Hawkins on Wills*, *211, *213; *Pells v. Brown*, Cr. Jac. (Eng.) 590; *Jarman v. Pye*, L. R., 2 Eq. (Eng.) 784. See *Doe d. Knight v. Chaffey*, 16 M. & W. (Eng.) 656; *Toman v. Dunlap*, 18 Pa. St. 72; *Daley v. Koons*, 90 Pa. St. 246; *Goldsbrough v. Martin*, 41 Md. 488; *Lesley v. Collier*, 3 Rich. Eq. (S. Car.) 125.

The principle has been applied to both real and personal estate. *Hawkins on Wills*, *211.

4. *Crowder v. Stone*, 3 Russ. (Eng.) 217. See as to realty *Bennett v. Lowe*, 5 M. & Pay. (Eng.) 485; 7 Bing. (Eng.) 535; *Ex parte Bate*, 11 W. R. (Eng.) 417, 1 N. R. (Eng.) 470.

"Death without lawful" issue denotes generally an indefinite failure of issue. But in this case a time is limited within which the failure of issue is to take place, and that is the time when the fund is to become divisible." So held where the bequest over was to take effect on the death of any of the legatees without lawful issue before their respective shares should become due and payable. *Crowder v. Stone*, 3 Russ. (Eng.) 217.

5. *Sir J. Leach*, 2 My. & K. (Eng.) 441; *Hughes v. Sayer*, 1 P. W. (Eng.) 534; *Messey v. Hudson*, 2 Mer. (Eng.) 133; *Ranelagh v. Ranelagh*, 2 My. & K. (Eng.) 441; *Turner v. Frampton*, 2 Coll. (Eng.) 231; *Westwood v. Southey*, 2 Sim. N. S. (Eng.) 192; *Fisher v. Barry*, 2 Hog. (Eng.) 153; *Roper on Legacies*, *1548. But *Gray v. Shawne*, 1 Eden (Eng.) 157.

Reason for Rule—Effect of Superadded Words of Limitation.—The reason for the construction is that "it will be intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest which might or might not be accompanied by actual possession." *SIR W. GRANT*, M. R., in *Massey v. Hudson*, 2 Mer. (Eng.) 133.

Hence, if the word *survivor* means, not the person surviving the failure of issue but the *longest liver of the legatees*, so that one legatee surviving another would take a transmissible interest before the failure of issue, the reason of the rule does not exist and the failure of issue will not be restricted. *Theobald on Wills* (2nd ed.) 545; *Chadock v. Cowley*, Cro. Jac. (Eng.) 695.

For the same reason words of limitation superadded to the word *survivor* repel the presumption arising from the use of that word that a merely personal benefit was intended; for though there should be no such failure of issue as would enable the survivors personally to take, yet his representatives would be entitled to claim in his right whenever the failure of issue should happen. *Massey v. Hudson*, 2 Mer. (Eng.) 134.

realty in England, it seems a gift to survivors has no restrictive effect.¹

See also *O'Donohue v. King*, 8 Ir. Eq. Rep. 185.

"Where words of inheritance or succession are superadded to the limitation in favor of survivors, who are to take after a general failure of the issue of the first taker, such issue cannot take as purchasers. The ulterior limitation over in such a case would itself fail for remoteness, and therefore cannot import such restrictive modification to the words heirs of the body or issue living at the death of the first taker." *DARGAN, Ch.*, in *Barksdale v. Gamage*, 3 Rich. Eq. (S. Car.) 271, 273; *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 108. *Contra*, *Threadgill v. Ingram*, 1 Ired. (N. Car.) 577.

It is a very grave question whether the unrestricted construction is adopted in such cases merely by reason of the addition of the superadded words of *succession* or *limitation* or because the survivor takes a *transmissible* interest. In other words is the unrestricted construction due to the use of the words of limitation *ipso facto* or to the effect produced by them? The former view seems to be the more accurate, since the restricted construction has prevailed in consequence of the use of the word survivor in several cases where such survivor has taken a transmissible interest. 2 Jarman on Wills (5th Am. ed.) *528. See *Hughes v. Sayer*, 1 P. W. (Eng.) 534; *Turner v. Frampton*, 2 Coll. (Eng.) 331; *Westwood v. Southey*, 2 Sim., N. S. (Eng.) 192; *Greenwood v. Verdon*, 1 K. & J. (Eng.) 74.

Both Theobald and Smith seem to be of opinion that the transmissibility of the interest and not the form of expression is the important matter. Theobald on Wills (2nd ed.) 545, 546; *Smith Ex. Int.*, §§ 553, 555. See also the language employed in *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 105, 62 Am. Dec. 396; *Assignees of Leadbeater, Ir. R.*, 8 Eq. 422; *McClenaghan v. Bankhead, Ir. R.*, 8 C. L. 195; *Taylor v. Walker*, 13 W. R. (Eng.) 986; *Garratt v. Cockerell*, 1 Y. & C. C. C. (Eng.) 494; *Harris v. Davis*, 1 Coll. (Eng.) 416.

1. *Hawkins on Wills*, *210. See *Chadock v. Cowley*, Cro. Jac. 695; *Roe v. Scott*, *Fearne C. R.* 473, *n.*; *Taylor v. Walker*, 13 W. R. (Eng.) 986; *Estate of Assignees of Leadbeater, Ir. R.*, 8 Eq.; *McClenaghan v. Bankhead*, Ir.

Rep., 8 C. L. 195; *Greenwood v. Verdon*, 1 K. & J. (Eng.) 74.

In the last two cases the possibility of applying the principle to real estate was impliedly recognized, although the decision turned in both cases upon another point.

Gift to Persons Then Living.—On the principle that a personal benefit was intended a gift to "the then surviving legatees," or to "persons then living," the persons being such as must be ascertained within the limits of perpetuity, has been construed to create a definite failure of issue. This principle applies to both real and personal estate. *Greenwood v. Verdon*, 1 K. & J. (Eng.) 74; *Murray v. Addenbrook*, 4 Russ. (Eng.) 407. See 2 Jarman on Wills *512, *528; Theobald on Wills (2d ed.) 544; *Campbell v. Harding*, 2 R. & Myl. (Eng.) 390; *Langley v. Heald*, 7 W. & S. (Pa.) 96.

In such cases the failure of issue contemplated is not a failure at the death of the ancestor, but at any time during the lives of legatees to take under the gift over, and the principle of *Crowder v. Stone* (see *ante*, 9) applies. See also *Jarman v. Pye*, L. R., 2 Eq. (Eng.) 784.

The gift over, however, must not embrace an indefinite range of unborn persons, and where the class to whom the property is given would include persons coming into being at any time before the failure of issue takes place, there is no reason for adopting the restrictive construction. *Webster v. Parr*, 26 Beav. (Eng.) 236; *Prior on Issue*, p. 85; *Distouches v. Walker*, 2 Ed. (Eng.) 261; *Candy v. Campbell*, 8 Bl. N. S. (Eng.) 469.

When, however, it is once ascertained by the description of the ulterior legatees as living at the period of failure, that failure at the death of the party is meant, an alternative gift to take effect if none of those legatees are then living, to others not so described, must also be valid. *Jones v. Cullimore*, 3 Jur., N. S. (Eng.) 444; *Gee v. Liddell*, L. R., 2 Eq. (Eng.) 341.

"If the event which is made the condition precedent of the ulterior gift is not the fact of the legatee surviving the extinction of issue, but merely that of his surviving the person whose failure of issue is referred to, no ground is

thereby laid for the restricted construction, as the ulterior gift might be intended to confer a *vested interest* on the death of such person, to take effect in possession in favor of the representatives of the legatee on the failure of issue at any remote period." 2 Jarman on Wills (5th Am. ed.) *528. See *Garratt v. Cockerell*, 1 Yo. & Coll., C. C. (Eng.) 494.

In the United States.—Where the limitation over is to others, or survivors of a class of, or surviving heirs or children of, the first taker, a definite failure of issue is generally intended. In many States the principle applies to devises and bequests alike. *Jackson v. Chew*, 12 Wheat. (U. S.) 153; 7 *Abbott v. Essex Co.*, 18 How. (U. S.) 202, 215-217; *Anderson v. Jackson*, 16 Johns. (N. Y.) 382; *Lion v. Burtis*, 5 Cow. (N. Y.) 408; *Fosdick v. Cornell*, 1 Johns. (N. Y.) 440; *Moffat v. Strong*, 10 Johns. (N. Y.) 12; *Pinckney v. Pinckney*, 1 Bradt., (N. Y.) 269; *Dumond v. Stringham*, 26 Barb. (N. Y.) 104; *Wilkes v. Lion*, 2 Cow. (N. Y.) 385; *Cutter v. Doughty*, 23 Wend. (N. Y.) 513; *Norris v. Beyea*, 13 N. Y. 273; *Pinkham v. Blair*, 57 N. H. 227, 240; *Kimball v. Penballow*, 60 N. H. 448; *Den v. Shenk*, 3 Hals. (N. J.) 29; *Fairchild v. Crane*, 2 Beas. (N. J.) 108; *Heddel v. Wells*, *Spencer* (N. J.) L. 223; *Groves v. Cox*, 40 N. J. L. 40, 44; *Zollicoffer v. Zollicoffer*, 4 Dev. & Bat. L. (N. Car.) 438; *Threadgill v. Ingram*, 1 Ired. (N. Car.) 577; *Porter v. Ross*, 2 Jones Eq. (N. Car.) 196; *Southerland v. Cox*, 3 Dev. (N. Car.) 394; *Hilliard v. Kearney*, 1 Busb. Eq. (N. Car.) 221; *Lowry v. O'Bryan*, 4 Rich. Eq. (S. Car.) 262; *McCorkle v. Black*, 7 Rich. Eq. (S. Car.) 407; *Carson v. Kennerley*, 8 Rich. Eq. (S. Car.) 259; *Gillam v. Caldwell*, 11 Rich. Eq. (S. Car.) 73; *De Treville v. Ellis*, 1 Bailey Eq. (S. Car.) 40; *Stevens v. Patterson*, 1 Bailey (S. Car.) Eq. 42; *McGraw v. Davenport*, 6 Port. (Ala.) 319; *Williams v. Graves*, 17 Ala. 62; *Gray v. Bridgforth*, 4 Geo. (Miss.) 312; *Rucker v. Lambdin*, 12 Sm. & M. (Miss.) 31; *Birney v. Richardson*, 5 Dana (Ky.) 427; *Hart v. Thompson*, 3 B. Mon. (Ky.) 487; *Deboe v. Lowen*, 8 B. Mon. (Ky.) 616; *Lewis v. Claiborne*, 5 Yerg. (Tenn.) 369; 26 Am. Dec. 270; *Turner v. Ivie*, 5 Heisk. (Tenn.) 222; *Booker v. Booker*, 5 Humph. (Tenn.) 505; *Williams v. Turner*, 10 Yerg. (Tenn.) 289; *Moody v. Walker*, 3 Ark. 148; *Cooper v. Hayes*, 96 Ind. 386.

But in some cases it has been held in conformity with the English decisions that a gift to survivors has no restrictive force in devises of realty. *Jackson v. Dashiell*, 3 Md. Ch. 257; *Hoxton v. Archer*, 3 Gill & J. (Md.) 199; *Bells v. Gillespie*, 5 Rand. (Va.) 273; *Broadus v. Turner*, 5 Rand. (Va.) 308; *Nowlin v. Winfree*, 8 Gratt. (Va.) 348. *Compare Williams v. Graves*, 17 Ala. 62; *Mayer v. Wiltberger*, Ga. Dec., pt. 2, 27; *Forman v. Troup*, 30 Ga. 496, 499; *Burton v. Black*, 30 Ga. 638; *Cox v. Buck*, 5 Rich. (S. Car.) 604; *Morgan v. Morgan*, 5 Day (Conn.) 517; *Dart v. Dart*, 7 Conn. 250; *Clarke v. Terry*, 34 Conn. 176; *Burrough v. Foster*, 6 R. I. 534; *Morris v. Potter*, 10 R. I. 58, 69.

In Massachusetts, *Hall v. Priest*, 6 Gray (Mass.) 18, follows the English authorities; but later authorities favor the restricted construction, even as regards devises of realty. *Richardson v. Noyes*, 2 Mass. 62; *Brightman v. Brightman*, 100 Mass. 238; *Allen v. Trustees*, 102 Mass. 262; *Hooper v. Bradbury*, 133 Mass. 303; *Abbott v. Essex Co.*, 2 Curtis (U. S.) 126; 18 How. (U. S.) 203.

As to Maine, see *Richardson v. Richardson* (Me.), 16 Atl. Rep. 250.

In Pennsylvania the restrictive force of a gift to survivors has been recognized in bequests of personality. *Mifflin v. Neal*, 6 S. & R. (Pa.) 460; *Rapp v. Rapp*, 6 Pa. St. 49; *Bedford's Appeal*, 40 Pa. St. 22.

Also in blended dispositions of real and personal estate. *Ingersoll's Appeal*, 86 Pa. St. 240. But see *Smith's Appeal*, 23 Pa. St. 9. But 'not in devises of realty alone. *Caskey v. Brewer*, 17 S. & R. (Pa.) 441; *Lapsley v. Lapsley*, 9 Pa. St. 130; *Wall v. Maguire*, 24 Pa. St. 248; *contra*, *Johnson v. Currin*, 10 Pa. St. 498. See *Clark v. Baker*, 3 S. & R. (Pa.) 470; *Haines v. Witmer*, 2 Yeates (Pa.) 400.

Rest—Remainder—Others.—The words "rest," "remainder," or "others," are not equivalent to *survivor*, and afford no presumption that a definite failure of issue was intended.

The term survivors has the restrictive operation where benefit to the persons in life not transmissible to heirs and representatives is intended. The vice of remoteness is not escaped where the gift over is to persons in being by name or to survivors and their heirs and representatives, for in these cases the heirs and representatives would be entitled to take at whatever time the issue

11. Gift Over to Person Named.—The fact that the gift over is to particular individual, specified by name, is not in itself sufficient to restrict the failure of issue, on the ground that a personal enjoyment was intended. This applies to both real and personal estate.¹

12. Direction to Pay Money.—A direction in the will for the payment of a sum of money upon the decease of the person upon the failure of whose issue the gift over is to take effect, or within a short time afterwards, imports a definite failure of issue. This applies both to real and personal property.²

13. Personal Trust.—A personal trust created by the gift over stands on the same footing as a personal interest,³ and raises a

of the first taker might fail. *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 105; 62 Am. Dec. 396.

See also *Smith Ex. Int.*, §§ 553, 555. So where *survivor* is construed *other*. *Richardson v. Richardson* (Me.), 16 Atl. Rep. 250; *Allen v. Trustees*, 102 Mass. 262. See *Clark v. Baker*, 3 S. & R. (Pa.) 470; *Haines v. Witmer*, 2 Yeates (Pa.) 400; *Lapsley v. Lapsley*, 9 Pa. St. 130; *Smith v. Osborne*, 6 H. L. Cas. (Eng.) *374; 2 *Redfield Wills* (2nd ed.) *374. But see *Cooper v. Hayes*, 96 Ind. 386.

Where a testator bequeaths personal estate to his two daughters and directed that upon the demise of either of them without issue, the share of her so dying should go to her sister without adding the words executors, administrators and assigns, the limitation over was construed as if it were a limitation to the survivor, because the dying of one without issue seemed to mean a dying without issue in the lifetime of the other. *Smith Ex. Int.*, § 556; *Mac Kinnon v. Peach*, 2 Keen (Eng.) 555. But see *Green v. Rod, Fitzgibb*. (Eng.) 68, stated *Fearne* 481. See *Fearne* 483.

1. *Lord Beauclerk v. Dormer*, 1 Atk. (Eng.) 307; *Barlow v. Salter*, 17 Ves. (Eng.) 307; *Fearne C. R.* 481; *Usitton v. Usitton*, 3 Md. Ch. 36; *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 105.

In some cases where a gift over is made to certain persons in being, without words of limitation, it has been considered as intended as a personal benefit to those persons and the gift will be construed to take effect on the death of the first legatees without issue during the lives of the ultimate legatees. *Eichelberger v. Barnitz*, 17 S. & R. (Pa.) 293. See *Deihl v. King*, 6 S. & R. (Pa.) 33; *Timberlake v. Graves*, 6 Munz. (Va.) 175; *Biscoe v. Biscoe*, 6

Gill & J. (Md.) 232; *Woodland v. Wallis*, 6 Md. 151; *Budd v. State*, 22 Md. 48; *Clifton v. Haig*, 4 Dessaus. (S. Car.) 330.

2. *Theobald on Wills* (2nd ed.) 543; *Nichols v. Hooper*, 1 P. W. (Eng.) 198; 2 Vern. (Eng.) 686; *Doe d. Smith v. Webber*, 1 B. & Ald. (Eng.) 713 (E. C. L. vol. 5); *King v. Frost*, 3 B. & Ald. (Eng.) 546; *Blinston v. Warburton*, *Fearne C. R.* 471; 2 K. & I. (Eng.) 400. See *Goodwin v. Clarke*, 1 Lev. (Eng.) 35; *In re Rye's Settlement*, 10 Hare (Eng.) 106; *Smith Ex. Int.*, §§ 560, 561; *Hill v. Hill*, 4 Barb. (N. Y.) 419; *Eaton v. Straw*, 18 N. H. 329; *Buchanan's Appeal*, 72 Pa. St. 448; *Hauer v. Sheetz*, 3 Yeates (Pa.) 205; *Taylor v. Taylor*, 63 Pa. St. 485; *Coyle's Appeal*, 83 Pa. St. 243; *Middlewarth's Admr. v. Blackmore*, 74 Pa. St. 414. Compare *James's Claim*, 1 Dal. (Pa.) 47; *Evans' Lessee v. Davis*, 1 Yeates (Pa.) 332; *Criley v. Chamberlain*, 13 P. F. S. (Pa.) 481.

But in *Standley v. Feakes*, 24 Beav. (Eng.) 485, 488, it was held that a direction that the lands were to be sold by prior devisee's executors and proceeds divided did not prevent an estate tail vesting in such prior devisee, because such sale was not confined to the lifetime of the executors but could be well executed by the court at any time in the future.

But if the trust to sell is vested in the testator's and not in the devisee's executors, the reasoning upon which this case proceeds has no application. *Re Chisholm*, 17 Grant (U. C.) 403, 406; *Canadice v. Scott*, 22 Grant (U. C.) 426. See *Taylor v. Taylor*, 63 Pa. St. 485. As to when a power to sell is annexed to the office of executor, see EXECUTORS AND ADMINISTRATORS, § VIII, 4, n., 7 Am. & Eng. Enc., p. 201.

3. See § V, 10, n.; 2 Jarman on Wills

like presumption that a definite failure of issue was contemplated.¹

14. Gift Over for Life.—If all the ulterior limitations dependent upon the failure of issue are for life only, the better opinion seems to be that the failure of issue will be construed to mean a failure at the death of the prior taker whose issue is referred to, otherwise where some only of the ulterior limitations are for life.²

15. Bequest of Perishable Goods—Original Estate Devised Pur Autre Vie.—It seems to be the better opinion that the mere fact that

(5th Am. ed.) *526; *Re Chisholm*, 17 Grant Ch. (U. C.) 403; s. c., 18 Grant Ch. (U. C.) 467; *Canadice v. Canadice*, 22 Grant Ch. (U. C.) 426.

Mr. Fearn placed *Keily v. Fowler* upon this ground—*Fearne C. R.* 482—though wrongly, as Mr. Jarman alleges, as the trust in that case was transmissible. In *Bigge v. Beasley*, 1 B. C. C. (Eng.) 187, LORD THURLOW said it would “be better to say that in *Keily v. Fowler* there was no rule of construction than Mr. Fearn’s.” Nevertheless Mr. Jarman urges that although the doctrine was misapplied by Mr. Fearn on principle, a personal trust meaning thereby one not transmissible in nature, raises as strong a presumption against an indefinite failure of issue as a personal interest, and the later Canadian cases sustain his position. 2 Jarman on Wills (5th Am. ed.) *526.

As to whether a power to executors to sell is transmissible, see Sugd. on Powers (8th ed.), 129 et. seq. See also EXECUTORS AND ADMINISTRATORS, § VIII, 4, n., 7 Am. & Eng. Enc., p. 201.

Jarman on Wills (5th Am. ed.) 514, 515; Theobald on Wills (2nd ed.) 546; Smith Ex. Int., § 559; Roper on Legacies, *1550; *Roe v. Jeffery*, 7 T. R. (Eng.) 589; *Trafford v. Boehm*, 3 Atk. (Eng.) 449; *Ide v. Ide*, 5 Mass. 502; *Wilson v. Wilson*, 32 Barb. (N. Y.) 328; *Taylor v. Taylor*, 63 Pa. St. 485; *Finlay v. Riddle*, 3 Binn. (Pa.) 139; *Drury v. Grace*, 2 Har. & J. (Md.) 356. *Contra*, *Hawkins on Wills*, *210; *Rye’s Settlement*, 10 Hare (Eng.) 106, 111; *Dale v. McGuinn*, 15 Grant. (U. C.) Ch. 101; *Watkins v. Sears*, 3 Gill (Md.) 496. See *Stevenson v. Jacobs*, 3 Murph. (N. Car.) 558.

The reason for the exception is that “it is not likely, in such case, that the testator was contemplating an indefinite failure of issue, as that might and most probably would not happen until very

many years after the death of the objects of the ulterior limitations.” Smith Ex. Int., § 559.

But the reason applies equally well to the creation of a contingent remainder for life after an estate tail. Moreover the creation of life estates after the failure of issue is perfectly consistent with an intention that the tenants for life should take, if the issue failed, in their lifetime. See TURNER, V. C., in *Rye’s Settlement*, 10 Hare (Eng.) 106, 111.

1. *Barlow v. Salter*, 17 Ves. (Eng.) 479. See also *Doe d. Jones v. Owen*, 1 B. & Ad. (Eng.) 318; *Peyton v. Lambert*, 8 Ir. Com. L. Rep. 485; *Boehm v. Clark*, 9 Ves. (Eng.) 580.

“Where the entire interest is given over, the mere circumstance that one taker is confined to a life interest furnishes no indication of an intention to make the whole bequest depend on the existence of that person at the time when the event happens on which the limitation over is to take effect.” See *W. Grant in Balow v. Salter*, 17 Ves. 483.

2. 2. Jarman on Wills (5th Am. ed.) *526, *527.

Non constat, that the testator did not intend the gift over to take effect on an indefinite failure of issue, provided such failure occurred while the subject matter of the bequest remained intact. The remark of TURNER, V. C., in *Rye’s Settlement*, 10 Hare (Eng.) 111, as to the restraining power of a gift over for life, seems to apply.

But Mr. Fearn refers the decision in *Keily v. Fowler*, where the subject matter of the bequest consisted of twenty cows and a horse, in part to this ground. *Fearne C. R.* (Butler’s ed.) 484, n. See also *Richardson v. Noyes*, 2 Mass. 56.

In some cases the principle has been applied to a bequest of slaves. *Royall v. Eppes*, 2 Munf. (Va.) 479; *Biscoe v.*

the subject matter of the bequest consists of perishable goods, and cannot survive an indefinite failure of issue, in itself affords no ground for restraining the failure of issue to the death of the first taker.¹

16. Effect of Power of Appointment.—Where the preceding gift to the issue is implied in a power of appointment, as where the gift is to A for life, and after his death to such of his issue as he should appoint, and in case he should die without issue, over, the failure of issue will be restrained to the death of the first taker, since such issue must be intended as A should, or at least might, appoint to, which must be intended issue *then living*. The principle applies to both real and personal estate.²

17. Failure of Testator's Own Issue.—Where a testator, *having no issue*, devises or bequeaths property in default or on failure of *issue of himself*, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to take effect upon an indefinite failure of issue, such as directions for the payment of debts, the limitation over is contingent on the event of his leaving no issue *surviving him*, and the contingency determined at his death.³

Biscoe, 6 Gill & J. (Md.) 232; Woodland v. Wallis, 6 Md. 151.

Where the Original Estate Devised Is Pur Autre Vie.—Where the estate devised is *pur autre vie*, a limitation over in default of issue is good, since it cannot be held to mean a failure, which might take place after the determination of the estate. Theobald on Wills (2nd ed.) 546; see Croly v. Croly, Batty (Ir.) 1; Manning v. Moore, Alc. & Nap. (Ir.) 96; Lee v. Flinn, Alc. & Nap. (Ir.) 418.

1. Target v. Gaunt, 1 P. W. (Eng.) 432; 10 Mod. (Eng.) 402; Gilb. Eq. Cas. (Eng.) 149; Atkinson v. Hutchinson, 3 P. W. (Eng.) 432; Hockley v. Mawbey, 1 Ves. Jr. 143, s. c., 3 B. C. C. (Eng.) 82; Leeming v. Sherratt, 2 Hare (Eng.) 14; Keating v. Keating, Ll. & G. temp. Plunk. (Eng.) 291; Smith Ex. Int., § 557; Roper on Legacies, *1555; Balgny v. Hamilton, More (Eng.) 186. The authority of Target v. Gaunt, 1 P. W. 432; may be considered shaken by Simmons v. Simmons, 8 Sim. (Eng.) 22, but was acknowledged in Eastwood v. Arison, L. R., 4 Ex. (Eng.) 141. But compare Martin v. Swannel, 2 Beav. (Eng.) 249; Crozier v. Crozier, 2 Con. & L. (Eng.) 204; 3 D. & War. (Eng.) 373. See also Torrance v. Torrance, 4 Md. 11; Newman v. Miller, 7 Jones (N. Car.) 518; Woodley v. Findlay, 9 Ala. 716.

Mr. Jarman is of opinion that where

there is an express limitation to the issue in default of appointment, such limitation will not be confined by implication to issue living at the death on the ground that the power embraces such objects only. 2 Jarman on Wills (5th Am. ed.) *531. See Smith v. Death, 5 Mad. (Eng.) 371; Seale v. Barter, 2 B. & P. (Eng.) 285; Davidson v. Proctor, 19 L. J. Ch. (Eng.) 396; 14 Jur. (Eng.) 32; Roddy v. Fitzgerald, 6 H. L. Cas. 823; Jesson v. Wright, 2 Bligh (Eng.) 1.

2. 2 Jarman on Wills (5th Am. ed.) *530; Eastwood v. Arison, L. R., 4 Ex. (Eng.) 141. But see Jesson v. Wright, 2 Bligh (Eng.) 1.

In Eastwood v. Arison, testator devised land to A, "and if he should die without issue, that property shall return to the E family, but if he lives to have children he shall have power to make a will of it to his children." Held, that the issue on failure of which the property was to return to the E family meant the children to whom A had power to leave it if he should have any, and that again meant children living at the time of his death, as it was to such children alone that he could leave the property by will. A therefore took for life only.

3. French v. Caddell, 3 B. P. C., Toml. ed. (Eng.) 257; Wellington v. Wellington, 4 Burr. (Eng.) 2165; 1 W. Bl. (Eng.) 645; Lytton v. Lytton, 4 B. C. C. (Eng.) 441; Sanford v. Irby, 3 B.

18. Effect of Alternative Limitations—Failure of Issue Confined to Period of Distribution or Possession.—If real estate be devised to A and his heirs, with a gift over if A die leaving issue, and a gift over if A die without issue, the words *die without issue* may be restrained to the event of A dying without issue before the period of possession or distribution (whether the devise be immediate or in remainder), in order to avoid an absolute inconsistency with the prior devise in fee to A.¹

19. Statutory Changes.—In *England*, by the stat. 1 Vict., ch. 26, § 29, in all wills made or republished on or after January 1st, 1838, in any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want of or a failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of issue, shall be construed to mean a want or failure in his lifetime or at his death, unless the words are referential to the objects of the prior estate, or preceding gift,² or are so clearly and explicitly used to denote an indefinite failure of issue as to exclude the statutory rule of construction.³ Similar statutes have been adopted in New York;⁴ New Jersey,⁵ Maryland,⁶ Virginia,⁷ West Virginia,⁸ North Carolina,⁹ South Carolina,¹⁰ Georgia,¹¹

& Ald. (Eng.) 654; Theobald on Wills (2nd ed.), 542; 2 Jarman on Wills, *501; Rye's Settlement, 10 Hare (Eng.) 106. See also *Doe v. Lucraft*, 1 M. & Sc. (Eng.) 573; 8 Bing. (Eng.) 386.

It seems that the mere fact that the gift over is dependent upon the failure of testator's own issue, unassisted by the context, is not sufficient to create a definite failure. *Bagot v. Legge*, 12 W. R. (Eng.) 1097; 4 N. R. (Eng.) 492.

1. *Hawkins on Wills*, *213; *Gee v. Manchester*, 17 Q. B. 737 (E. C. L. R., vol. 79); *Clayton v. Lowe*, 5 B. & Ald. 636 (E. C. L. R., vol. 7). Compare *Fisher v. Webster*, L. R., 14 Eq. (Eng.) 283; *Olivant v. Wright*, 24 W. R. (Eng.) 84; *Ladd v. Harvey*, 21 N. H. 515; *Arnold v. Brown*, 7 R. I. 188, 197; *Allen v. Trustees*, 102 Mass. 262; *Richardson v. Richardson* (Me.), 16 Atl. Rep. 250; *Ingersoll's Appeal*, 86 Pa. St. 240. Compare § VI, note.

2. See § IV.

The referential construction is not affected by the act.

See *Theobald on Wills* (2nd ed.), 535; 2 *Jarman on Wills* (5th Am. ed.), 494; *Green v. Green*, 3 De G. & S. (Eng.) 480.

3. Prior on Issue, § 2; *Hawkins on Wills*, *214; 2 *Jarman on Wills* (5th

Am. ed.) *533; *Smith Ex. Int.*, § 563. As to the construction of the act, see *In re O'Bierne*, 1 Jo. & Lat. (Eng.) 352; *Meredith v. Treffry*, 12 Ch. D. (Eng.) 172.

A similar statute exists in Ontario. R. S. O., ch. 106, § 31.

4. 2 Rev. Stats., pt. 2, ch. 1, § 22, taking effect January, 1830.

5. Act of March 12th, 1851, R. S. 1877, p. 1248; pl. 25; *Convict v. King*, 2 Beas. (N. J.) 375. See *Morehouse v. Cotheal*, 2 Zab. (N. J.) 430.

6. Act of 1862, Rev. Code, 1878, art. 49, § 9. See *Mason v. Johnson*, 47 Md. 347.

7. Act March 12th, 1819, Code 1873, title 33, ch. 112, § 10. See *Schultz v. Schultz*, 10 Gratt. (Va.) 358; *Wine v. Markwood*, 31 Gratt. (Va.) 43.

8. R. S., 1879, ch. 82, § 10.

9. Act taking effect January 15th, 1828; *Bat. Rev.*, ch. 42, § 3. See *Garland v. Watt*, 4 Ired. L. (N. Car.) 287; 42 Am. Dec. 120; *Spruill v. Moore*, 5 Ired. Eq. (N. Car.) 284; 49 Am. Dec. 428.

10. Act of December 20th, 1853, Gen. Stats., 1882, § 1862.

11. Act of February 11th, 1854, Code 1882, § 2251. *Worrill v. Wright*, 25 Ga. 659; *Gibson v. Hardaway*, 68 Ga. 370. Compare *Harris v. Smith*, 16 Ga.

Alabama,¹ Mississippi,² Kentucky,³ Tennessee,⁴ Wisconsin,⁵ Michigan,⁶ Missouri,⁷ Minnesota,⁸ California,⁹ Dakota,¹⁰ Montana,¹¹ Nevada,¹² Idaho¹³ and New Mexico.¹⁴

VI DYING WITHOUT ISSUE REFERRED TO DEATH IN LIFETIME OF TESTATOR.—In the absence of special circumstances, it seems to be the better opinion that the words "dying without issue" will not be confined to a dying of the prior taker in the lifetime of the testator since where the context is silent, words referring to the death of the prior taker, in connection with some collateral event, apply to the contingency happening as well *after* as before the death of the testator.¹⁵

545; *Griswold v. Griswold*, 18 Ga. 545, 550.

1. Code taking effect January 1st, 1853; Code 1876, § 2181.

2. Act of June 13th, 1822, Rev. Code 1880, § 1203. *Powell v. Brandon*, 24 Miss. 343; *Kirby v. Calhoun*, 8 Smed. & M. (Miss.) 462.

3. Rev. Stats. 1877, p. 586. *Compare Moore v. Moore*, 12 B. Mon. (Ky.) 651, 660; *Sale v. Crutchfield*, 8 Bush (Ky.) 636, 648.

4. Comp. Stats. 1871, § 2009.

5. R. S., 1878, § 2046.

6. Code taking effect March, 1847. *How. An. Stats.* 1882, § 5538. See *Goodell v. Hibbard*, 32 Mich. 48, 55.

7. Rev. Code of 1845, R. S. 1879, § 3942. *Faust v. Birner*, 30 Mo. 414.

8. Stat. at Large 1873, ch. 32, § 22.

9. Act of April 27th, 1855, Civ. Code 1872, § 1071.

10. Rev. Civ. Code, § 617.

11. *Stimson's Dig. Am. Stat. Law*, § 1415.

12. Nevada Comp. L. (1873) 271.

13. Idaho (1874-1875). p. 604, 45.

14. New Mexico Comp. Law (1884), § 1424.

Construction.—The English act does not apply where the words are "die without heirs of the body," as in that case there is no ambiguity. *Harris v. Davis*, 1 Coll. (Eng.) 416. *Dawson v. Small*, L. R., 9 Ch. (Eng.) 651.

But under the American statutes, with the exception of New Jersey and Maryland, the same rule of construction is applied to the words "die without heirs," or "heirs of the body," as is by the English statute applied to "die without issue." *Hawkins on Wills*, *215, note.

But if the words "heirs," or "heirs of the body" are used in the sense of issue, the statute, even in *Maryland*, applies. *Gambrill v. Forest Grove*

Lodge, 66 Md. 17; s. c. (Md.), 10 Atl. Rep. 596.

In *Alabama*, *California* and *Dakota*, the rule is expressly stated to extend to both realty and personality. *Stimson's Am. Stat. Law* (January 1st, 1886), § 1415, and note at beginning of ch. 3, p. 173.

In *Georgia*, the provision not being restricted to one species of property, applies to both; as is probably the case in the other States mentioned. *Ga. Code* (1861), § 2225.

This statutory rule of construction will, of course, yield to a contrary intention appearing in the will; and in some of the States the legislature has been careful so to provide. *Stimson's Am. Stat. Law* (January 1st, 1886), § 1415, *citing* statutes of N. J., Md., W. Va., N. C., Tenn.; also § 2800, *citing* statutes of Cal., Dak. and Mon.

The statute does not apply where the words importing a failure of issue would, under the old law, have been construed not to refer to an indefinite failure of issue. 2 *Jarman on Wills* (5th Am. ed.) *534; *Morris v. Morris*, 17 Beav. (Eng.) 198; *Jarman v. Vye*, L. R., 2 Eq. (Eng.) 784.

15. *Smith v. Stewart*, 4 De G. & S. (Eng.) 252; 2 *Jarm.* (5th Am. ed.) *783; *Allen v. Farthing*, 2 Medd. (Eng.) 310; s. c., 2 *Jarman on Wills* (5th Am. ed.), *783; *Edwards v. Edwards*, 15 Beav. (Eng.) 245; *Child v. Giblett*, 3 My. & K. (Eng.) 71. See also *Gawler v. Cadby Jac.* (Eng.) 346; *Gosling v. Townshend*, 17 Beav. (Eng.) 245; s. c., 2 W. R. (Eng.) 23; *Johnston v. Antrobus*, 21 Beav. (Eng.) 556; *Randfield v. Randfield*, 8 H. L. Cas. (Eng.) 225, 236; *Bowers v. Bowers*, L. R., 5 Ch. (Eng.) 244; *Re Heathcote's Trusts*, 22 W. R. (Eng.) 42; 29 L. T., N. S. 445; *Olivant v. Wright*, 24 W. R. (Eng.) 84; *Parry v. Daggs*, 26

W. R. (Eng.) 353; *Ware v. Watson*, 7 D. M. & G. (Eng.) 248; *O'Mahoney v. Burdett*, L. R., 7 H. L. Cas. (Eng.) 388, 395. See *Lewin v. Killey*, L. R., 13 App. Cas. (Eng.) 783; *Britton v. Thornton*, 112 U. S. 526, 533.

As to what limitations will be held substitutional, see *Lampley v. Blower*, 3 Atk. (Eng.) 397; *Butler v. Ommaney*, 4 Russ. (Eng.) 70; *Pearson v. Stephens*, 5 Bligh, N. S. (Eng.) 203; s. c., *Dow & Cl. (Eng.)* 328; *Gibbs v. Tait*, 8 Sim. (Eng.) 132; *Doe v. Sparrow*, 13 East (Eng.) *359; *Prior on Issue*, pl. 77-83.

But where the prior limitation expressly confers a fee simple in realty or an absolute interest in personalty, and there are alternative limitations over, which collectively provide for the death of the devisee or legatee under all possible circumstances, the words of contingency apply exclusively to the happening of the event in the testator's lifetime, in order to avoid repugnancy, inasmuch as the alternative limitations, if not so restricted, would reduce the prior devise in fee or absolute interest to an estate for life. *Clayton v. Lowe*, 5 B. & Ald. (Eng.) 636. See *Gee v. Manchester*, 17 Q. B. 737 (E. C. L. R., vol. 79); s. c., 19 L. J. Ch. (Eng.) 151, 14 Jur. (Eng.) 825; *Woodburne v. Woodburne*, 23 L. J. Ch. (Eng.) 336. Compare *Ingersoll's Appeal*, 86 Pa. St. 240; *Clough v. Clough*, 15 (N. H.) Atl. Rep. 127; *Chaplin v. Doty*, 15 (Vt.) Atl. Rep. 362; *Barrell v. Barrell*, 38 N. J. Eq. 60, 63.

But this reason does not apply where there are no words in the primary bequest expressly giving an absolute interest, as there is no danger, in such case, of imputing two inconsistent intentions to the testator in refusing to hold the bequest absolute upon the testator's death. *Cooper v. Cooper*, 1 K. & J. (Eng.) 658. See also *Bowers v. Bowers*, L. R., 5 Ch. (Eng.) 244; *Gosling v. Townshend*, 2 W. R. (Eng.) 23; *Rogers v. Waterhouse*, 4 Drew (Eng.) 329. But see *Rogers v. Rogers*, 7 W. R. (Eng.) 541.

As to effect of limitation to survivors in case of death of first taker without issue, see *WALWORTH*, Ch., in *Moore v. Syms*, 25 Wend. (N. Y.) 119, 150; *Tier v. Pennell*, 1 Edw. Ch. (N. Y.) 354; *Hurlburt v. Emerson*, 16 Mass. 244; *Williamson v. Chamberlain*, 2 Stock. Ch. (N. J.) 373; *Wurts v. Page*, 4 C. E. Green (N. J.) 365; *Hansford v. Elliott*, 9 Leigh (Va.) 79; *Drayton v. Drayton*, 1 Dessaus. Eq. (S. Car.) 324; *Elliott v.*

Smith, 1 Dessaus. Eq. (S. Car.) 499; *Hilliard v. Kearney*, 1 Busb. Eq. (N. Car.) 221; *Ruff v. Rutherford*, 1 Bail. Ch. (S. Car.) 7. See also *Cross v. Coltart*, Weekly Notes, 1884 (Eng.), p. 123; *Buckle v. Farvett*, 4 Hare (Eng.) 536; *Giles v. Smith*, 8 Sim. (Eng.) 360; *Waugh v. Waugh*, 2 My. & K. (Eng.) 41.

In United States.—The principle in the text has been followed in *Britton v. Thornton*, 112 U. S. 526, 533. See also *Buchanan v. Buchanan*, 99 N. Car. 308; *Williams v. Lewis*, 100 N. Car. 142; *Kelley v. Meiers*, 135 Mass. 231; *Greer v. Wilson*, 108 Ind. 322. Compare *Price v. Johnson*, 90 N. Car. 592; *Fields v. Whitfield* (N. Car.) 7 Rep. 780, 783; *Suydam v. Thayer*, 94 Mo. 49.

But in many States the supreme court declined to follow the principle of the text. *Held*, that in the absence of context or circumstances showing a contrary intent, the words dying without issue referred to a dying within the lifetime of the testator. *Quackenbos v. Kingsland*, 102 N. Y. 128; 55 Am. Rep. 771, 778; *Livingstone v. Greene*, 52 N. Y. 118, 124; *Embury v. Sheldon*, 68 N. Y. 227, 233; *Nellis v. Nellis*, 99 N. Y. 505; *Moore v. Lyons*, 25 Wend. (N. Y.) 119, 125; *Kerr v. Bryan*, 32 Hun (N. Y.) 51; *Leonard v. Kingsland*, 67 How. Pr. (N. Y.) 431; *Shoonmaker v. Stockton*, 37 Pa. St. 461; *Waugh's Appeal*, 78 Pa. St. 436; *Mickle's Appeal*, 92 Pa. St. 514; s. c., 13 Phila. (Pa.) 281; *Hancock's Estate*, 13 Phila. (Pa.) 283. Compare *Wurts v. Page*, 4 Green, C. E. (N. J.) 365; *Baldwin v. Taylor*, 37 N. J. Eq. 78; *Denise v. Denise*, 37 N. J. Eq. 163, 169; *Barrell v. Barrell*, 38 N. J. Eq. 60, 63; *Burdge v. Walling*, 16 (N. J.) Atl. Rep. 51; *Phelps v. Robbins*, 40 Conn. 250, 267; *White v. White*, 52 Conn. 518; *Coe v. James*, 54 Conn. 511; s. c., 9 Atl. Rep. 392; *Phelps v. Phelps*, 55 Conn. 359; *Chaplin v. Doty* (Vt.), 15 Atl. Rep. 362; *Hall v. Chaffee*, 14 N. H. 215; *Clough v. Clough* (N. H.), 15 Atl. Rep. 127; *Birney v. Richardson*, 5 Dana (Ky.) 424; *Trabue v. Terry* (Ky.), 9 S. W. Rep. 161; *Edwards v. Bible*, 43 Ala. 666; s. c., 54 Ala. 475; *Harris v. Smith*, 16 Ga. 545; *Griswold v. Greer*, 18 Ga. 545, 550.

As to what will be sufficient evidence of a contrary intent see *Van Derzee v. Slingerland*, 103 N. Y. 47; *Matter of New York etc. R. Co.*, 105 N. Y. 89, 93; 49 Am. Rep. 478; *Mickey's Appeal*, 92 Pa. St. 514.

VII. EFFECT OF LIMITATION OVER UPON PRECEDING LIMITATION

—1. **Where the Failure of Issue Is Indefinite.**—In regard to real estate, where the issue are not mentioned in the preceding limitation, a devise in fee to the first taker will be restrained, or devise for life enlarged to an estate tail by a gift over on an indefinite failure of issue. When there is an express devise to the issue in general, or issue male or female, *eo nomine*, interposed between the prior devise to the ancestor, and the subsequent devise over on an indefinite failure of his issue in general, or issue of the given description, and the word issue in the intermediate devise would be construed a word of limitation if there were no such devise over, the devise over does not prevent the word issue from being construed as a word of limitation, but operates in aid of that construction.¹ With regard to personalty, a bequest to A,

The tendency is to lay hold of slight circumstances. *Buel v. Southwick*, 70 N. Y. 581; *Hennessy v. Patterson*, 85 N. Y. 91, 92; *Nellis v. Nellis*, 99 N. Y. 505; *Tyson v. Blake*, 22 N. Y. 558.

For further discussion see LEGACIES AND DEVISES. See also WILLS.

A testator having given the residue and remainder of his estate, real and personal, to J B, "his heirs and assigns forever," charged with the payment of debts, funeral expenses and certain small legacies, added the following proviso: "*Provided*, that in case the said J B doth not return to Philadelphia, from his present intended voyage to South America, or in case he doth not return to Philadelphia within a reasonable time after my decease, but departs this life without lawful issue, then and in such case or cases all my said message, lot and residuary estate, real and personal, intended for the said J B shall go to A B subject to the same charges. *Held*, that the proviso was to be taken to refer to a dying without issue on the contemplated voyage, and J B having returned from the voyage in the lifetime of the testator took a fee simple in the real estate. *McCarthy v. Dawson*, 1 Whart. (Pa.) 4.

1. This construction will be adopted whether the prior limitation is in words which would pass a fee or indefinite or expressly for life. *Smith Ex. Int.*, §§ 564-568; *SHADWELL, V. C.*, in *Mackell v. Weeding*, 8 Sim. (Eng.) 4; Prior on Issue, §§ 184, 185. See *Chapman d. Scholes v. Scholes*, 2 Chitty 643; *Denn d. Slater v. Slater*, 5 D. & E. (Eng.) 335; *Doe d. Neville v. Rivers*, 7 D. & E. (Eng.) 276; *Doe d. Ellis v. Ellis*, 9 East (Eng.) 382; *Tenny d. Agar v. Agar*, 12 East (Eng.) 252; *Romilly v. James*, 6 Taunt. (Eng.) 263;

Dansey v. Griffiths, 4 Man. & Sel. (Eng.) 61; *Doe d. Jones v. Owens*, 1 B. & Ad. (Eng.) 318; *Doe d. Cadogan v. Ewart*, 7 Ad. & El. (Eng.) 636. See also *Parker v. Tootal*, 11 H. L. Cas. 143; *Dainty v. Dainty*, 6 T. R. (Eng.) 307; *Doe d. Blandford v. Applin*, 4 D. & E. (Eng.) 82; *Doe d. Cock v. Cooper*, 1 East (Eng.) 229; *Ward v. Bevil*, 1 You. & Jer. (Eng.) 512. See also 4 Kent Com., *276 et seq.; *Fisk v. Keene*, 35 Me. 349; *Parker v. Parker*, 5 Met. (Mass.) 134; *Wheatland v. Dodge*, 10 Met. (Mass.) 502; *Hall v. Priest*, 6 Gray (Mass.) 18; *Haymond v. Howe*, 12 Gray (Mass.) 49; *Williams v. Hitchborn*, 4 Mass. 189; *Hawley v. Northampton*, 8 Mass. 3; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Simonds v. Simonds*, 112 Mass. 157; *Turrill v. Northrop*, 51 Conn. 33; *Manchester v. Durfee*, 5 R. I. 549; *Jackson v. Bellinger*, 18 Johns. (N. Y.) 368; *Paxon v. Lefferts*, 3 Rawle (Pa.) 59; *Shoemaker v. Huffnagle*, 4 W. & S. (Pa.) 437; *Willis v. Bucher*, 3 Wash. (U. S.) 369; *Eichelberger v. Barnitz*, 9 Watts. (Pa.) 447; *Shoofstall v. Powell*, 1 Grant Cas. (Pa.) 19; *Lapsley v. Lapsley*, 9 Pa. St. 130; *Hansell v. Hubbell*, 24 Pa. St. 244; *Doyle v. Mallady*, 33 Pa. St. 264; *Greenawalt v. Greenawalt*, 71 Pa. St. 438; *Middleswarth v. Blackmore*, 74 Pa. St. 414; *Lawrence v. Lawrence*, 105 Pa. St. 335; *Condict v. King*, 13 N. J. Eq. 375; *Waples v. Harman*, 1 Harr. (Del.) 223; *Roach v. Martin*, 1 Harr. (Del.) 548; *Hoxton v. Archer*, 3 Gill & J. (Md.) 109; *Tate v. Tally*, 3 Call. (Va.) 354; *Goodrich v. Harding*, 3 Rand. (Va.) 280; *Thomason v. Anderson*, 4 Leigh (Va.) 118; *Wright v. Cahoon*, 12 Leigh (Va.) 370; *Beasley v. Whithurst*, 2 Hawks (N. Car.) 437; *Whitworth v. Stuckey*,

1 Rich. Eq. (S. Car.) 404; Goodall v. Hibbard, 32 Mich. 47.

Thus a devise to A and his heirs, and if A dies without issue, over, creates an estate tail in A. Brice v. Smith, Willes (Eng.) 1; Tenny v. Agar, 12 East (Eng.) 253; Dansey v. Griffiths, 4 M. & S. (Eng.) 61. See Albee v. Carpenter, 12 Cush. (Mass.) 382; Wynn v. Story, 38 Pa. St. 166; Seely v. Seely, 44 Pa. St. 434; Moody v. Snell, 81 Pa. St. 359; Cleveland v. Havens, 2 Beas. (N. J.) 101; s. c., 78 Am. Dec. 90; Rowe's Exrs. v. White, 16 N. J. Eq. 411; s. c., 84 Am. Dec. 169.

So a devise to A or to A for life, and if he dies without issue, over, will also create an estate tail. Lee's Case, 1 Leon (Eng.) 285; Robinson's Case, Willes (Eng.) 3; 1 P.W. 605; 3 Wills 246; Medicott v. Joslin, 2 Brod. & B. (Eng.) 632; Doe v. Gallini, 3 A. & E. (Eng.) 340; Denn v. McMurtrie, 3 Green (N. J.) 276.

The reason for the rule is that in the former case "the testator has explained himself to have used the word *heirs* in the qualified and restricted sense of heirs of the body, and in the latter he has, by postponing the ulterior devise until the failure of the issue of the prior devisee, afforded an irresistible inference that he intended that the estate to be taken by the prior devisee under the indefinite devise should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which as an executory devise to take effect on a general failure of issue, would of course be void for remoteness." 1 Jarman on Wills (5th Am. ed.) *554; Paxon v. Lefferts, 3 Rawle (Pa.) 59.

Estate tail and not estate for life passes by devise of land to be equally divided among three persons, with a subsequent provision that in case one of them shall die without issue the property given to him shall descend to the testator's heirs in fee. This is not a case to which the statute (R. S. C. 59, § 9) abolishing the rule in Shelly's case applies. Hayward v. Howe, 12 Gray (Mass.) 49; 71 Am. Dec. 734; Whitcomb v. Taylor, 122 Mass. 249.

Exceptions.—A, having a son and two daughters, provided by will—"If it shall happen my son B and my two daughters die without issue of their bodies lawfully begotten, then all my lands shall remain to my nephew D

and his heirs." Held (1) that no express estate was given to the children; (2) that they took no estate by implication, because then it must be either a joint estate for life, with several inheritances in tail or several estates tail in succession, one after another. The latter it could not, be because it was uncertain which should take first; nor the former, because the heir at law could be disinherited without a necessary implication, which in this case there was not, for it was only a designation and appointment when the land should come to the nephew. Gardner v. Sheldon, Vaugh. 259; 1 Eq. Ca. Ab. 137, pl. 6; 1 Freem. (Eng.) 11.

But this case has been considered shaken by Tenny d. Agar v. Agar, 12 East (Eng.) 252; Romilly v. James, 6 Taunt. (Eng.) 263; 1 Marsh. (Eng.) 592.

Again, where the person on whose general failure of issue a devise is expressly made expectant is the heir at law of the testator, he becomes by the application of the rule under consideration, tenant in tail by implication in precisely the same manner as if there had been a prior devise to him and his heirs in the will. 1 Jarman (5th Am. ed.) *556; citing Goodridge v. Goodridge, Willes (Eng.) 369, 7 Mad. 453; Daintry v. Daintry, 6 T. R. 307. See Smith Ex. Int., §§ 585, 588.

Smith Ex. Int., § 569. See Franklin v. Lay, 6 Mad. (Eng.) 258; Murthwaite v. Barnard, 2 Brod. & Bing. (Eng.) 623; Murthwaite v. Jenkinson, 2 Bar. & Cres. (Eng.) 359; Denn d. Webb v. Puckey, 5 Durn. & East (Eng.) 299; Frank v. Stevin, 3 East 548; Doe d. Dobson v. Grew, 2 Wils. (Eng.) 322; s. c., Fearne, 182; King v. Burchell, Amb. (Eng.) 379; s. c., Fearne 363, 364; Marshall v. Bonsfield, 2 Mad. (Eng.) 166.

Gift to Issue by Way of Remainder.—

Thus where the preceding devise is to A for life and after his decease to his issue, an estate tail would be created without, and necessarily with, the aid of the limitation over. Sparrow v. Shaw, 2 Sab. (Eng.) 798; s. c., *nom.* Shaw v. Wright, 3 Bro. P. C. (Eng.) 120.

So where the preceding devise is to A for life and after his decease to the issue of his body and the heirs of the body of such issue. Merest v. Hodgson, 9 Gri. (Eng.) 556. See Franklin v. Lay, 6 Mad. (Eng.) 258; Roe v. Grew, Wilmot (Eng.) 272; but see Loddington v. Kime, 1 Salk. (Eng.) 224; 1 Lord

and if he dies without issue, over, confers an absolute interest.¹ So where the preceding bequest to A is expressly for life.² But

Raym. (Eng.) 203; s. c., *nom.* Carter v. Bernardiston, 3 Bro. P. C., Toml. ed. (Eng.) 64.

So where the limitation is to A for life, with remainder to his issue and their heirs or heirs and assigns, followed by a gift over on failure of issue of A, A takes an estate tail; the limitation to the heirs general of the issue being restrained to heirs of the body by force of the gift over, so as to reduce the devise to one to A for life with remainder to his issue, and the heirs of their bodies. Frank v. Stevin, 3 East (Eng.) 348; Denn v. Puckey, 5 T. R. (Eng.) 299; Franklin v. Lay, 6 Madd. (Eng.) 258. See Paxon v. Lefferts, 3 Rawle (Pa.) 59; Taylor v. Taylor, 63 Pa. St. 484; Kleppner v. Laverty, 70 Pa. St. 70; Gonzales v. Barton, 45 Ind. 295.

In this case the better opinion would seem to be that the estate tail in A is implied from the gift over, since it is doubtful if, without such gift over, the issue would not take by purchase. See LORD ST. LEONARDS in Montgomery v. Montgomery, 3 Jo. & Lat. (Eng.) 47. See also Myers v. Anderson, 1 Strobb. Eq. (S. Car.) 344; M'Lure v. Young, 3 Rich. Eq. (S. Car.) 559; Ward v. Jones, 5 Ired. Eq. (N. Car.) 400. *Contra*, Parker v. Clarke, 6 D. M. & G. (Eng.) 109; Williams v. Williams, 33 Weekly Rep. (Eng.) 118; Carroll v. Barns, 15 W. N. C. (Pa.) 553. See as to superadded words of limitation § III, 2, c.

Where lands are devised to A for life with remainder to his issue, share and share alike as tenants in common, or with other words implying that the issue are to take concurrently, and there is a gift over on failure of issue of A, inasmuch as the issue, if taking by purchase, would take for life only, the words implying distribution are rejected and A is held to take any estate tail in order to carry out the general intention that all the issue should take. Hawkins' Wills *190. Doe d. Blandford v. Aplin, 4 T. R. (Eng.) 82; Doe d. Cock v. Cooper, 1 East (Eng.) 229; Ward v. Bevil, 1 Yo. & Jer. (Eng.) 513. See Murthwaite v. Jenkinson, 2 B. & C. (Eng.) 357; Kavanagh v. Morland, Kay (Eng.) 16; Woodhouse v. Herrick, 1 K. & J. (Eng.) 352; Roddy v. Fitzgerald, 8 H. L. Cas. (Eng.); Ogden's Appeal, 70 Pa. St. 501.

In such case there is no authority for the construction which would give the issue estates for life by purchase, with an estate tail in remainder only to the parent by implication. COMPTON, J., in Roddy v. Fitzgerald, 8 H. L. Cas. (Eng.) 823, 859.

Whether the construction would be the same in the absence of a gift over may well be questioned. But see Doe v. Rucestle, 8 C. B. (Eng.) 876 (E. C. L. R. vol. 54), where the gift over was a definite failure of issue.

As a part of the context the devise over, following a limitation to A with remainder to his issue and their heirs, or to the issue as tenants in common, must certainly be taken into consideration in determining whether the word issue in the preceding devise is to be taken as a word of purchase or limitation, although the better opinion seems to be that the presence of the devise over is not indispensable to the latter construction. See PARKE, B., in Slater v. Dangerfield, 15 M. & W. (Eng.) 275; Jackson v. Calvert, 1 J. & H. (Eng.) 235; WOOD, V. C., in Woodhouse v. Herrick, 1 K. & J. (Eng.) 352. See Parker v. Clarke, 6 D. M. & G. (Eng.) 109; Hayes' Inquiry 302; Phillips v. James, 2 Dr. & Sm. (Eng.) 404; 3 D. J. & S. (Eng.) 72; Williams v. Williams, 33 Weekly Rep. (Eng.) 118; Carroll v. Burns, 15 W. N. C. (Pa.) 553.

1. Coms.Exrs. *1110; Everest v. Gell, 1 Ves. Jr. (Eng.) 286; Chandless v. Price, 3 Ves. (Eng.) 99; Ward v. Bevil, 1 Yo. & Jer. (Eng.) 513. See *Re Andrews' Will*, 27 Beav. (Eng.) 608; 6 Jur., N. S. (Eng.) 114; Henderson v. Cross, 7 Jur., N. S. (Eng.) 177; s. c., 9 W. R. (Eng.) 263; Smith's Appeal, 23 Pa. St. 2; Mengel's Appeal, 61 Pa. St. 248; Usittton v. Usittton, 3 Md. Ch. 36; Shephard v. Shephard, 2 Rich. Eq. (S. Car.) 142; s. c., 46 Am. Dec. 41; Schultz v. Schultz, 10 Gratt. (Va.) 358.

"The reason for this is clear; the first bequest carries the whole interest in the property; the second is void for remoteness, and therefore does not derogate from the estate created by the first." Prior on Issue, § 186. See *Re Andrews' Will*, 27 Beav. (Eng.) 608.

2. Prior on Issue, § 187; Fearnce Cont. Rem. 486; Roper on Legacies, *1526; Love v. Windham, 1 Lev. (Eng.) 290.

if the preceding bequest is to A for life, and *after his decease* to his issue, with a gift over if he die without issue, the issue take in remainder as purchasers under the preceding bequest, and the gift over being construed referentially, a definite failure is created.¹

2. Where the Failure of Issue Is Definite.—A gift over upon a definite failure of issue will in no wise alter the construction of the preceding limitation. Its only effect will be to engraft upon it an executory devise or contingent remainder to operate upon the happening of the events specified.²

See LORD THURLOW's opinion in *Atty. Gen. v. Bayley*, 2 Bro. C. C. (Eng.) 558; and in *Knight v. Ellis*, 2 Bro. C. C. (Eng.) 578. See also *Brooks v. Lord Lake*, 10 Jur. (Eng.) 485; *Bradshaw v. Skilbeck*, 1 Bing. N. C. (Eng.) 188; *Lepine v. Ferrad*, 2 Ru. & My. (Eng.) 378; *Mogg v. Mogg*, 1 Mer. (Eng.) 654; *Williams v. Lewis*, 6 H. L. Cas. (Eng.) *1020; *Byng v. Lord Stafford*, 5 Beav. (Eng.) 558; *Bennett v. Bennett*, 2 Dr. & Sm. (Eng.) 266; *Addison v. Addison*, 9 Rich. Eq. (S. Car.) 58. See *Seibert v. Butz*, 9 Watts (Pa.) 494; *Pott's Appeal*, 30 Pa. St. 168. Compare § V, 1, n. (2).

But in *Target v. Gaunt*, 1 P. W. (Eng.) 433, LORD MACCLESFIELD states the rule to be directly contrary, and *Boehm v. Clarke*, 9 (Ves.) 580, and *Barlow v. Salter*, 17 Ves. (Eng.) 479. SIR W. GRANT seems to consider the question still open.

The reason for the rule as stated in the text is thus explained by Roper: Bequest to A for life, and, if A dies without issue, to B, gives A an absolute interest, for A, the legatee, being entitled by the express bequest for life only, and B, the legatee over, being entitled to nothing upon the single event of A's death, but upon that event coupled with a general failure of A's issue, if A were not considered as taking immediately for himself and his issue, the interest between his death and the event upon which B could take would be undisposed of; therefore as the words are large enough, the court implies an intention in the testator to transmit the legacy to A's issue; but as chattels cannot be entailed, an absolute interest in them *ex necessitate* must vest in B. Roper on Legacies, p. *1526, *citing* *Brooks v. Lord Lake*, 10 Jur. 485.

1. Prior on Issue, §§ 244, 257, 301, 316; *Hawkins on Wills*, *197; *Knight v. Ellis*, 2 Bro. C. C. (Eng.) 570; *Atkinson v. Paice*, 1 Bro. C. C. (Eng.) 91;

Ex parte Wynch, 5 De G. M. & G. (Eng.) 188; *Goldney v. Crabb*, 19 Beav. (Eng.) 338; *Parker v. Clarke*, 6 De G. M. & G. (Eng.) 104; *Hedges v. Harpur*, 3 De G. & J. (Eng.) 129; *Stewart v. Jones*, 3 De G. & J. (Eng.) 532; *McGarry v. Thompson*, 29 Grant (U. C.) Ch. 287. But see *Pott's Appeal*, 30 Pa. St. 168. Compare *Myers' Appeal*, 49 Pa. St. 111. See *ante*, §§ III, 2, C. (2), IV, 2.

Otherwise where the bequest is to A for life and after his decease to his heirs male. *Williams v. Lewis*, 6 H. L. Cas. (Eng.) *1013, *1020.

The principle in the text applies also to a devise of chattels real. *Hawkins on Wills*, *197.

Limitation to A and His Issue.—Under a limitation to A and his issue, with a gift over on an indefinite failure of issue, A takes an estate tail in realty and an absolute interest in personalty whether there are issue in being at the time the will takes effect or not. Prior on Issue, § 189 *et seq.*; *Seale v. Bailes*, 2 B. & P. (Eng.) 485; *Broadhurst v. Morris*, 2 B. & Ad. (Eng.) 1; *Goodright v. Wright*, 1 P. W. (Eng.) 397; s. c. 1 *Strange* (Eng.) 25; *Franklin v. Lay*, 2 Bligh (Eng.) 59, n.; *Doe d. Gilman v. Elvey*, 4 East (Eng.) 313. See *ante*, § III, 2 b.

2. Prior on Issue, § 173; *Smith Ex. Int.*, § 584; *Greene v. Ward*, 1 Russ. (Eng.) 262; *Doe d. Herbert v. Selby*, 2 Barn. & Cr. (Eng.) 926; *Smith v. Horlock*, 7 Taunt. (Eng.) 129; *Burnett v. Lowe*, 7 Bing. (Eng.) 535; *Murthwaite v. Jenkinson*, 2 B. & C. (Eng.) 357; *Kavanagh v. Morland*, Kay (Eng.) 16. See also *Doe d. Barnfield v. Welton*, 2 Bos. & Pal. (Eng.) 324; *Plunket v. Holmes*, 1 Lev. (Eng.) 11.

Where there is an express devise interposed between the prior devise to the ancestor and the limitation over on an indefinite failure of his issue, and that intermediate devise is not to his issue

ITEM.—Also; moreover; besides; in addition to.¹

eo nomine, but to his sons, daughters or children, indefinitely or for life, or in tail; the sounder construction, upon principle, if not upon authority, would seem to be that the words introducing the limitation over raise an estate in him, by implication, in remainder after the estate limited by the intermediate devise to his sons, daughters or children, unless the object of the intermediate devise is to create a perpetual succession of life estates. *Smith Ex. Int.*, § 576. See *Parr v. Swindels*, 4 Russ. (Eng.) 283; *Franks v. Price*, 5 Bing. N. C. (Eng.) 87.

Where there is an express devise to the issue in general or issue male or female, *eo nomine*, indefinitely or for life or in tail, interposed between the prior devise to the ancestor and the subsequent devise over on an indefinite failure of his issue in general or issue of the given description, and the intent is clear and unequivocal that the word issue shall be taken to be a word of purchase and it would be so construed if there were no such devise over; the better opinion would seem to be that the addition of the devise over does not prevent the word issue from being so construed, and the intermediate devise from conferring a distinct estate upon the issue, unless the object of the intermediate devise is to create a perpetual succession of life estates; but yet that it raises an estate tail, by implication, in favor of the ancestor, to take remainder after the intermediate estate conferred upon the issue. *Smith Ex. Int.*, § 571. Thus, "if there be a gift to the issue, and a limitation in the will with reference to them, which has the effect of giving them the fee simple, then if there be a gift over, in case of dying without issue, the gift over affords no evidence of intention to justify the application of the rule in *Shelly's* case, because the fee was in the issue and the words *dying without issue* are consequently held to mean only such issue as were before mentioned, as in the case of *Hockley v. Mawbey*, 1 Ves. Jr. 142, and *Leming v. Sherratt*, 2 Hare (Eng.) 14.

But it must first be made out that the fee is in the issue as purchasers." *Kavanagh v. Morland*, Kay (Eng.) 16.

A limitation over in case the prior devisee die without leaving issue *living at his death* is not considered explanatory of the species of issue included in the prior devise, and does not prevent the prior devise taking an estate tail under it. The result simply is that if the tenant in tail has no issue at his death, the devise over takes effect; if otherwise, the devise over is defeated notwithstanding a subsequent failure of issue. 2 *Jarman on Wills* (5th Am. ed.) *445. See *Lyon v. Mitchell*, 1 Madd. (Eng.) 467; *Hutchinson v. Stevens*, 1 Keen (Eng.) 240; *Broadhurst v. Morris*, 2 B. & A. (Eng.) 1.

1. It does not mean "in like manner." It is used to show that what follows is intended to be in addition to what precedes, or it is only made use of to distinguish the clauses in the will. *Evans v. Knorr*, 6 Rawle (Pa.) 69. "Item is an usual word in a will to introduce new distinct matter; therefore a clause thus introduced is not influenced by, nor to influence a precedent or subsequent sentence unless it be of itself imperfect and insensible without reference." *Hopewell v. Ackland*, 1 Salk. 239; *Horwitz v. Norris*, 60 Pa. St. 282; *Hoxton's Lessee v. Gardiner*, 1 H. & M. (Md.) 459. "'Item' shows that the testator is dealing with a new subject, and that the words following apply to that only, and not to the preceding matter, unless the intention that they should do so is plain." *Doe v. Westley*, 4 B. & C. 669.

"The terms 'item,' 'further,' 'moreover,' are commonly used in the beginning of a new devise or bequest, without indicating any particular intention in the disposition of the property." *Burr v. Sim*, 1 Whart. (Pa.) 264.

It is, however, sometimes construed conjunctively in the sense of 'and' or 'also,' and need not necessarily be construed as independent of the preceding clause. *Cheeseman v. Partridge*, 1 Atk. 438; *Castledon v. Turner*, 3 Atk. 259.

JAIL.—See PRISONS.

JAIL LIBERTIES.—See PRISONS.

JEFAILS—(See AMENDMENTS).—An oversight in pleading; a mistake, or error; strictly, the acknowledgment of an error.¹

JEOPARDY—(See CONSTITUTIONAL LAW).

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I. DEFINITION.—The word jeopardy signifies danger or peril; and in law the term is applied to the situation of a prisoner where a jury is sworn and empanelled to try his case and charged with his deliverance, upon a valid indictment,² and it is well settled at common law,³ and by a constitutional enactment of the United States,⁴ that no person shall be subject to be twice put in jeopardy of life or limb for the same offence.

II. UNIVERSALITY OF THE PRINCIPLE.—The principle of jeopardy is found in one of the maxims of the civil law,⁵ and embodied in the very elements of the common law.⁶ It is an ancient and well

1. Burr. Law. Dict.; 3 Bl. Com. 407. *F'ai failli* was the expression in which the ancient pleader acknowledged his error. Statutes of jeofails are statutes of amendments.

2. Bouv. L. Dict., tit. Jeopardy; Abb. L. Dict., tit. Jeopardy; Kendall v. State, 65 Ala. 492; State v. Redman, 17 Iowa 329; Cooley's Const. Lim. 326.

Webster's definition is, exposure to death, loss or injury, hazard, danger, peril.

3. 4 Black. Com. 315.

4. Const. U. S., Amend. 5.

5. Bouv. L. Dict. (15th ed.) tit. (*nom.* *bis in idem*).

But the finding of a similar maxim in the civil law, "*nom. bis in idem*," would indicate that the principle is a part of that universal law of reason, justice and conscience, of which CICERO said: "Nor is it one at Rome and another at Athens, one now and another in the future, but among all nations it is the same." Lactantius Inst. Div., bk. 7, ch. 8.

6. 4 Black. Com. 335; U. S. v. Gilbert, 2 Sim. (U. S.) 42; People v. Goodwin, 13 Johns. (N. Y.) 201; and see Com. v. Roby, 12 Pick. (Mass.) 501.

The safeguard is broader than the great commentator BLACKSTONE stated

established principle which is a part of that universal law of reason, justice and conscience, which reaches its culmination in our national constitution.¹ This provision in the United States constitution, however, is exclusively a restriction upon federal power, and does not limit the power of a state over its citizens;² but substantially the same restriction is contained in the constitution,³ or adopted by the legislature⁴ of nearly every state in the Union, the common law rule of no second jeopardy for the same offence, as distinguished from the constitutional one, having been generally adopted.⁵

III. TO WHAT JEOPARDY APPLIES.—While the words “life and limb,” used in the constitutional provision, would seem to indicate that it was intended to apply only to the higher crimes, it, being a remedial provision, is liberally construed, and is as a general rule applied to all indictable offences, including misdemeanors.⁶

it, for two kindred maxims of the common law, “*nemo debet bis vexari pro una et eadem causa*,” and “*nemo debet bis puniri pro uno delicto*,” have long guarded the rights of successful litigants in civil, and prevented oppression in criminal cases, not only so far as life is concerned, but also with respect to property, limb and liberty. 17 Am. L. Rev. 735.

In considering this question one should remember that at the time it became embedded into the constitutional jurisprudence of our English forefathers, twice in jeopardy only applied to life and limb and did not apply to misdemeanors. Hale P. C., vol. 1, ch. 3, vol. 2, ch. 19.

1. State v. Benham, 7 Conn. 414; Mount v. State, 14 Ohio 295; State v. Norvell, 2 Yerg. (Tenn.) 24; U. S. v. Keen, 1 McLean (U. S.) 429.

The declaration is not that a person shall not be twice tried for the same offence, but that he shall not be twice put in jeopardy. Hilands v. Com., 111 Pa. St. 1.

This constitutional provision, it has been said, extends to the common law maxim, which was limited to felonies, to all grades of offences; and it is but the application to the administration of criminal jurisprudence of a more general maxim, that no one shall be twice vexed for one and the same cause. The object of incorporating it under the fundamental law was to render it, as respects criminal causes, inviolable by any department of the government. State v. Behimer, 20 Ohio St. 572; Whart. Pl. & Ev., § 574.

2. Prescott v. State, 19 Ohio St. 187;

Twitchell v. Com. 9 Pa. St. 211; U. S. v. Barnhart, 22 Fed. Rep. 285; 10 Sawy. (U. S.) 491.

The supreme court of the State having denied a claim of immunity, specially set up under article 5 of amendments of the federal constitution, protecting any person from twice being put in jeopardy for the same offence, the supreme court of the United States has jurisdiction to review that decision. Bohanan v. Nebraska, 118 U. S. 231.

3. Bish. Cr. L. (7th ed.), § 981; Whart. Cr. Pr. (8th ed.), § 490.

The constitutions of the United States and all the States except six, namely: Connecticut, Maryland, Massachusetts, North Carolina, Virginia and Vermont, contain this prohibition against double punishment in very similar terms, and it being thus made a part of the fundamental law the decisions must conform therewith, except in the six States above mentioned. 7 Am. L. Rev. 735.

4. 17 Am. L. Rev. 735; Greenwook v. State, 6 Baxt. (Tenn.) 576.

5. 24 Cent. L. J. 563.

The plea of once in jeopardy under our constitutional provisions is similar to the plea of *autrefois acquit* or *autrefois convict* at common law. Whart. Pl. & Ev., § 537 (1875).

6. McCauley v. State, 26 Ala. 135; Jones v. State, 15 Ark. 261; State v. Lavinia, 25 Ga. 311; Campbell v. State, 11 Ga. 353; Williams v. Com., 29 Pa. St. 102; State v. Weaver, 13 Ired. (N. Car.) 203; State v. Lee, 10 R. I. 494; State v. Rankin, 4 Coldw. (Tenn.) 145; State v. Connor, 5 Coldw. (Tenn.) 315; Com. v. Olds, 5 Litt. (Ky.) 137; Day v.

IV. ESSENTIAL ELEMENTS OF JEOPARDY—1. Court of Competent Jurisdiction.—Legal jurisdiction does not arise if the court has no jurisdiction of the offence,¹ or power to hear or determine the cause.² But where there are two or more courts, each of which has jurisdiction, the court first assuming jurisdiction, takes exclusive cognizance of the case,³ and a conviction or an acquittal in such court is a bar to an indictment in any other court;⁴ but after

Com., 23 Gratt. (Va.) 915; Brink v. State, 18 Tex. App. 344; s. c., 51 Am. Rep. 317.

There is, however, an apparent tendency, in some of the courts to hold the doctrine more strictly in the higher crimes, especially those punishable with death, than in ordinary misdemeanors. Bish. Cr. L. (7th ed.), § 990; and see People v. Olcott, 2 Johns. (N. Y.) Cas. 301; Williams v. Com., 2 Gratt. (Va.) 567; U. S. v. Morris, 1 Curt. (U. S.) 23; Com. v. Cook, 6 Serg. & R. (Pa.) 577.

1. Ball v. State (Ark.), 2 S. W. 462; Severin v. People, 37 Ill. 414; O'Brian v. State, 12 Ind. 369; State v. Odell, 4 Blackf. (Ind.) 156; State v. M'Cory, 2 Blackf. (Ind.) 5; Com. v. Peters, 53 Mass. (12 Metc.) 387; Com. v. Goddard, 13 Mass. 455; Com. v. Hyde, Thatch. Cr. Cas. (Mass.) 112; People v. Tyler, 7 Mich. 161; Montross v. State, 61 Miss. 429; Marston v. Jenness, 11 N. H. 156; State v. Britton, 48 N. J. L. 371; s. c., 7 A. 679; Com. v. Myers, 1 Va. Cas. 188.

On an indictment for felony, a plea of former conviction is not supported by proof of an acquittal of the same charge before a justice, and conviction of a misdemeanor included in such felony, the justice having no jurisdiction over felonies. State v. Nichols, 38 Ark. 550.

An acquittal by a jury, in a court of the United States, of a defendant who is there indicted for an offence of which that court has no jurisdiction, is no bar to an indictment against him, for the same offence, in a State court. Com. v. Peters, 12 Metc. (Mass.) 387.

One charged before a police court with being a disorderly person, and discharged with formal objections to the jurisdiction of the court may be arrested again immediately on a warrant of a justice of the peace on like complaint. State v. Britton, 47 N. J. L. 251.

Change in the Law.—If, after the commission of the offence, the law is repealed, and another substituted without

any saving clause relative to past crimes, no court will have jurisdiction and a trial will be a nullity. Packer v. People, 8 Colo. 361; Garvey's Case, 7 Colo. 384.

A special plea of *autrefois convict* to an indictment before a court that had no jurisdiction over the offence is bad. Reich v. State, 53 Ga. 73; 1 Am. Cr. Rep. 543.

Where one pleaded, in bar to an indictment for assault and battery, a former conviction for the same offence before a justice of the peace, and it appeared from the record that the justice first ordered the defendant to recognize for his appearance at the common pleas, and then, on the defendant pleading guilty, revoked the order and sentenced him to pay a fine, the plea was held sufficient. Com. v. Goddard, 13 Mass. 455.

2. Dunn v. State, 2 Ark. 229; s. c., 35 Am. Dec. 54; State v. Payne, 4 Mo. 376; State v. Hodgkins, 42 N. H. 474; Hodges v. State, 5 Coldw. (Tenn.) 7; Wilson v. State, 16 Tex. 246; Flournoy v. State, 16 Tex. 30.

One convicted of murder wholly without authority of law cannot base a plea of once in jeopardy on such conviction. Packer v. People, 8 Colo. 361.

A conviction for an assault and battery, by the city court of Little Rock, Arkansas, under the act of 1840, which is held to be void, is *coram non jure*, and absolutely void, and constitutes no bar to a prosecution, in the circuit court, for the same offence. Rector v. State, 1 Eng. (Ark.) 187.

A prisoner is not put in jeopardy by being put on trial before a judge and jury at a special term of court not called as authorized by law. Dunn v. State, 2 Ark. 229; s. c., 42 Am. Dec. 689; People v. Webb, 38 Cal. 467.

3. U. S. v. Barnhart, 22 Fed. Rep. 285; 10 Sawy. (U. S.) 491; Burdett v. State, 9 Tex. 43.

4. When a mayor's court and the county court have concurrent jurisdiction of the offence of keeping a disor-

jurisdiction has been assumed by one court the defendant will not be put in jeopardy by a trial in another court of concurrent jurisdiction,¹ and a judgment of an inferior court is no bar to the prosecution in a higher court for a higher grade of the offence of which the inferior court has no jurisdiction.² A conviction or an acquittal by a justice, on a charge of which he had jurisdiction only to examine the accused and hold to bail, or discharge, is void, and no bar to an indictment for the same offence,³ as well as a conviction or an acquittal pronounced in a case in which the preliminary jurisdictional requisites, as complaint, process, etc., had been omitted.⁴ Not only must the court have jurisdiction of the offence, but it must have been committed within the territorial limits of its jurisdiction. If committed elsewhere, a former jeop-

derly house, an acquittal in the mayor's court is a bar to an indictment in the county court. *Handley v. State*, 16 Tex. App. 444.

A conviction in an inferior court having concurrent jurisdiction of the offence must stand upon an equal footing. It cannot be claimed that a rightful conviction in one court has more or less efficacy in protecting a respondent from further prosecution than a similar conviction in a court of concurrent jurisdiction. In *Hawkins' Pleas of the Crown*, ch. 35, § 10, it is said "an acquittal in any court whatever which has jurisdiction of the cause is as good as if in the highest court." "*A fortiori*," says PARKER, C. J., in *Com. v. Goddard*, 13 Mass. 455, "should a conviction be good in such case."

1. While after indictment and before trial, a justice of the peace took jurisdiction of the same offence, before whom the offender was tried and sentenced, the court held that the conviction and sentence was no bar to the indictment. *Burdett v. State*, 9 Tex. 43.

2. *White v. State*, 9 Tex. App. 390.

A conviction of an assault before a justice is not a bar to an indictment for a higher grade of assault not within the justice's jurisdiction, although based on the same assault. *Boswell v. State*, 20 Fla. 869.

3. *State v. Morgan*, 62 Ind. 35; *O'Brian v. State*, 12 Ind. 369; *State v. Odell*, 4 Blackf. (Ind.) 156; *State v. Payne*, 4 Mo. 376; *Foust v. State*, 85 Tenn. 342; *Hodges v. State*, 5 Coldw. (Tenn.) 7.

4. Conviction before a justice of the peace, in the absence of any charge is void, and no bar to a subsequent indictment. *Bigham v. State*, 59 Miss. 529.

On a trial for an aggravated assault

defendant pleaded former conviction before a justice of the peace. It appeared that the justice acted without affidavit or warrant, and no witnesses were examined, and that defendant pleaded guilty to a single assault. *Held*, no bar. *Warriner v. State*, 3 Tex. App. 104; s. c., 30 Am. Rep. 124.

The judgment of a justice of the peace, on a conviction for a misdemeanor, upon the voluntary appearance of the offender, without process, prosecutor, or the hearing of evidence, is extrajudicial, and is no bar to an indictment in the circuit court. *State v. Atkinson*, 9 Humph. (Tenn.) 677.

Information of Offender.—A conviction before a justice of the peace, and a sentence to pay a fine, on the confession or the information of the offender himself, is no bar to an indictment for the same offence. *Com. v. Alderman*, 4 Mass. 477.

A former conviction for intoxication, rendered by a justice of the peace against one of his own complaint, is not a bar to the prosecution previously instituted by the State's authority for the same offence, though the form is determined by the statute. A formal complaint is necessary, under Const. Vt., ch. 1, art. 2, and R. L., §§ 1667, 1719, 1749, to confer jurisdiction on the magistrate. *State v. Wakefield* (Vt.), 15 A. 181.

Change of Venue.—The court to which a change of venue in a criminal cause is taken acquires no jurisdiction of the cause until there is filed in it a transcript of the record and proceedings in the cause from the original court, duly certified by the clerk under the seal of the court; and therefore a trial of the defendant upon a transcript without a seal would be no jeopardy, and no defence against a trial upon the same

ardly is no defence;¹ and if the court derives its existence from an unconstitutional statute,² or holds a term not authorized by law,³ its judgments are no bar.

2. Sufficient Indictment or Information.—Former jeopardy is a good defence where the acquittal or conviction is upon a valid indictment sufficient in form and substance to sustain a conviction,⁴ and not otherwise;⁵ and no jeopardy arises on the trial of an in-

record after it is perfected by the seal. *Ball v. State*, 48 Ark. 94; Am. Dec. 1886, 2 S. W. 462.

1. *Nicholson v. State*, 72 Ala. 176; *Campbell v. People*, 109 Ill. 565; *Com. v. Roby*, 29 Mass. (12 Pick.) 496; *State v. Barnhart*, 22 Fed. Rep. 285; 10 Sawy. (U. S.) 491.

The *North Carolina* courts have jurisdiction only of offences committed within the territorial boundaries of that State, and if they are committed in another State, that is a matter of defence under the plea of "not guilty." *State v. Mitchell*, 83 N. C. 674.

2. *Rector v. State*, 1 Eng. (Ark.) 187; and see *McGinnis v. State*, 9 Humph. (Tenn.) 43.

3. *Dunn v. State*, 2 Pike (Ark.) 239; *Rex v. Bowman*, 6 Car. & P. (Eng.) 101.

4. *Kendall v. State*, 65 Ala. 492; *State v. Ward*, 48 Ark. 36; *Black v. State*, 36 Ga. 447. Compare *U. S. v. Bigelow*, 3 Mackey (D. C.) 393; *U. S. v. Phillips*, 5 Mackey (D. C.) 250.

A verdict of acquittal or conviction, on a good indictment, is a bar to a subsequent prosecution for the same offence, though no judgment is entered. *State v. Norvell*, 2 Yerg. (Tenn.) 24.

An indictment must not only state all the facts which constitute the offence intended to be charged, but must state them with such certainty and precision that the defendant may judge whether they constitute an indictable offence or not, and may demur or plead accordingly, and may plead his conviction or acquittal in bar of another prosecution for the same offence. *Fink v. Milwaukee*, 17 Wis. 26.

5. *State v. Cheek*, 25 Ark. 206; *People v. McNealy*, 17 Cal. 333; *People v. March*, 6 Cal. 543; *State v. Woodruff*, 2 Day (Conn.) 504; *Black v. State*, 36 Ga. 447; *Gerard v. People*, 4 Ill. (3 Scam.) 362; *Mount v. Com.* 2 Duv. (Ky.) 93; *Com. v. Bakeman*, 105 Mass. 53; *Com. v. Keith*, 49 Mass. (3 Metc.) 531; *Com. v. Loud*, 44 Mass. (3 Metc.) 328; *Cochrane v. State*, 6 Md. 400; 2

Hale, P. C. 248; *State v. Williams*, 5 Md. 82; *People v. Cook*, 10 Mich. 164; *Kohlheimer v. State*, 39 Miss. 548; *People v. Barrett*, 1 Johns. (N. Y.) 66; *State v. Ray*, 1 Rice (S. Car.) 1; 8 c. 33 Am. Dec. 90; *Pritchett v. State*, 2 Sneed (Tenn.) 285; *Walton v. State*, 3 Sneed (Tenn.) 687; *State v. Garrigues*, 1 Hayw. (N. Car.) 241; *Com. v. Chichester*, 1 Va. cas. 312.

That a former jury was empanelled to try the same offence, but the cause was dismissed for a defect in the indictment before any evidence was admitted, is not sufficient to bar a subsequent indictment for the same offence. *State v. Priebnow*, 16 Neb. 131.

On an indictment for felony, a *vol. pros.*, entered with the assent of the court, even after the jury is empanelled and proof heard, where the indictment is bad, does not operate as an acquittal of the prisoner, there having been no legal jeopardy. *Walton v. State*, 3 Sneed (Tenn.) 687.

The State after entering a *vol. pros.* on an indictment may frame a new bill containing other counts and repeating the former charge in the same words. *State v. Tindal*, 5 Harring. (Del.) 488.

No Legal Crime.—A judgment quashing an indictment on the ground of the unconstitutionality of the statute under which the charge is brought, when the accused has not been tried as to his guilt or innocence under the charge, will not be a bar to a subsequent prosecution of the accused under the same charge. *State v. Taylor*, 34 La. An. 978.

As the *Indiana* statutes recognize no such offence as that of "unlawfully carrying a dangerous weapon," a conviction of an offence so designated is not a bar to a prosecution for a statutory offence. *Davidson v. State*, 99 Ind. 366.

Larceny from Bailor.—Prisoner was indicted for stealing a pair of boots, the property of A, and acquitted. He was then indicted again for stealing the same boots, laid as the property of B, and

dictment found by an illegally organized grand jury;¹ but it is otherwise where the indictment is merely voidable for matters not appearing on the record.² There is no jeopardy, however, where the indictment is quashed because of the incompetency of some of the grand jurors finding it;³ the test question being whether or not the indictment or complaint is so utterly defective that the merits could not be tried and no judgment, either of conviction or acquittal could be pronounced upon it;⁴ and in proceedings on a

pleaded *autrefois acquit*. It appeared that A was a boy fourteen years of age, living with and assisting B, who was his father; that the boots were the property of B, but that, at the time they were stolen by the prisoner, A had, temporarily, in his father's absence, the charge of the stall from which they were stolen. *Held*, 1, that A was not a bailee, and that the ownership of the boots could not properly be laid in him; 2, That the plea of *autrefois acquit* could not be sustained notwithstanding the power of amendment given by 14 and 15 Vict., ch. 100. *Reg. v. Green*, 37 Eng. Law and Eq. 597.

How Pleaded.—Such a defence does not call for a plea in abatement under *Bat. North Carolina* Rev., ch. 33, § 70, which was enacted to cover cases where the offence was committed in the state, but which was charged to have occurred in the wrong county. *State v. Mitchell*, 83 N. Car. 674.

In *Missouri* a second indictment may be found for the same offence, although the first has been sent to another county and after a *nol. pros.* entered as to the first, the second may be tried in the county where found. *State v. Patterson*, 73 Mo. 695.

1. *Finley v. State*, 61 Ala. 201; *Kohlheimer v. State*, 39 Miss. 548.

2. *Kohlheimer v. State*, 39 Miss. 448.

3. *Brown v. State*, 5 Eng. (Ark.) 607.

Where the defendant was indicted and convicted of murder, and on appeal a new trial was ordered, on the ground of objection to a juror, whereupon, on motion of the prosecution, the indictment was set aside on account of irregularities in summoning and empanelling the grand jury, on which new trial the prisoner was convicted; it was *held*, that the second trial and conviction did not put the prisoner "twice in jeopardy for the same offence," as it is apparent that the prisoner was not put in jeopardy by the first trial, which had been held to be erroneous. *People v. March*, 6 Cal. 543.

4. *Johnson v. State*, 82 Ala. 29; *State v. Ward*, 48 Ark. 36; s. c., 2 S. W. 101; *People v. Clark*, 67 Cal. 99; *People v. McNealy*, 17 Cal. 332; *Black v. State*, 36 Ga. 447; *State v. Clark*, 69 Iowa 196; s. c., 28 N. W. 537; *Mount v. Com.*, 2 Duv. (Ky.) 93; *Com. v. Peters*, 53 Mass. (12 Metc.) 387; *Com. v. Roby*, 29 Mass. (12 Pick.) 502; *Com. v. Goddard*, 13 Mass. 455; *State v. Owen*, 78 Mo. 367; *People v. Barrett*, 1 Johns. (N. Y.) 66; *State v. Holly*, 2 Bay (S. Car.) 262; *State v. Ray*, 1 Rice (S. Car.) 1; *Walton v. State*, 3 Sneed (Tenn.) 687; *Com. v. Curtis*, Thatch. Cr. Cas. (Mass.) 202; *Com. v. Chichester*, 1 Va. Cas. 312; *King v. Emden*, 9 East (Eng.) 439; *Reg. v. Drury*, 3 Car. & K. (Eng.) 190; s. c., 3 Cox C. C. 544.

A conviction on a void indictment, not followed by punishment, is not a bar to a subsequent indictment for the same offence. *U. S. v. Jones*, 31 Fed. Rep. 725.

One convicted under an illegal indictment, or to whom a new trial has been awarded, is not exempt from a second prosecution for the same offence. *Simco v. State*, 9 Tex. App. 338.

After prosecuting under an indictment which has been ignored, the State is not barred, in new proceedings, from selecting indictment or information, as provided by the constitution. *State v. Ross*, 14 La. An. 364.

Discharge of the jury before verdict, without objection, upon sustaining defendant's objection to the indictment that it did not charge the commission of a crime, will not support the plea of *autrefois acquit*. *State v. Priebnow*, 16 Neb. 131.

Where the attorney general entered a *nol. pros.* to an indictment after the jury had been sworn to try it, because it did not allege the value of the property stolen. *Held*, that the defendant had not been put in jeopardy, so that he could be tried under a second indictment. *State v. Crutch*, 1 Houst. Crim. C. (Del.) 204.

second indictment it is immaterial whether the first one was in fact quashed or not.¹

3. *Issue Joined.*—There must be an issue formed before jeopardy can attach,² and it will not attach where the defendant has made a plea of guilty through fear,³ or where the plea has been erroneously entered by the clerk.⁴

A prosecuting attorney without leave of the court amended his indictment shortly before trial, and the defendant made no objection thereto on the trial. *Held*, that the prosecuting officer could not treat the amendment as a nullity, but that the defendant having been acquitted on trial on the amended indictment, a subsequent prosecution for the same offence was barred, if the indictment, as amended, was sufficient. *People v. Cook*, 10 Mich. 164.

Evidence that, on the defendant's motion, judgment was arrested on the first indictment because it was insufficient, will not maintain a plea of former conviction. *State v. Sherburne*, 58 N. H. 535.

Mistake in Allegation of Time.—Where, after the jury was empanelled, the indictment was found to charge the offence at a future time and was quashed, it was *held* that the prisoner was not in jeopardy. *State v. Jenkins*, 20 s. c., 351.

An information for murder charged the commission of the offence on a day subsequent to the date of its filing; the mistake being discovered on the trial, the jury was discharged, on motion of the prosecution, before verdict. A new information was then filed, to which the defendant pleaded that he had been once in jeopardy for the same offence. *Held*, that a conviction upon this information would have been a nullity, and that it was not admissible to sustain the plea. *People v. Larson*, 68 Cal. 18.

Misdescription.—An indictment for manslaughter, quashed, justly or erroneously, for misdescription of the mortal wound, is no bar to a second indictment for the same offence. *Com. v. Gould*, 12 Gray (Mass.) 171.

One cannot plead former jeopardy who was formerly indicted under a wrong given name, a *nol. pros.* having been entered on the discovery of the error. *Branch v. State*, 20 Tex. App. 399.

1. *State v. Vincent*, 91 Mo. 662.

In *Georgia*, however, it was *held* that a verdict of not guilty, rendered under an erroneous decision of the court that

the indictment upon which it is rendered is insufficient to support a conviction, will protect the accused against a subsequent conviction for the same offence, though rendered, without evidence, on motion of the defendant, upon the ground that the indictment was insufficient. *Black v. State*, 36 Ga. 447.

2. *Ned v. State*, 7 Port. (Ala.) 187; *Bell v. State*, 44 Ala. 393; *Grogan v. State*, 44 Ala. 9; *Lee v. State*, 26 Ark. 260; s. c., 7 Am. Rep. 60; *Boswell v. State*, 111 Ind. 47; s. c., 9 West. Rep. 262.

Until the defendant has entered his plea, or it has been entered for him upon his refusal to plead, he cannot be put in jeopardy. *Weaver v. State*, 8 Blackf. (Ind.) 563.

After a verdict the court cannot order a plea of "not guilty" to be entered for the defendant without his consent, and then render judgment against him on the verdict. *Davis v. State*, 38 Wis. 487.

If there is no arraignment or a waiver of it, the trial is a nullity and jeopardy does not attach. *Newson v. State*, 2 Kelley (Ga.) 60; *Davis v. State*, 38 Wis. 487; *Douglass v. State*, 3 Wis. 820.

There was a failure to arraign the accused on the second trial; it was *held* that the defendant had not waived his right, by not pleading, to insist on a former conviction. *State v. Martin*, 30 Wis. 216; s. c., 11 Am. Rep. 567. See *State v. Brannon*, 55 Mo. 63; s. c., 17 Am. Rep. 643; *Lesslie v. State*, 18 Ohio St. 390; *Thompson v. State*, 9 Tex. App. 649.

The jury was sworn to try the case before the defendant had been arraigned or had entered his plea. The court immediately, over the objection of the defendant, arraigned the defendant, and, upon his refusal to plead, entered a plea of not guilty for him. The jury was then re-sworn, and the defendant convicted. It was *held* that the defendant was not put in jeopardy by the jury being sworn before arraignment and plea. *Weaver v. State*, 8 Blackf. (Ind.) 563.

3. *Sanders v. State*, 85 Ind. 318.

4. One is not put in jeopardy by an

4. **Legal Jury.**—If there is not a complete panel of jurors, the trial is a nullity and jeopardy does not attach,¹ and a trial without a jury is void and not a putting in jeopardy.²

5. **Jury Charged with the Prisoner.**—The jury is said to be charged with the prisoner when the twelve jurors are duly empanelled and sworn;³ and when they are thus sworn to try the accused on the charge preferred, jeopardy attaches.⁴ If it attaches for the mo-

erroneous entry of the clerk that he had pleaded "not guilty," the same being amended after a continuance of the cause without trial to the next term. *Phillips v. People*, 88 Ill. 160.

Plea by Attorney.—In a prosecution for felony, a plea of not guilty by an attorney is a nullity: such plea must be pleaded by defendant in person, and that fact should appear by the record. *State v. Conkle*, 16 W. Va. 736.

1. *Bell v. State*, 44 Ala. 395; *Moore v. Clegg*, 72 Ind. 358; *Allen v. State*, 54 Ind. 461; *Brown v. State*, 8 Blackf. (Ind.) 561; *Brown v. State*, 16 Ind. 496; *Cancemi v. People*, 4 Smith (18 N. Y.) 128; *State v. Burket*, 2 Treadw. Const. (S. Car.) 155.

The discharge of two jurors after arraignment, but before introduction of any evidence, on the ground that they were on the grand jury that found the indictment, and the consequent impaneling of a new jury, does not render a conviction by the latter a case of second jeopardy. *Watkins v. State*, 60 Ga. 601.

2. *State v. Mead*, 4 Blackf. (Ind.) 309; s. c., 30 Am. Dec. 661.

3. *Madden v. Emmons*, 83 Ind. 331; *McFadden v. Com.*, 23 Pa. St. 12; *Hilands v. Com.*, 111 Pa. St. 1; *Harris Cr. L.* 311.

In the case of *Newsom v. State*, 2 Kelly (Ga.) 60, the court say that, "What we understand by charging the jury with the case, or submitting the case in charge to the jury," is "that they are thus charged to make enquiry into the truth of the fact alleged on one side and denied on the other, and all things being ready for the trial, the clerk concludes his charge to the jury with these words, 'hear your evidence.' In the judgment of this court, when a case is given in charge to a jury in England, it is submitted to a jury in Georgia."

4. *Kendall v. State*, 65 Ala. 492; *Bell v. State*, 44 Ala. 395; *Grogan v. State*, 44 Ala. 9; *Cobia v. State*, 16 Ala. 781; *Whitmore v. State*, 43 Ark. 271; *State v. Ward* (Ark.), 2 S. W. 191; *People v. Webb*, 38 Cal. 467; *People v.*

Horn, 70 Cal. 17; *Newsom v. State*, 2 Kelly (Ga.) 60; *Wright v. State*, 5 Ind. 292; *Weinzorpfli v. State*, 7 Blackf. (Ind.) 186; *State v. Walker*, 26 Ind. 346; *Morgan v. State*, 13 Ind. 215; *Maden v. Emmons*, 83 Ind. 331; *Weaver v. State*, 8 Blackf. (Ind.) 563; *State v. Redman*, 17 Iowa 329; *People v. Barker*, 60 Mich. 277; *Ah King v. People*, 4 Cal. 307; *State v. Ephraim*, 2 Dev. & B. (N. Car.) L. 162; *Spier's Case*, 1 Dev. (N. Car.) 491; *Price v. State*, 19 Ohio 423; *Com. v. Cook*, 6 Serg. & R. (Pa.) 577; *Hilands v. Com.*, 111 Pa. St. 1; *McFadden v. Com.*, 23 Pa. St. 12; *State v. Norvell*, 2 Yerg. (Tenn.) 24; *State v. Connor*, 5 Coldw. (Tenn.) 311; *Gruber v. State*, 3 W. Va. 699; *Reg. v. Oulaghan, Jebb* (Eng.) 270.

The putting in of a plea does not put the defendant in jeopardy, as that must be done before the jury is sworn. *Com. v. Dunham, Thatch. C. C. (Mass.)* 513; *People v. Fisher*, 14 Wend. (N. Y.) 9; *Com. v. Drew*, 57 Mass. (3 Cush.) 279.

One is not in jeopardy until the whole jury is sworn. Before this, the court, for cause, may order a new drawing. *Alexander v. Com.*, 105 Pa. St. 1.

The discharge of a defendant prosecuted for bastardy, by reason of the relator's failure to appear, does not bar another prosecution. *State v. Barbour*, 17 Ind. 526.

A discharge from a former indictment upon payment of costs, in consequence of the refusal of the prisoner to prosecute further, is no bar to a subsequent indictment. *State v. Blackwell*, 9 Ala. 79.

The charging of the jury here regarded, is similar to the State's statement to the jury of its cause of action, as it takes place immediately after the jury is sworn, and after an old form it is an address to the jury, as follows: "Gentlemen of the jury, look upon the prisoner and hearken to his charge; he stands indicted by the name of A B, late of the parish of, etc., laborer, for that he (reading the indictment). Upon this indictment he has been ar-

ment only, it is sufficient to put the accused within the provision of the constitution.¹

6. The Same Offence.—A former trial and acquittal is no bar unless the offences charged in both indictments are the same, both in law and in fact,² and if it appears that the second case is for the

raigned; upon his arraignment he hath pleaded not guilty; your charge, therefore, is to enquire whether he be guilty or not guilty, and hearken to the evidence." 1 Whart. on Cr. L., § 590.

"Twice put" in jeopardy, and "twice put on trial," says CHIEF JUSTICE TAYLOR, in *Spier's Cas.* (1 Dev. N. Car. 491), "convey to the mind several and distinct meanings, for we can readily understand how a person has been put in jeopardy, upon whose case the jury have not passed. The danger and peril of a verdict do not relate to a verdict given. When the jury are empanelled on the trial of a person charged with a capital offence, and the indictment is not defective, his life is in peril, or jeopardy, and continues so throughout the trial."

But there is a very respectable holding to the effect that the jeopardy does not attach until verdict is rendered. *Com. v. Olds*, 5 Litt. (Ky.) 137; *People v. Westchester*, 1 Park. C. C. (N. Y.) 659; *United States v. Perez*, 22 U. S. (9 Wheat.) 579; *U. S. v. Gilbert*, 2 Sumn. (U. S.) 19; *State v. Moor*, 1 Walk. (Miss.) 134; *Swindel v. State*, 32 Tex. 102; *O'Brian v. Com.*, 6 Bush (Ky.) 563; *Wilson v. Com.*, 3 Bush (Ky.) 105.

Other cases hold that jeopardy only begins after verdict. *U. S. v. Perez*, 22 U. S. (9 Wheat.) 579; *People v. Goodwin*, 18 Johns. (N. Y.) 187; s. c., 9 Am. Dec. 203; *U. S. v. Gilbert*, 2 Sumn. (U. S.) 19; *State v. Moor*, Walk. (Miss.) 134; s. c., 12 Am. Dec. 541; *Taylor v. State*, 35 Tex. 97; *Moseley v. State*, 33 Tex. 671; *State v. Champeau*, 52 Vt. 313; s. c., 36 Am. Rep. 754.

1. 1 Bish. Cr. L. (7th ed.), § 1013; *Morgan v. State*, 13 Ind. 215; *Wright v. State*, 7 Ind. 324.

2. 4 Black. Com. 336; 1 Russ. on Crimes 829; *Wilkinson v. State*, 59 Ind. 416; s. c., 2 Am. Cr. Rep. 596; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Burns v. People*, 1 Park. (N. Y.) Cr. 182; *People v. Nichols*, 3 Park. (N. Y.) Cr. 579; *People v. Burch*, 5 N. Y. Cr. Rep. 29, 30; *State v. Steward*, 11 Oreg. 52, 238; *State v. Herrick*, 3 Nev. 259; *State v. Spear*, 6 Mo. 645; *Morman v. State*, 24

Miss. 54; *Com. v. Foster*, 3 Metc. (Ky.) 1; *U. S. v. Wilson*, 7 Pet. (U. S.) 150.

In a prosecution for a second offence, a conviction of a previous offence is equally conclusive whether defendant's plea in the previous case was guilty, not guilty, or *nolo contendere*. *State v. Fagin*, 64 N. H. 431; 6 N. Eng. 669.

A conviction on one of several counts in an indictment for the same offence, and a discontinuance as to the residue, is a bar to a subsequent indictment for the same charges. *U. S. v. Keen*, 1 McLean (U. S.) 429.

Conviction for keeping a disorderly house is a bar to a prosecution for the same offence at any time prior to the finding of the indictment. *U. S. v. Burch*, 1 Cranch (U. S.) 36; *Dixon v. Corp. of Wash.*, 4 Cranch (U. S.) 114.

Where an affidavit made before a justice charges an indictable offence above the grade of an assault, for which the defendant is subsequently indicted and acquitted, such acquittal may be pleaded in bar of further proceedings before the justice. *State v. Wightman*, 26 Mo. 515.

Where an information to award an additional punishment sets forth a previous conviction and sentence upon an indictment embracing an averment of two former convictions and sentences, it was *held*, that the judgment and sentence upon the indictment was a bar to any further sentence upon the information for the same offences. *Plumbly v. Com.*, 2 Metc. (Mass.) 413.

Where defendants are bound to keep the streets of an incorporated town in order, and several streets are presented on the same day, and several bills are found, a conviction on one may be pleaded in bar to the others. *State v. Fayetteville*, 2 Murph. (N. Car.) 371.

Defendant was acquitted of the charge of carrying a pistol. *Held*, to bar a prosecution for carrying the same pistol at another place sixty yards away, to which he immediately went. *Smith v. State*, 79 Ala. 257.

A conviction or an acquittal upon an indictment under Rev. Sts. of *Massachusetts*, ch. 126, § 5, for burning a building, which does not aver that the

same transaction as the first, it is immaterial if the offence is called by a different name.¹

building alleged to have been burned was "other than is mentioned" in section 3 of the same chapter, is a bar to a second indictment, under section 3 for the same burning. *Com. v. Squire*, 1 Metc. (Mass.) 258.

Different Court.—Where a party has been tried in a county court, on an indictment for an affray, he cannot be again tried for the same act in the superior court on a bill for assault and battery. *State v. Stanly*, 4 Jones (N. Car.) L. 290.

A party regularly convicted of assault and battery before a justice of the peace, cannot be prosecuted for the same offence in the court of common pleas. *Bruce v. State*, 9 Ind. 206.

Where proceedings were commenced against a person for an alleged offence, upon a complaint and warrant, before a justice of the peace, in a matter where he has final jurisdiction, and the accused is arraigned, tried and discharged as not guilty, and judgment has been entered thereon, he cannot be again put on trial, under another similar complaint and warrant for the same offence. *Stevens v. Fassett*, 27 Me. 266.

A judgment rendered by a justice of the peace, under the *Kentucky* act of 1802, upon a warrant for a breach of the peace, committed by an assault and battery, is a bar to an indictment for the same assault and battery. *Com. v. Miller*, 5 Dana (Ky.) 320.

A conviction by a justice of the peace for a misdemeanor, in *Tennessee*, under the act of 1848, ch. 66, is a bar to a subsequent prosecution, for the same offence by indictment or presentation, and, it seems, it would be so even if that act were unconstitutional. *McGinnis v. State*, 9 Humph (Tenn.) 43.

Discharge Under Habeas Corpus.—A person, discharged under the Habeas Corpus act of *South Carolina*, from prison, having been committed on a charge of murder, was *held* to be protected thereby from a subsequent prosecution on the same charge, as in case of a former acquittal. *State v. Fley*, 2 Brev. (S. Car.) 338.

1. *Moore v. State*, 71 Ala. 307; *Holt v. State*, 38 Ga. 187; *State v. Layton*, 25 Iowa 193.

In *Texas* Const., art. 1, § 14, as to second jeopardy, "same offence" means not the same *eo nomine*, but the

same criminal act or omission. A conviction of "swindling" is a good bar to a prosecution for "uttering a forged instrument." *Hirshfield v. State*, 11 Tex. App. 207.

Where the gravamen of a riot is an assault and battery, a final judgment in the prosecution for an assault will bar a prosecution for the riot. *Wininger v. State*, 13 Ind. 540.

A conviction for simple larceny of a hat is a bar to an indictment for larceny of the same from a shop, the stealing in both cases being the same. *State v. Wiles*, 26 Minn. 381.

A plea of an acquittal by a justice of the peace is a sufficient bar to an indictment for an assault and battery, which alleges that "the life of the prosecutor was put in great danger," etc. *Com. v. Cunningham*, 13 Mass. 245. These words are used merely of course, and do not import a high and aggravated battery. *Com. v. Cunningham*, 13 Mass. 245. See also *State v. M'Cory*, 2 Blackf. (Ind.) 5.

In *Hinkle v. Com.*, 4 Dana (Ky.) 518, it was *held* that although setting up a gaming table and keeping a gaming table and inducing others to bet at it are distinct offences, yet where they are committed by one person at the same time, they are but one offence, may be laid in one count, and warrant but one penalty.

A conviction as a "common seller of liquor," under *Vermont*, St. 1852, is a conclusive bar to all complaints for sales prior to filing the complaint on which the conviction was had. *State v. Nutt*, 2 Wms. (28 Vt.) 598.

Variation in Name.—B's indictment in the circuit for wounding Jackson Perkins with a stone, a deadly weapon, *held*, barred by B's conviction before a justice for a breach of the peace, by assaulting and beating F. J. Perkins. *Com. v. Bright*, 78 Ky. 238.

An indictment charging one with stealing the property of A and B is barred by the dismissal of a former indictment charging him with stealing at the same time and place like property of A. *Williams v. Com.*, 78 Ky. 93.

"I have bought of Barnhardt Krummer two frocks for seven dollars. Ask your employers for the money, and let him have it." (Signed) "Mrs. Williams." B. K. was indicted for forg-

a. Where the Same Act Constitutes Several Offences.—Where the same act constitutes a crime against several persons, a conviction or acquittal as to one bars an indictment as to another,¹ and where the same act constitutes several different crimes a conviction or acquittal as to one also bars a subsequent prosecution as to another.² The same individual may, however, at the same time, and

ing this instrument, and for uttering it to Samuel Williams, Jr. (a son of Samuel Williams), as the act of his mother. *Held*, that the instrument, in connection with the intrinsic facts, was within the statute of forgery, and that an acquittal on the indictment on the merits, was a bar to a subsequent indictment for obtaining the money from S. W., Jr., by the false pretences that the instrument was true. *People v. Krummer*, 4 Parker (N. Y.) C. R. 217.

In *State v. Benham*, 7 Conn. 414, it was *held* that having in possession at one time several forged bank notes of different banks, with intent to pass them and defraud the person who should take them, and the several banks, constitute but one offence. So in *State v. Eggesht*, 41 Iowa 574; s. c., 20 Am. Rep. 612, it was *held* of uttering four forged checks of different parties at the same time.

1. *Clem v. State*, 42 Ind. 420; s. c., 13 Am. Rep. 369; *Woodford v. People*, 62 N. Y. 117; s. c., 40 Am. Rep. 463; *State v. Damon*, 2 Tyler (Vt.) 387.

In *State v. Merritt*, Phillips (N. Car.) 134, the indictment charged an assault on A; the proof showed that a gun was fired at A and B, the shot passing between them. The indictment was *held* good, the court observing that an indiscriminate assault upon several is very clearly an assault upon each individual. But it is not *held* that separate indictments would lie. In *State v. Comms.*, 2 Murph. (N. Car.) 371, distinguished from the principal case on the grounds that it was a case of mere omission of duty, the court, however, observed, this notion of rendering crimes, like matter, infinitely divisible, is repugnant to the spirit and policy of the law, and ought not to be countenanced.

Where K, with two others, was indicted for riotously, etc., assembling to disturb the peace, and for riotously, etc., beating M, a plea that K had been before indicted for an assault and battery on said M, being the same offence, and that on the trial the riotous conduct, now charged on K and others, was shown in aggravation of said assault

and battery, and that he had been convicted of the same, was *held* to be a good bar. *Com. v. Kinney*, 2 Va. Cas. 139.

Where in one transaction the defendant stole the cattle of two different owners, and was indicted separately for each theft, it was *held* that a conviction on one indictment was a bar to the trial on the other, but an acquittal was not a bar. *Wright v. State*, 17 Tex. App. 152.

2. *State v. Colgate*, 31 Kan. 511; *Triplett v. Com.*, 84 Ky. 193; *State v. DeGraffenreid*, 9 Baxt. (Tenn.) 287; *Williams v. State*, 24 Tex. App. 69.

An acquittal under an indictment for burglary in breaking and entering a dwelling with intent to steal, is a bar to a subsequent indictment for grand larceny, when the alleged taking was connected with a part of the same transaction constituting the alleged burglary at the same place and on the same occasion. *Triplett v. Com.*, 84 Ky. 193.

An indictment charged burglary and theft in the same count. The court in its charge submitted the charge of burglary only, and the jury found a general verdict of guilty of burglary. *Held*, that the verdict conformed to the indictment, and the charge of the court, the judgment and sentence conformed to the verdict; and the conviction was for burglary alone, but operated to bar any further prosecution for the theft charged in the indictment. *Turner v. State*, 23 Tex. App. 512; s. c., 2 S. W. 619.

Although the *Missouri* statute permits burglary and larceny to be charged in the same count of an indictment, they are not one offence, but separate offences; and where, upon the trial of such an indictment, defendant is acquitted of the burglary and convicted of the larceny, he cannot, upon a new trial upon the same indictment, be convicted of burglary. *State v. Bruffer*, 75 Mo. 389. Compare *State v. Gannon*, 1 Mo. App. 502.

Defendant being tried for both burglary and larceny upon an indictment in one count, as permitted by statute, was acquitted of burglary and convicted of

in the same transaction, commit two or more distinct crimes, in which case a prosecution for one is no bar to an indictment for another,¹ the distinction being that in the former case, the indict-

larceny. A new trial being granted, *held*, that he could not be held to answer for the burglary upon the second trial. *State v. Bruffey*, 75 Mo. 389.

1. *State v. Standifer*, 5 Port. (Ala.) 523; *Crocker v. State*, 47 Ga. 568; *Fant v. People*, 45 Ill. 259; *Olathe v. Thomas*, 26 Kan. 233; *Hilands v. Com.*, 114 Pa. St. 372; *Campbell v. State*, 22 Tex. App. 262.

An acquittal upon an indictment for a felony constitutes no bar to an indictment for a misdemeanor; and an acquittal for a misdemeanor is no bar to an indictment for felony. *People v. Saunders*, 4 Parker (N. Y.) C. R. 196; *Reg. v. Gilmore*, 15 Cox Cr. Cas. 85; s. c., 36 Eng. Rep. 500.

New York Code Crim. Proc., § 720, providing that a charge once dismissed by a grand jury cannot be again submitted except by direction of the court, does not apply when the charge subsequently considered is for an offence different from that previously dismissed. *People v. Warren*, 5 Hill (N. Y.) 440.

Illinois Act of June 23rd, 1883, respecting second and third offences, is not unconstitutional; second conviction need not be for same crime as former. *Kelly v. People* (Ill.), 3 West 45.

Contempt of Court.—A person may be indicted for an assault, committed in view of the court, though previously fined for contempt for the same act. *State v. Yancy*, 1 N. C., L. R. 519; s. c., 6 Am. Dec. 553; *State v. Woodfin*, 5 Ired. (N. Car.) L. 199; 2 Bish. Cr. L., § 264.

Conviction of Assault After Acquittal of Murder.—On an indictment for murder in the statutory form, charging merely that the prisoner feloniously, wilfully, and of malice aforethought, did kill and murder the deceased, no conviction could be had of an assault, and consequently an acquittal on such an indictment is no bar to a prosecution for an assault for the same act. *Reg. v. Smith*, 34 U. C., Q. B. 140; 1 Am. Cr. Rep. 511.

An acquittal of the charge of murder is not a bar to a prosecution for being an accessory before the fact. *Morrow v. State*, 14 Lea (Tenn.) 475.

Acquittal under an indictment which, as permitted in *Mississippi Code 1880*, § 3016, charges murder, without aver-

ring an assault and battery, does not bar a subsequent indictment for the latter offence. *Moore v. State*, 59 Miss. 25.

A former conviction for concealing the birth of a bastard child is no defence to an indictment for the murder of such child. The Code, § 1004; *State v. Morgan*, 95 N. Car. 641.

Assault and Battery.—A person convicted of an assault and battery committed in a riot may still be tried and convicted of the riot. *U. S. v. Peaco*, 4 Cranch (U. S.) 601; *Scott v. U. S.*, 1 Morris (Iowa) 142.

On trial of an information charging assault with a dangerous weapon with intent to kill, a plea of *autrefois acquit*, referring to the prosecution of the same defendant on a charge of robbery at the same time, is not good. *State v. Helveston*, 38 La. An. 314.

A conviction or an acquittal for a simple assault and battery, before a court of competent jurisdiction to try the same, does not bar a subsequent prosecution for the same assault with intent to commit a felony. *State v. Hattabough*, 66 Ind. 223. Or an indictment for a riot out of which the assault and battery arose. *Freeland v. People*, 16 Ill. 380.

An acquittal on an indictment for a felonious assault will not bar a prosecution for the same offence as a common assault and battery, before a justice of the peace. *State v. Wightman*, 26 Mo. 515.

In *Mississippi*, an assault with intent to kill, and an assault with intent to commit manslaughter, are different crimes, and differently punished; and a prisoner who is indicted for the former and convicted of the latter is convicted of another and different offence than that charged in the indictment. *Norman v. State*, 24 Miss. 54.

A charge of assault and battery, presented in the lifetime of the person assaulted, and dismissed by one grand jury after his death, does not prevent another grand jury from finding an indictment for manslaughter based upon the same assault. *People v. Warren*, 109 N. Y. 615.

To an indictment for shooting with intent to kill a human being, the respondent pleaded former acquittal. It appeared, from the plea, that he had

been formerly prosecuted for maliciously shooting and wounding a horse, on which charge he had been acquitted, and the plea alleged the identity of the two offences. *Held*, that a demurrer to this plea was properly sustained. The two offences are essentially different, and could not be legally identical, although both offences might have been committed in one and the same transaction. *State v. Horneman*, 16 Kan. 452; s. c., 2 Am. Cr. Rep. 427.

Rape.—Where a person of color has been acquitted upon an indictment for a rape, and is subsequently indicted for an assault with intent to commit the rape upon a white female, under the act of 1823, he cannot object upon the trial that the evidence offered proves an actual rape, because the jury may convict for the specific charge contained in the indictment, if the evidence proves that charge, notwithstanding it may prove the other charge for which the prisoner has been formerly tried and acquitted. *State v. Jesse*, 3 Dev. & B. (N. Car.) 98.

Bigamy.—A former acquittal of bigamy constitutes no defence against a charge of adultery. *Swancoat v. State*, 4 Tex. App. 105.

Larceny.—An indictment for stealing a hog cannot be pleaded in bar to an indictment for wilfully killing the same hog. *State v. Ellison*, 4 Lea (Tenn.) 229.

A former acquittal on a charge of petit larceny is no bar to a prosecution for obtaining goods on false pretences, although both indictments were for the same transaction, if in fact the evidence was incompetent to warrant a conviction on the charge of petit larceny. *Dominick v. State*, 40 Ala. 680. Or for obtaining the same goods by conspiracy. *State v. Sias*, 17 N. H. 558; or for receiving stolen goods. *Foster v. State*, 39 Ala. 229.

Notwithstanding a conviction of cattle theft under *Texas Pen. Code*, art. 749, by driving cattle from their accustomed range, and the assessment of a fine, defendant may again be found guilty of theft and imprisoned. (*Overruling Sisk v. State*, 9 Tex. App. 90) *Campbell v. State*, 22 Tex. App. 262.

Forgery.—A prisoner, acquitted of the forgery of an order, and also of falsely uttering, as true, a forged order, cannot plead that acquittal to a subsequent indictment, charging him with having fraudulently obtained sundry goods by means of a false privy token

and counterfeit letter, which privy token was the same order, of the forgery and uttering of which he had been acquitted. *Com. v. Quann*, 2 Va. Cas. 89.

Arson.—One put on trial for the statutory offence of burning an untenanted house is not in second jeopardy from having been acquitted, by direction of the judge, of arson. *State v. Jenkins*, 20 S. Car. 351.

Intoxicating Liquors.—A person convicted of being a common seller of spirituous liquors cannot plead this conviction in defence of a single act of sale; they are different offences. *State v. Maher*, 35 Maine (5 Red.) 225; *State v. Coombs*, 32 Me. (2 Red.) 529.

An acquittal of the offence (Conn. Gen. St., p. 520) of keeping intoxicating liquors for sale is no bar to a conviction of the offence (§ 43) of keeping a place in which it is reputed that they are kept for sale. *State v. Moriarty*, 50 Conn. 415.

A conviction for selling a pint of liquor without a license is no bar to an indictment for selling it to a minor without the written consent of his parent or guardian. *Ruble v. State* (Ark.), 10 S. W. 262.

A defendant may be legally convicted of retailing without a license, and of trading with a slave, in *South Carolina*, though both offences arise out of the same act. *State v. Glasgow, Dudley* (S. Car.) 40.

Disorderly House.—A conviction for keeping a faro bank, contrary to a municipal bylaw, is no bar to an indictment for keeping a disorderly house, on the same evidence. *U. S. v. Hood*, 2 Cranch (U. S.) 133.

Disturbance.—Defendant was indicted for unlawfully disturbing a religious assembly. The disturbance consisted in firing a pistol. He was convicted and sentenced, and afterwards indicted for an attempt to commit murder by shooting at another with a pistol. The shooting was the same for which he had previously been convicted. *Held*, that this fact constituted no bar to the second indictment. *State v. Ross*, 4 Lea (Tenn.) 442.

The Test.—In *Womack v. State*, 7 Coldw. (Tenn.) 508, it is *held* that when two persons are killed by one act the defendant may be indicted for the single act of killing both; but to constitute such single offence, something more should appear than that they were committed on the same occasion.

ment was such that the accused might have been convicted upon proof of the facts set forth in the second indictment, while in the latter case, additional or other facts are required to be proven.¹ Out of the same facts, however, a series of changes may be preferred, in such a manner as to render a prosecution a bar to any subsequent prosecution for any one or more of the series.²

b. Offences Covering the Same Period.—A prosecution for an offence covering a certain period is a bar to a subsequent prosecution for an offence consisting of the same acts covering a portion of the period;³ but if the indictment charges the commission of the crime from one given time to another, and the evidence is confined to the time thus carved out, the prosecution will be no bar to a subsequent prosecution for the commission of such crime at another or other times.⁴

c. Greater and Lesser Offences.—Where a greater offence includes a lesser one, being placed in jeopardy under an indictment for the included offence only, constitutes a bar to a prosecution for the greater offence;⁵ so, upon a trial for the higher grade of

or in the progress of the same affray. It is sufficient now to say, without attempting to establish an abstract proposition which shall serve as a test in all cases, that if the physical acts of assault and killing are distinct, and the intention to kill one is an intention formed and existing distinct from and independent of the intention to kill the other, the two acts cannot constitute a single offence of murder.

1. See Chit. Crim. Law, 453; 1 Russ. on Crimes, 829, 826; Com. v. Ruby, 12 Pick. (Mass.) 496.

2. See Com. v. Jenks, 1 Gray (Mass.) 490; Reg. v. Elrington, 9 Cox C. C. 86.

3. Com. v. Dunster, 145 Mass. 101; Com. v. Cunningham (Mass.), 5 N. Eng. Rep. 116; s. c., 13 N. E. Rep. 352; Com. v. Robinson, 126 Mass. 259; State v. Nutt, 28 Vt. 598.

Where defendant had been acquitted upon an information before a justice of the peace, charging him with selling whiskey and stomach bitters, *held*, that, on a second information charging the sale of an intoxicating mixture called "dandelion bitters," it was error to allow evidence of any sales of such mixture during the time covered by the first information. State v. Sterrenberg, 69 Iowa 544.

Where under an indictment for unlawfully selling liquor at different times, a conviction has been had, and there has been no election as to the particular time relied on, the conviction is a bar to a subsequent prosecution for

any sale to the same party within the same time. State v. Nunnally, 43 Ark. 68.

4. Huffman v. State, 23 Tex. App. 491.

An acquittal on an indictment for being a common seller of intoxicating liquors on the third of June, and thence to the day of finding of the indictment, is no bar to a prosecution for an unlawful sale on the 2nd of June. Com. v. Keefe, 7 Gray (Mass.) 332.

A judgment that a place is a nuisance between designated days in 1879 is no bar to an indictment of it as a nuisance between designated days in 1880, though the order to abate in the first case has not been obeyed. Gormley v. State, 37 Ohio St. 120.

5. Roberts v. State, 14 Ga. 8; Hickey v. State, 23 Ind. 21; Jackson v. State, 14 Ind. 327; Hamilton v. State, 36 Ind. 280; State v. Murray, 55 Iowa 530; Com. v. Squire, 1 Metc. (Mass.) 258; Com. v. Bosworth, 113 Mass. 200; State v. Snyder, 50 N. H. 150; State v. Buzzell, 58 N. H. 257; People v. Smith, 57 Barb. (N. Y.) 46; State v. Lewis, 2 Hawks (N. Car.) 98; State v. Ingles, 2 Hayw. (N. Car.) 4; State v. Smith, 43 Vt. 324; State v. Wiles, 26 Minn. 381; Jones v. State, 1 L. & E. Rep. 174; Com. v. Sheldon, 3 Mass. 188.

Where a prisoner has once been convicted of murder in the second degree, he cannot if he obtains a new trial be convicted of murder in the first degree. Jones v. State, 13 Tex. 168.

an offence consisting of degrees if the defendant is convicted of an inferior grade, such conviction operates as an acquittal of, and will bar a subsequent prosecution for any of the higher grades;¹ and where such a conviction is reversed and a new trial ordered, the new trial must be confined to the particular charge upon which the defendant was found guilty on the former trial.² But if the

1. *Smith v. State*, 68 Ala. 424; *Johnson v. State*, 29 Ark. 31; s. c., 2 Am. Cr. Rep. 430; *People v. Appgar*, 35 Cal. 389; *People v. Gilmore*, 4 Cal. 376; *State v. McNaught*, 36 Kan. 624; *State v. Byrd*, 31 La. An. 419; *State v. Payson*, 37 Me. 361; *Com. v. Herty*, 109 Mass. 348; *Hurt v. State*, 25 Miss. 378; *State v. Brannon*, 55 Mo. 63; *State v. Ross*, 29 Mo. 32; *Burns v. People*, 1 Park. (N. Y.) Cr. 182; *People v. Cignarale*, 110 N. Y. 23; *Guenther v. People*, 24 N. Y. 100; *People v. Dowling*, 84 N. Y. 478; *Parker v. State*, 22 Tex. App. 105; *State v. Kittle*, 2 Tyler (Vt.) 471; *State v. Moon*, 41 Wis. 684; s. c., 2 Am. Cr. Rep. 64.

If the offence charged be one consisting of different degrees, the statute (*Texas Code Crim. Proc.*, art. 713) which declares that "The jury may find the defendant not guilty of the higher (naming it) but guilty of any degree inferior to that charged in the information or indictment" is not mandatory so far as acquittal of the higher degree is concerned, but the finding of the lesser degree is *per se* an acquittal of the higher. *Robinson v. State*, 21 Tex. App. 160.

Two indictments were found against the prisoner at the same term, the one for burglary and larceny, the other for a robbery, both charging the felonious taking of the same goods. He was found guilty of larceny on the first indictment, and not guilty of the burglary. *Held*, that he could not be put on trial on the second indictment. *State v. Lewis*, 2 Hawks (N. Car.) 98. See *State v. Risher*, 1 Rich. (S. Car.) 219.

An instruction that the evidence on an indictment for statutory burglary is not sufficient to convict of the breaking and entering, is not equivalent to an acquittal on that part of the charge so as, in case of disagreement of the jury, to constitute a bar to further prosecution for the same offence. *People v. Schoemeth*, 44 Mich. 489.

When an accused indicted for a crime in the first degree has been convicted of that crime in the third degree, and such conviction has been reversed on appeal,

the accused, having, in legal effect, been acquitted of the crime in the higher degree, cannot under the *New York Penal Code*, "be thereafter indicted or tried for the same crime in any other degree." (Sec. 36.) *People v. Palmer*, 43 Hun (N. Y.) 397; 5 N. Y. Crim. 101; 6 N. Y. St. Rep. 341.

2. *Bell v. State*, 48 Ala. 684; s. c., 17 Am. Rep. 40; *Johnson v. State*, 29 Ark. 31; s. c., 21 Am. Rep. 154; *People v. Appgar*, 35 Cal. 389; *People v. Gilmore*, 4 Cal. 376; *Sipple v. People*, 110 Ill. App. 144; *Logg v. People*, 8 Ill. App. 99; *State v. Malling*, 11 Iowa 239; *State v. Tweedy*, 11 Iowa 350; *State v. McNaught*, 36 Kan. 624; *Morris v. State*, 8 Smed. & M. (Miss.) 762; *State v. Ross*, 29 Mo. 32; *State v. Kattlemann*, 35 Mo. 105; *State v. Bruffy*, 75 Mo. App. 389; *People v. Dowling*, 84 N. Y. 478; *Campbell v. State*, 9 Yerg. (Tenn.) 333; *Esmon v. State*, 1 Swan (Tenn.) 14; *State v. Martin*, 30 Wis. 216; s. c., 11 Am. Rep. 567; *State v. Belden*, 33 Wis. 120; s. c., 14 Am. Rep. 748; and see *Livingston's Case*, 14 Gratt. (Va.) 592.

On an indictment for murder there was a verdict of guilty of manslaughter, but an acquittal of murder, and the verdict was set aside on the motion of the defendant and a new trial granted. *Held*, that the defendant was discharged from the charge of murder, but that a conviction of manslaughter on the same indictment, upon such second trial was valid. *Slaughter v. State*, 6 Humph. (Tenn.) 410.

Accordingly, when the judgment is reversed for an illegal sentence upon a conviction in which there was no error, a new trial cannot be ordered, but the prisoner must be discharged, and this though on a motion in arrest of judgment he asked for a new trial. *Shepherd v. People*, 11 Smith (25 N. Y.) 406.

Article 783, which declares that "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place," does not apply in cases admitting of degrees where a party, having been

several counts of the indictment are upon the same transaction charging it in different ways, instead of separate and distinct transactions, a new trial would bring up the whole case.¹

The rule as above stated is not, however, universally followed, the principle having been adopted in some courts that a verdict is severable only where there is a conviction or an acquittal on different counts for separate and distinct offences, or where there are several defendants;² but where the indictment, though consisting of several counts, is founded upon a single transaction, the verdict is a unit, and in case of conviction upon one or more counts, a new trial will open the whole case.³

One acquitted or convicted of an offence which necessarily includes a lesser one cannot afterwards be convicted of the latter offence.⁴ An apparent exception to the foregoing rule exists in

convicted of a lesser degree, is accorded a new trial. In such cases the rule is that the case stands for trial upon the degree for which the conviction was had, and the degrees inferior thereto; and that, with respect to such degrees, the case stands as if no previous trial had been had. *Robinson v. State*, 21 Tex. App. 160.

Must be Plead.—A trial on an indictment for murder, conviction and recommendation by the jury to mercy, and on appeal a new trial ordered, *not pros.* entered, and a new indictment for the same offence. Conviction under the new indictment, without recommendation to mercy, and motion in arrest of judgment, on the ground that the former verdict was acquittal of murder in the first degree, and the prisoner could not be tried for the same offence again. *Held*, 1, that the question, not having been presented in the pleadings or evidence, was not properly before the court, but, 2, that such state of facts did not bring the case within the rule which prohibits a trial for a higher grade of offence than that found on conviction on a former trial. *Mann v. State*, 34 Ga.

As to the unconstitutionality of a statute changing the rule that a new trial does not open the case as to the crime of which there has been an acquittal, passed after the crime is committed. See *Kring v. State*, 107 U. S. 221; s. c., 4 Cr. L. Mag. 550; 16 Cent. L. J. 308; and see *Garvey v. People*, 4 Crim. L. Mag. 715; s. c., 6 Colo. 559; 45 Am. Rep. 531.

1. *State v. Owen*, 17 Cent. L. J. 214.

On the second trial the accused may be convicted of an offence which was embraced in the indictment and on

which no verdict of acquittal was given. *State v. Smith*, 53 Mo. 139.

2. *State v. Behrimer*, 20 Ohio St. 572; see *Hurley's Case*, 6 Ohio 400.

3. *Johnson v. State*, 29 Ark. 31; s. c., 21 Am. Rep. 154; *State v. McCord*, 8 Kan. 232; s. c., 12 Am. Rep. 469; *Veatch v. State*, 60 Ind. 291; *Stewart v. State*, 15 Ohio St. 155.

Where the accused on trial for murder is convicted of the lesser offence of manslaughter, and the verdict is set aside and a new trial granted, at his own instance, he may on the retrial, be convicted of the higher offence of murder. *Com. v. Arnold*, 3 Litt. (Ky.) 309; s. c., 6 Cr. L. Mag. 61; *Bailey v. State*, 26 Ga. 579; *Bohanan v. State*, 18 Neb. 57; s. c., 53 Am. Rep. 791.

An indictment contained three counts, one charging the commission of the crime of manslaughter by throwing a glass tumbler against the head of the deceased; in the second, by striking him with the tumbler in hand; the third, by striking the head with the fist. A verdict of guilty on the first, and not guilty on the second and third, was returned. A motion for a new trial was granted, and it was *held* to be granted as to all three counts. *Jarvis v. State*, 19 Ohio St. 585; *State v. Stanton*, 1 Ired. (N. Car.) 424; *State v. Commrs.*, 3 Hill (S. Car.) 239.

Where defendant's conviction of a lower degree, under an indictment charging the highest degree, of the crime, is, on his appeal, reversed and a new trial ordered, he can be again tried under the indictment, without regard to the former conviction. *People v. Palmer*, 109 (N. Y.) 413.

4. *State v. Standifer*, 5 Port. (Ala.) 523; *Fox v. State*, (Ark.); 8 S. W. 836;

the case of a prosecution for a misdemeanor before a justice punishable by fine only, it being no bar to a prosecution of a grade of the offence amounting to a felony, of which the justice had no jurisdiction.¹

d. Offences of the Same Genus.—A former prosecution for an offence is a bar to a subsequent prosecution when the former prosecution was for an offence which constitutes an essential element of the latter charge;² thus a conviction for petit larceny is a bar to a subsequent prosecution for grand larceny on the same facts,³

Davis v. State, 45 Ark. 464; *Hall v. State*, 50 Ark. 28; *State v. Hattabough*, 66 Ind. 223; *State v. Foster*, 33 Iowa 525; *Triplett v. Com.*, 84 Ky. 193; *Com. v. Roby*, 12 Pick. (Mass.) 502; *People v. McGowan*, 17 Wend. (N. Y.) 386; *Case of Sargent*, 2 City Hall Rec. (N. Y.) 44; *Thomas v. State*, 40 Tex. 36; *State v. Cooper* (13 N. J. L.), 1 Green 361; *Reg. v. Gould*, 9 C. & P. (Eng.) 364; 17 Am. L. Rev. 736.

The plea *autrefois acquit* is good, if the defendant has been before tried for the same offence, on an indictment on which he might have been lawfully convicted and sentenced. *Heikes v. Com.*, 26 Pa. St. 513.

Inasmuch as a conviction for wilfully driving stock from its accustomed range, etc., can be had under an indictment charging the theft of the stock, it is no objection to the sufficiency of a plea of former jeopardy interposed upon the trial for the wilful driving of the stock, etc., that the indictment under which the former trial was had, charged the theft of the stock. *McElMurray v. State*, 21 Tex. App. 691.

An indictment contained nine counts for embezzlement and fourteen for larceny. *Held*, that a general verdict, "guilty of embezzlement," acted as an acquittal on the charge of larceny, and was a bar to any subsequent prosecution therefor. *Guenther v. People*, 24 N. Y. (10 Smith) 100.

In *Missouri* an accused was indicted "for robbery in the first degree," which was a sufficient indictment for larceny. Upon the trial the jury found him guilty of robbery "in the second degree." The verdict was set aside, as there were no degrees in robbery. Subsequently the defendant was again tried upon the same indictment and convicted of larceny. This was *held* error, as the defendant could, upon the first trial, have been convicted of either robbery or larceny but was lawfully convicted

of neither; the verdict operated as an acquittal. *State v. Brannon*, 55 Mo. 63; s. c., 17 Am. Rep. 643.

1. *State v. Nichols*, 38 Ark. 550; *Southworth v. State*, 42 Ark. 270; *Freeland v. People*, 16 Ill. 380; *State v. Foster*, 33 Iowa 525; *Com. v. Curtis*, 11 Pick. (Mass.) 134; *Prime v. State*, 41 Tex. 300; *White v. State*, 9 Tex. App. 390.

2. A conviction on an indictment charging, as a distinct offence, a part of one transaction, bars a prosecution on the other parts. *Wright v. State*, 17 Tex. App. 152.

In *Tennessee*, a conviction, judgment and execution, for felony not capital, committed before such conviction, etc. *Crenshaw v. State*, Mart. & Yerg. 122; see *Hawkins v. State*, 1 Port. (Ala.) 475; *State v. McCarty*, 1 Bay (S. Car.) 334.

The prosecution cannot split up the act into several parts. The prosecutor "may carve out as large an offence as he can, but he can carve only one." *Thomas v. State*, 40 Tex. 36; 1 Bish. Cr. L., § 1060; *Drake v. State*, 60 Ala. 42; *Wright v. State*, 17 Tex. App. 152.

3. *Southworth v. State*, 42 Ark. 270; *Williams v. State*, 42 Ark. 35; *State v. Murray*, 55 Iowa 530.

Conviction for larceny of a pocket book is a bar to a subsequent indictment for stealing a note in the pocket book at the same time. *U. S. v. Lee*, 4 Cranch (U. S.) 446.

A conviction for simple larceny of a hat (of the value of four dollars) is a bar to an indictment for larceny of the same from a shop, the stealing in both cases being one and the same. *State v. Wiles*, 26 Minn. 381; s. c., 2 Am. Cr. Rep. 621.

When by one act a man was guilty of theft and of swindling, a conviction of one was *held* to be a bar to the other. *State v. Sims*, 21 Tex. App. 649.

Where two yearlings are branded at

and a prosecution for robbery¹ or burglary² may be barred by a former prosecution for a larceny or other offence where the latter offence must have been included in the former. If the larceny is of several different articles belonging to different persons, it is but one offence, and the prosecution for the larceny of the goods of one will bar a prosecution as to the others;³ but it would be different if the property of the different owners was so separated that each taking would be a distinct and separate act.⁴ The same rule applies in cases of crime against the person, as assault, rape, etc., where the one act is a necessary ingredient of the other,⁵ as well as to arson,⁶ forgery and other offences.⁷ On the other

the same time by one not their owner, conviction for the crime of branding one of them is a bar to a prosecution for branding the other. *Adams v. State*, 16 Tex. App. 162.

1. *State v. Mikesell*, 70 Iowa 176; but see *Wilson v. State*, 24 Conn. 57.

A conviction for petit larceny before a justice of the peace is a bar to a subsequent prosecution on indictment for larceny from the person based on the same act. *State v. Gleason*, 56 Iowa 203.

A trial and acquittal for robbery is a bar to an indictment for larceny, where the property alleged to have been taken is the same. *People v. McGowan*, 17 Wend. (N. Y.) 386.

One cannot be indicted, convicted, and punished for robbery, and also for an assault with intent to commit murder, growing out of the robbery. *Wilcox v. State*, 6 Lea (Tenn.) 571; s. c., 40 Am. Rep. 53.

2. *Roberts v. State*, 14 Ga. 13; *People v. Smith*, 57 Barb. (N. Y.) 46; *State v. Lewis*, 2 Hawks (N. Car.) 98; s. c., 11 Am. Dec. 741.

Where goods are taken in a burglary, and larceny and burglary are charged in the same count, a conviction of larceny is, it seems, a bar to a subsequent indictment for burglary. *Gordon v. State*, 71 Ala. 315.

3. *Willis v. State*, 24 Tex. App. 586.

4. *Phillips v. State*, 85 Tenn. 551.

5. See Reg. v. *Elrington*, 9 Cox C. C. (Eng.) 86.

A party charged with an assault and convicted cannot afterwards be punished for the battery committed at the same time. *State v. Chaffin*, 2 Swan (Tenn.) 493.

In *Delaware*, a person cannot be indicted both for a riot and disturbing a religious meeting by such riot, as the punishment for the former covers the

latter offence. *State v. Townsend*, 2 Harr. (Del.) 543.

In *State v. Shepard*, 7 Com. 54, it was held that a conviction for an assault with intent to commit a rape was a bar to an indictment for rape, the court saying: "If the conviction there cannot be pleaded in bar of an indictment for a rape, then he may be tried again; and as he has already suffered, and is still enduring a punishment for the less crime, and may be condemned and suffer for the greater, he may be twice punished for the same act — a doctrine repugnant to well established principles of law."

An acquittal on an indictment for seduction is a bar to a subsequent indictment for fornication and bastardy founded on the same act. *Dinkey v. Com.*, 17 Pa. St. 126.

6. An acquittal of arson of a mill is a bar to a subsequent prosecution for arson of books of accounts at the same time. *State v. Colgate*, 31 Kan. 511; s. c., 47 Am. Rep. 507.

A conviction upon an indictment for arson, is a bar to an indictment for the murder of a person burned in the house, for burning which the accused was convicted of arson. *State v. Cooper*, 1 Green (13 N. J. L.) 361.

7. In two indictments against the same person for forgery, the first alleged a forged order on "J. Irwin & Co.," the second on "John Irwin & Co.," and this was the only difference between them. *Held*, that *autrefois acquit* was well pleaded to the second, the defendant being acquitted on the first. *Durham v. People*, 4 Scam. (Ill.) 172.

A party cannot be prosecuted, under the act of *Tennessee* of 1833, ch. 10, § 2, for betting on, and running a race horse, along a public road, as two distinct offences. Conviction for running, is a good bar to a conviction for betting,

hand, if the two crimes are entirely separate and distinct acts, however closely they may be connected, and even though some of the ingredients of the one enter into the other, a prosecution for the one will be no bar to a prosecution for the other,¹ and if, after

on the same indetical race. *Fiddler v. State*, 7 Humph. (Tenn.) 508.

1. **Killing Several Persons.**—In *Vaughan v. Com.*, 2 Va. Cas. 273, it was *held* that if the defendant is indicted and acquitted of shooting A, and subsequently indicted for shooting B, the same act of shooting being charged in each case, the former acquittal will not be a bar, because the ground of acquittal might have been that the shot did not strike A, or that the shooting was not with intent to hurt A. Here there was but one discharge of the gun. In *Smith v. Com.*, 7 Gratt. (Va.) 593, a conviction of advising a slave to abscond was *held* no bar to an indictment for advising another slave to abscond, although the advice was given at one and the same time and by the same words and acts. The court pronounced no opinion, but simply affirmed the conviction. See also *State v. Standifer*, 5 Port. (Ala.) 523; *People v. Majors*, 65 Cal. 138; s. c., 52 Am. Rep. 295; *Teat v. State*, 53 Miss. 439; *State v. Nash*, 86 N. Car. 650; s. c., 41 Am. Rep. 472.

A and B were passing along a road together, C killed A, and D killed B. Both were indicted for killing A. C was convicted, and D acquitted. Both were then indicted for killing B. C pleaded *autrefois convict*. D pleaded *autrefois acquit*. *Held*, that the pleas should be overruled. *State v. Vines*, 34 La. An. 1079.

Murder and Intent to Kill.—A conviction on an indictment for an assault with intent to murder is not a bar to an indictment for murder. *Com. v. Roby*, 12 Pick. (Mass.) 496. See *Curtis v. State*, 22 Tex. App. 227.

In *People v. Warren*, 1 Park. Cr. Cas. (N. Y.) 338, it was *held* that an acquittal of intent to kill A by mixing poison in bread was no bar to a subsequent indictment for attempt to kill B by the same transaction. The court distinguished between the act and intent, saying: "The intent in these cases is the material constituent of the crime. Though the acts may have been the same, the crimes, as characterized by the intent, are different." But in an indiscriminate assault there

can be no specific and distinguishable intent.

Killing in Different Ways.—An acquittal on an indictment for a murder committed by shooting with powder and shot from a gun is no bar to an indictment for murder committed by beating upon the head with a gun—the two offences are distinct in regard to legal jeopardy. *Guedel v. People*, 43 Ill. 226.

Other Assaults.—A party may be convicted upon an indictment for an assault and battery, although he has already been convicted upon an indictment for an assault and battery upon another party, at the same time and place, both assaults having been made during the continuance of a fight in which the defendant and others had engaged. *Greenwood v. State*, 64 Ind. 250.

The defendant, with three others, was convicted of an affray for beating in public one M. During the affray, the prosecutrix went up to protect M, who was her son, and the defendant struck her. *Held*, that the conviction for the affray was no bar to this indictment for an assault and battery on the prosecutrix. *State v. Parrish*, 8 Rich. (S. Car.) 322.

A was acquitted on an indictment for the murder of an unborn child, through the use of means designed to produce a miscarriage by the mother. *Held*, that this was no bar to an indictment against A for attempting to produce such miscarriage by the same or any other means. *State v. Elder*, 65 Ind. 282; and see *State v. Nathan*, 5 Rich. (S. Car.) 219.

Incest and Adultery.—Pauline Deitz and Pauline Seitz are not *idem sonans*. An acquittal on a trial for incest with one is not a bar to an indictment for incest with the other. *Nance v. State*, 17 Tex. App. 385. And a man indicted for adultery cannot plead in bar the former acquittal of his paramour and codefendant. *Alonzo v. State*, 15 Tex. App. 378; s. c., 49 Am. Rep. 207.

Arson.—An acquittal upon an indictment charging the defendant with setting fire to a barn, whereby a dwelling house was burnt, in the night time, and

alleging it to be the barn of A and B, is no bar to another indictment for the same offence, alleging it to be the barn of A and C. *Com. v. Wade*, 17 Pick. (Mass.) 395, and see *Com. v. Mortimer*, 2 Va. Cas. 325.

On a question of second jeopardy, the effect of *nolle prosequi* on one count of an indictment for arson, *held*, to leave the indictment as if the count had never been preferred; and an acquittal on the second count not to preclude re-indictment for arson in the first degree. *Walker v. State*, 61 Ala. 30.

Burglary and larceny are separate offences, conviction for one of which is no bar to a prosecution for the other. *State v. Martin*, 76 Mo. 337. Compare *State v. Kelsoe*, 76 Mo. 505.

A conviction for larceny, on an indictment for breaking and entering with intent to steal, is not pleadable in bar against a subsequent prosecution for the breaking. *Wilson v. State*, 24 Conn. 57.

And an acquittal for burglary with intent to commit a larceny is no bar to a prosecution for the larceny. *State v. Warner*, 14 Ind. 572.

Different Larcenies.—Separate indictments charged the defendant with the theft of two horses. He was acquitted on one of the indictments. The horses belonged to different persons, and were a mile apart when taken. *Held*, that defendant could not plead "former acquittal" in bar to the other indictment. *Alexander v. State*, 21 Tex. App. 406; s. c., 57 Am. Rep. 617.

Where a person was acquitted on a former indictment for the larceny of certain bonds, *held*, that such an acquittal was not a bar to conviction on an indictment under *Massachusetts Gen. Sts.*, ch. 161, § 39, for fraudulent conversion of the same bonds, it not appearing in the pleadings or evidence at the trial on the latter indictment, that the defendant was not intrusted with the custody of them. *Com. v. Tenney*, 97 Mass. 50; and see *Shubert v. State*, 21 Tex. App. 551; *Hite v. State*, 9 Yerg. (Tenn.) 357.

An acquittal on the charge of embezzling cloth and other materials of which overcoats are made is no defence to an indictment for embezzling overcoats, although the same facts which were proved on the trial of the first indictment are relied upon in support of the second. *Com. v. Clair*, 7 Allen (Mass.) 525.

Where a person entrusted by another

with goods for a particular purpose obtains money thereon by falsely representing himself as the owner and selling them, he may be indicted as well for embezzling the goods as for obtaining money from the purchaser under false pretences; and a conviction of the latter offence will not bar a prosecution for the former. *State v. Faulkner*, 39 La. An. 811.

A was indicted for stealing a sheep, charged to be the property of B, and acquitted on the ground that the owner of the property was unknown. He was afterwards indicted for the same offence, the sheep being charged to be the property of some one to the jurors unknown. *Held*, that the plea of former acquittal was no bar to a conviction on the latter indictment. *State v. Revels*, Busbee (N. Car.) L. 200.

Robbery and Assault.—A previous trial on the charge of robbery is not a bar to a subsequent indictment for assault with a dangerous weapon, at the same time on the same person. *State v. Helveston*, 38 La. An. 314.

A conviction of assault with a deadly weapon is not a bar to a prosecution for an attempt to commit robbery committed at the same time. *People v. Benson*, 6 Cal. 221.

Burglary.—A conviction of burglary, *Held*, not to bar a separate prosecution for a theft committed at the same time. *Howard v. State*, 8 Tex. App. 447.

Where the same transaction includes a burglary and a conspiracy to commit burglary, the two offences may be "carved out" of the transaction; and a conviction for the one will not bar a prosecution for the other. *Whitford v. State*, 24 Tex. App. 489.

Forgery.—An acquittal upon an indictment for forging an order with intent to defraud John Lang, is no bar to an indictment for forging the same order with intent to defraud William Lang. *U. S. v. Book*, 2 Cranch (U. S.) 294.

Uttering Forged Instrument.—Where a person passes, or attempts to pass, the same forged instrument upon different persons at different times and different places, he is guilty of two separate and distinct offences; and a conviction or acquittal for one alone will not bar a prosecution for the other. *Burks v. State*, 24 Tex. App. 326.

Where the only recital of evidence in the record of a trial of an indictment for uttering and publishing as true a forged instrument, knowing it to be forged, is

a conviction for an assault, the assaulted party dies, the conviction is no bar to an indictment for murder.¹

that the defendant proved that he had been before indicted and tried for the forgery of the same writing, with the uttering of which he was charged in the indictment, and upon such trial had been regularly acquitted, a charge of the court that a trial for, and acquittal of, the forgery of an instrument was not a bar to a subsequent indictment for uttering the same instrument as genuine, knowing it to be forged, was *held* to be correct. *Harrison v. State*, 36 Ala. 248.

Illegal Sale of Intoxicating Liquors.—

A former conviction of the principal for the sale of intoxicating liquors is no defence to a subsequent indictment against his clerk for the same act of sale. *State v. Finan*, 10 Iowa (With.) 19.

Keeping a tenement used for the illegal sale and illegal keeping of intoxicating liquors, and being a common seller of intoxicating liquors during the same time and at the same place, are distinct offences; and a conviction for one is no bar to an indictment for the other, although the same acts are relied on in proof of both charges. *Com. v. O'Donnell*, 8 Allen (Mass.) 548; *Com. v. Bubser*, 14 Gray (Mass.) 83; *Com. v. Hudson*, 14 Gray (Mass.) 11; *Com. v. Cutler*, 9 Allen (Mass.) 486.

An information charging that the defendant kept intoxicating liquors with the intent to sell, is no bar to an indictment charging that he established and continued a building and place in which he kept liquors with intent to sell. *State v. Harris*, 64 Iowa 287.

Code Iowa, § 1543, as amended by ch. 143, Laws 20th Gen. Assem., prescribes as punishment for keeping a liquor nuisance a fine not exceeding \$1,000, no minimum being prescribed. A subsequent amendment (ch. 66, Laws 21st Gen. Assem.) prescribes as the penalty for such offence a fine not exceeding \$1,000, and not less than \$300, power being reserved to punish any offence prior to such act. *Held*, that an acquittal under an indictment charging under the latter amendment is no bar to a trial under an indictment precisely similar to the former one, except that the dates charge an offence under the former amendment. *State v. Weber* (Iowa), 39 N. W. 286.

Other Crimes and Misdemeanors.—In

order that the first of two indictments for keeping a gaming house should bar the other it must appear in proof that the keeping alleged in the two was without intermission; that the dates set out in the indictment show no intermission is not sufficient, as under neither, need the time be proved as laid, and it may be that there was an interval between the times laid. *State v. Lindley*, 14 Ind. 431.

One cannot plead former acquittal of the offence of keeping a gaming table, because his partner was tried for the same offence and acquitted. *Gosforth v. State*, 22 Tex. App. 405.

In *State v. Fife*, 1 Bail. (S. Car.) 1, the defendant traded at the same time with two negroes without permit, and being indicted for the offence in separate indictments, he was *held* punishable under each. The court disposed of the argument that there was but one injury to the master, by saying that the injury was not an ingredient, or if it was, "it is certainly a repetition of it to buy from another." This begs the whole question by assuming one part of a simultaneous act to be a repetition of another part.

A conviction of keeping a shop open on the Lord's day is no bar to an indictment for a nuisance in keeping the same shop at the same time for the illegal sale and keeping of intoxicating liquors. *Com. v. Shea*, 14 Gray (Mass.) 386.

A, the agent of a certain lottery scheme, was acquitted on the ground that, in the judgment of the inferior court wherein the prosecution was instituted the statute creating the offence was unconstitutional. B, another agent of the same scheme, was then indicted. *Held*, that the commonwealth was not estopped from maintaining the prosecution. *Justice v. Com.*, 81 Va. 209.

1. *Johnson v. State*, 19 Tex. App. 453; s. c., 53 Am. Rep. 385; *Com. v. Evans*, 101 Mass. 25; *More v. Com.*, 108 Mass. 433; *Com. v. Drum*, 19 Pick. (Mass.) 479; *State v. Hattabough*, 66 Md. 223; *Burns v. People*, 1 Park. (N. Y.) Cr. 182; *Curtis v. State*, 22 Tex. App. 227; *Queen v. Morris*, Law Rep., 1 C. C. 90.

To an indictment for manslaughter the defendant pleaded a former conviction for assault and battery, from which the person named in the indictment died

e. The Test as to the Identity of the Offences.—On a plea of former acquittal, the true test to determine whether the accused has been put in jeopardy for the same offence is, whether or not the facts alleged in the second indictment, if proved to be true, would have warranted a conviction on the first indictment;¹ or whether or not the second case is precisely the same transaction as the first;² subject to the exception, however, that where, after the first prosecution, a new act intervenes, for which the defendant is responsible, which, together with the facts then existing, constitute a new and distinct crime; a prosecution for the first offence is not a bar to an indictment for the new offence.³

V. THE PLEA OF JEOPARDY WHEN SUSTAINED—1. **Examination Before Committing Magistrate.**—A discharge by a committing magistrate is not sufficient to sustain a plea of former jeopardy for the same offence,⁴ the magistrate having power merely to examine and

after the former conviction. *Held*, that the plea was not a bar to the indictment. *State v. Littlefield*, 70 Me. 452.

1. *McCoy v. State*, 46 Ark. 141; *Wilson v. State*, 24 Conn. 57; *Roberts v. State*, 14 Ga. 8; *Freeland v. People*, 16 Ill. 380; *Durham v. People*, 5 Ill. (4 Scam.) 172; *State v. Holmes*, 56 Iowa 588; *State v. Keogh*, 13 La. An. 243; *State v. Birmingham*, Busb. (N. Car.) L. 120; *Price v. State*, 19 Ohio 423; *State v. Stewart*, 11 Oreg. 238; *Hilands v. Com.*, 114 Pa. St. 372; *Hite v. State*, 9 Yerg. (Tenn.) 198; *State v. Cameron*, 3 Heisk. (Tenn.) 85; *Ex parte Rogers*, 10 Tex. App. 655; *Irwin v. State*, 7 Tex. App. 78; *Simco v. State*, 9 Tex. App. 338; 7 Crim. Law Mag. 711.

When a party has been indicted for forging certain endorsements on a note, and acquitted, and he is afterwards indicted for uttering and publishing as true a note made by himself, on which the names of certain individuals were alleged to have been forged as endorsers, to which he pleaded his former acquittal the court *held*, that, as the proof necessary to convict must be the same in both cases, the plea was a good bar. *People v. Allen*, 1 Park. (N. Y.) C. R. 445.

If a person be indicted for shooting S W, and acquitted thereof, and then indicted for shooting J W, the plea of *autrefois acquit* will not be supported, although the same act of shooting is charged in each indictment; for the jury who tried the first indictment might have acquitted the prisoner on several grounds, which would not affect the second trial. *Vaughan v. Com.*, 2 Va. Cas. 273.

Mississippi Code, § 2857, provides that where an indictment for gaming charges a single offence, other offences may be put in evidence provided that in such case after acquittal or conviction on the merits the accused shall not be again liable for any offence antedating the indictment. *Held*, not to confer immunity for offences of which evidence was adduced. *Pope v. State*, 63 Miss. 53.

Where in a single transaction, a party commits two distinct crimes so related to each other that proof to sustain one need not involve the proof necessary to sustain the other, indictments will lie for both and a conviction of one will not bar the other. *State v. Faulkner*, 39 La. An. 811; 2 S. 539.

2. *Roberts v. State*, 14 Ga. 8.

Autrefois acquit avails only where the transaction is the same, and both indictments may be, and must be, sustained by the same proof. *Autrefois convict* only requires the transaction to be the same. *Wright v. State*, 17 Tex. App. 152.

3. *Case of Nicholas*, Foster's Cr. L. 64; *State v. Hattabough*, 66 Ind. 223; *Com. v. Evans*, 101 Mass. 25; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Burns v. People*, 1 Park. (N. Y.) Cr. 183.

4. *Ex parte Fenton* (Cal.), 12 P. 267; *Bulson v. People*, 31 Ill. 409; *In re McIntyre*, 10 Ill. (5 Gilm.) 422; *State v. Hattabough*, 66 Ind. 223; *State v. Morgan*, 62 Ind. 35; *Re Garst*, 10 Neb. 78; *Marston v. Janness*, 11 N. H. 156; *Ex parte Porter*, 16 Tex. App. 321; *McCann's Case*, 14 Gratt. (Va.) 570; *Com. v. Bailey*, 1 Va. Cas. 258; *Com. v. Meyers*, 1 Va. Cas. 188; but

discharge or bind over,¹ and even if he has jurisdiction both to try and punish the prisoner, and to examine and send him to the county court for indictment, the plea cannot be sustained if he exercised the latter jurisdiction only.²

2. Examination Before Grand Jury.—An examination of the case, and a failure to find an indictment against the accused, does not put him in jeopardy;³ and though there cannot be two trials, the pendency of one indictment is no bar to a second one for the same crime.⁴ Though the rule is laid down in *Indiana* that after failure of the grand jury to find an indictment, a prosecution by information cannot be had.⁵

3. Demurrer to the Indictment.—The hearing and decision of a demurrer to an indictment does not constitute a putting the defendant in jeopardy.⁶ The contrary rule, however, seems to have been adopted in *New York* and *California*, the demurrer, if sustained,

see *Morrissey v. People*, 11 Mich. 327.

The rule that no person shall be twice put in jeopardy for the same offence does not apply to the proceeding for surety of the peace. *State v. Vankirk*, 27 Ind. 121.

Neither a complaint to, and issuing of a warrant by, a justice, no further proceedings being had, nor a conviction before a justice on a confession or testimony given by the offender, is a bar to a subsequent indictment for the same offence. *Bradley v. State*, 32 Ark. 722.

A was brought before a justice of the peace for examination on the charge of assault with intent, and the record showed a finding of "not guilty." *Held*, not a bar to an indictment for the same or an inferior assault. *Fluty v. State*, 45 Ark. 97.

While the finding of a court of enquiry, acquitting the prisoner of all blame in causing the death of another, is not a legal bar to a prosecution, it is entitled to weight as an expression of the views of the military court, of the necessity of using a musket to prevent the escape of the deceased. *U. S. v. Clark*, 31 Fed. Rep. 710.

The 24 and 25 Vict., ch. 100, § 45, makes a conviction before a magistrate a bar to a civil action for the same assault. A police magistrate, after hearing a case of common assault, ordered the accused to enter into recognizances and pay the recognizance fee, but did not order him to be imprisoned or to pay any fine. *Held*, that this was not a conviction within the statute. *Hartley v. Hindmarsh*, Law Rep., 1 C. P. 553.

1. *Marston v. Janness*, 11 N. H. 156.

2. *Wolverton v. Com.*, 75 Va. 909.

An arraignment before a justice of the peace on a complaint, for an offence of which he has concurrent jurisdiction with the court of common pleas is no bar to an indictment for the same offence. *Com. v. Golding*, 14 Gray (Mass.) 49.

3. *Com. v. Miller*, 2 Ashm. (Pa.) 61; *State v. Whipple*, 57 Vt. 637.

A grand jury's dismissal of a charge, followed by a dismissal, under *California* Penal Code, § 1382, of the action against the defendant, is in the nature of a nonsuit; and another prosecution does not put in second jeopardy. *Ex parte Clarke*, 54 Cal. 412.

4. *U. S. v. Neversen*, 1 Mackey (D. C.) 152; *State v. Arnold* (Mo.), 7 West Rep. 283.

It is no bar to an information for manslaughter that the grand jury has, before its filing, ignored an indictment for murder for the same homicide. *State v. Vincent*, 36 La. An. 770.

5. *State v. Boswell*, 104 Ind. 541.

6. *State v. Gill*, 33 Ark. 129; *U. S. v. Phillips* (D. C.), 4 Cent. Rep. 620.

An erroneous judgment for the defendant, sustaining a demurrer to an indictment, upon the ground that it contains a misjoinder of offences, does not operate as a bar to a future prosecution, and may be reversed by the court of appeals. *Com. v. Anthony*, 2 Metc. (Ky.) 399.

If a prisoner demur to an indictment, and the indictment thereupon be quashed, and the prisoner set at liberty, he may be again arrested, and held to answer on a new indictment for the

being a bar to a subsequent prosecution, unless the court directs a resubmission of the charge.¹

4. The Plea of Guilty.—The plea of guilty by the defendant and its entry on the record, constitutes a conviction, and is a bar to a subsequent prosecution for the same offence, even though no judgment was pronounced upon it.²

5. The Entry of a "Nolle Prosequi."—Before the jury is empanelled and sworn, the prosecuting officer may enter a *nolle prosequi* at his pleasure, and it will be no bar to a subsequent prosecution for the same act,³ but if it is entered after the jury is empanelled and sworn, without the consent of the defendant, it is equivalent to an acquittal, and he cannot be again put in jeopardy for the same offence.⁴ Where, however, there is a statute authorizing the entry

same offence. *Cochrane v. State*, 6 Md. 400.

1. A decision on a demurrer only bars a prosecution for the same offence. Code Crim. Proc., § 327; *People v. Richards*, 44 Hun (N. Y.) 278.

The sustaining of a demurrer to an information, no direction for a new information being given, is a bar to another prosecution; and the case is not altered by the fact that a new information was filed before the judgment on the demurrer. *People v. Jordan*, 63 Cal. 219.

2. *People v. Goldstein*, 32 Cal. 432.

3. *Doyal v. State*, 70 Ga. 134; *Reynolds v. State*, 3 Kelly (Ga.) 53; *Com. v. Wheeler*, 2 Mass. 172; *People v. Kuhn* (Mich.), 11 West 533; s. c., 5 N. W. 88; *State v. Andrew*, 76 Mo. 101; *Lindsay v. Com.*, 2 Va. Cas. 345; *Wortham v. Com.*, 5 Rand. (Va.) 669.

A discontinuance of a prosecution by a prosecuting officer, upon whatever terms it may have been done, leaves the offence in the same position as before the prosecution was instituted. *State v. Main*, 31 Conn. 572.

Missouri Rev. St., § 1808, provides that if there are at the same time pending against the same defendant two indictments for the same offence or matter, the first indictment shall be deemed to be suspended by the second, "and shall be quashed." *Held*, that the pendency of the first of two indictments was no bar to a conviction under the second. (*Overruling State v. Smith*, 71 Mo. 45) *State v. Eaton*, 75 Mo. 586.

California.—Section 597 of the Criminal Practice act, which empowers courts to set aside indictments on motion of the prosecution, is not limited to cases of defect in the instrument itself, and such a dismissal is no bar to a subse-

quent prosecution for the same offence if it amounts to a felony. *People v. March*, 6 Cal. 543.

Under the *California Code*, § 1387, an order of the county court to dismiss a charge does not operate as a bar to another prosecution for the same offence. *Ex parte Cahill*, 52 Cal. 463.

Where the State's officers stipulate with one who has stolen a horse, that, if he will testify against his confederates, a *nol. pros.* shall be entered as to him, the State will be bound by the agreement; and a demurrer to his plea setting up the stipulation will be overruled. *Hardin v. State*, 12 Tex. App. 186.

Defendant was indicted, and an application by the state for a continuance was properly refused, whereupon a *nol. pros.* was entered, and defendant was at once indicted again in order that he might be held for the next term. *Held*, that although such practice was reprehensible on the part of the state, defendant could not plead it in bar to a second indictment. *Venters v. State*, 18 Tex. App. 198.

4. *Reynolds v. State*, 3 Kelly (Ga.) 53; *Mount v. State*, 14 Ohio 295; s. c., 45 Am. Dec. 542; *Stewart v. State*, 15 Ohio St. 155; *State v. M'Kee*, 1 Bail. (S. Car.) L. 651; s. c., 21 Am. Dec. 499.

The respondent was indicted for larceny, and while being tried, a *nol. pros.* was entered on that indictment. He was then indicted for burglary in the same transaction, and to this indictment, pleaded his former jeopardy. *Held*, that the plea was good, and a bar to further prosecution. *Jones v. State*, 55 Ga. 625; s. c., 1 Am. Cr. Rep. 510.

In case of an indictment for an assault with intent to murder, the entry, by leave of court and without the de-

of a *nolle prosequi*, and the finding of another indictment, such entry will be no bar to a subsequent prosecution.¹ The defendant should demand a verdict where the *nolle prosequi* is entered upon to prevent a waiver of the jeopardy.²

Some courts have adopted the rule that a *nolle prosequi*, though against the consent of the defendant, will be no bar to a subsequent indictment if entered by leave of the court.³

6. **Discharge of the Jury.**—The discharge of the jury in a criminal case upon a valid indictment without the consent of the defendant, not called for by imperious necessity, operates as an acquittal and bars a further trial;⁴ but where the discharge is abso-

defendant's consent, of a *nol. pros.*, as to so much of the indictment as relates to the murder, will operate as to that part of the charge as an acquittal. *Baker v. State*, 12 Ohio St. 214.

When upon a valid indictment, the accused is regularly put on trial and the jury have been empanelled and sworn, and the evidence on both sides submitted, the argument of counsel heard and the charge of the court delivered, a *nol. pros.* is entered by leave of the court and against the will of the accused upon the ground that the proof failed to sustain the indictment, the accused cannot again be held to answer on a new indictment for the same offence. *State v. Connor*, 5 Coldw. (Tenn.) 311.

Quare, where the entry of a *nol. pros.* has the effect of putting an end to the prosecution altogether. *Reg. v. Allen*, 1 Ellis, B. & S. 850.

Entering a *nol. pros.* as to a part of the offence, which is not a distinct and independent charge does not avoid or alter the effect of a conviction as a bar. *Com. v. Dunster*, 145 Mass. 101; *Com. v. Cunningham*, 104 Mass. 545.

1. Where a statute authorized a *nol. pros.* to be entered and another indictment to be preferred, where, in the progress of a trial, there shall appear such a variance between the proof adduced and the indictment as will require the acquittal of the accused, unless he will assent to an amendment, it was held to be constitutional and consequently no jeopardy had attached. *State v. Kreps*, 8 Ala. 951.

2. And it has been said if the defendant does not demand a verdict at the time a *nol. pros.* is entered upon, he cannot plead that he was once in jeopardy for the same offence, although he objected at the proper time

to the entering of a *nol. pros.* *Com. v. Kimball*, 73 Mass. (7 Gray) 328. See *Kingen v. State*, 46 Ind. 132.

3. *State v. Champeau*, 52 Vt. 313.

Defendant was indicted for theft from H. Franks, and on trial the owner's name was shown to be Frank and *nol. pros.* was entered against defendant's protest. A plea of once in jeopardy was held bad to a new indictment charging the theft from Franks, the name not being *idem sonans*. *Parchman v. State*, 2 Tex. App. 228; s. c., 28 Am. Rep. 435.

4. *Bell v. State*, 44 Ala. 393; *Grogan v. State*, 44 Ala. 9; *State v. Kreps*, 8 Ala. 951; *Ned v. State*, 7 Port. (Ala.) 187; *Whitmore v. State*, 43 Ark. 271; *McKenzie v. State*, 26 Ark. 334; *Lee v. State*, 26 Ark. 260; s. c., 7 Am. Rep. 611; *People v. Huckeler*, 48 Cal. 331; s. c., Am. Cr. Rep. 507; *People v. Webb*, 38 Cal. 467; *People v. Cage*, 48 Cal. 323; s. c., 17 Am. Rep. 436; *Reynolds v. State*, 3 Kelly (Ga.) 53; *Nolan v. State*, 55 Ga. 521; s. c., 1 Am. Cr. Rep. 532; *Boswell v. State*, 111 Ind. 47; *Daggett v. Bonewitz*, 107 Ind. 276; *Doles v. State*, 97 Ind. 555; *Maden v. Emmons*, 83 Ind. 331; *Kingen v. State*, 46 Ind. 132; *State v. Walker*, 26 Ind. 346; *Joy v. State*, 14 Ind. 139; *Morgan v. State*, 13 Ind. 215; *McCorkle v. State*, 14 Ind. 39; *Miller v. State*, 8 Ind. 325; *Wright v. State*, 5 Ind. (Porter) 290; *Weinzorpflium v. State*, 7 Blackf. (Ind.) 186; *Harker v. State*, 8 Blackf. (Ind.) 540; *State v. Davis*, 4 Blackf. (Ind.) 345; *State v. Redman*, 17 Iowa 329; *State v. Callendine*, 8 Iowa 288; *Grable v. State*, 2 Green (Iowa) 559; *O'Brian v. Com.*, 9 Bush (Ky.) 333; *Com. v. Goodenough*, *Thatch. Cr. Cas. (Mass.)* 132; *Com. v. Tuck*, 20 Pick. (Mass.) 356; *Com. v. Stowell*, 9 Metc. (Mass.) 569; *Hall v. People*, 43 Mich. 417; *People v. Jones*, 48 Mich. 554; *Teat v. State*, 53 Miss.

lutely necessary for the purposes of justice no jeopardy attaches.¹

453; s. c., 24 Am. Rep. 708; *Grant v. People*, 4 Park. (N. Y.) Cr. 527; *People v. Barrett*, 2 Cai. (N. Y.) 304; *King v. People*, 5 Hun (N. Y.) 297; *In re Spier*, 1 Dev. (N. Car.) 491; *Hines v. State*, 24 Ohio St. 134; *Dobbins v. State*, 14 Ohio St. 404; *Hilands v. Com.*, 111 Pa. St. 1.; *McFadden v. Com.*, 23 Pa. St. 12; *State v. Garrigues*, 1 Hayw. (N. Car.) 241; *Brink v. State*, 18 Tex. App. 344; *State v. I. S. S.*, 1 Tyler (Vt.) 178; *Gruber v. State*, 3 W. Va. 699; 1 Bish Cr. L., § 1013; *Cooley's Const. Lim.* 326; and see *State v. Champeau*, 52 Vt. 313.

A judgment on the verdict of conviction or acquittal is not necessary, in order that either may constitute a bar to another indictment for the same offence. *Mount v. State*, 14 Ohio 295.

The consent of a defendant that the jury may separate during the recess of the court, is not a consent that one of them may absent himself and necessitate the discharge of the jury; and such discharge, without his consent, will not deprive him of the defence of former jeopardy against the subsequent prosecution for the same offence. *State v. Ward*, 48 Ark 36; *Hilands v. Com.*, 111 Pa. St. 1.

Neither the attorney for the State nor the court can arbitrarily take a criminal case from the jury and again hold the person to trial on the charge, although it is newly presented; and where this was done because the name of the government witness had not been endorsed in the indictment, the proceeding was *held* to operate as an acquittal. *State v. Callendine*, 8 Clarke (Iowa) 288.

It has been decided in *New York* that jeopardy does not attach until the verdict is obtained and judgment has passed thereon. But it is *held*, also, that in such a case the prosecution can not withdraw a juror and thus obtain a new trial; that the objection to such a practice lies back of the constitution and rests upon the principles of the common law, which are essential to the protection of the accused by securing him a speedy and impartial trial and the best means of vindicating his innocence. *Klock v. People*, 2 Park. (N. Y.) C. R. 676; *People v. Goodwin*, 18 Johns. (N. Y.) 187.

A jury was empanelled and sworn, the indictment was read, and the

prisoner pleaded not guilty. Then the State's attorney moved to postpone to a later day of the term, on the ground that his witnesses were not in court. The prisoner objected, but the motion was granted and the jury discharged. *Held*, that the prisoner was in jeopardy and could not be again put on trial even at the same term. *Pizano v. State*, 20 Tex. App. 139; s. c., 54 Am. Rep. 511.

Where, under an indictment for shooting with intent to kill, it appeared that though the pistol was discharged, the person shot at was not hit. The court, after the evidence was all in and prisoner's counsel was making his argument, discharged the jury without prejudice to the prosecution, but against prisoner's objection. *Held*, that this was a virtual acquittal, and as conviction could have been had of "shooting at," was a bar to a subsequent indictment for that offence. *Mitchell v. State*, 42 Ohio St. 383.

1. *Nugent v. State*, 4 Stew. & P. (Ala.) 72; *People v. Webb*, 38 Cal. 467; *Rulo v. State*, 19 Ind. 298; *Com. v. Bowden*, 9 Mass. 494; *Com. v. Pun-chase*, 2 Pick. (Mass.) 521; *Hector v. State*, 2 Mo. 166; *People v. Goodwin*, 18 Johns. (N. Y.) 187; *State v. Hall*, 9 N. J. L. (4 Halst.) 256; *State v. M'Kee*, 1 Bail. (S. Car.) 651; *Mahala v. State*, 10 Yerg. (Tenn.) 532; *Fletcher v. State*, 6 Humph. (Tenn.) 249; *U. S. v. Perez*, 22 U. S. (9 Wheat.) 579; *Rex v. Edwards*, 4 Taunt. (Eng.) 309; *Reg. v. Bure*, 2 M. & R. (Eng.) 472; *Hans-com's Case*, 2 Hale P. C. (Eng.) 295.

A jury sworn in a criminal case may be discharged by the court under any sudden and uncontrollable emergency, and the discharge is no bar, even in a capital case, to another trial. *U. S. v. Shoemaker*, 2 M'Lean (U. S.) 114; *State v. Coolidge*, 2 Wall. (U. S.) 364.

If after the jury are sworn in a criminal case, and depart from the bar, one of the jurors separate from his fellows, whereby the court are compelled to discharge the jury without the consent of the defendant, he may be again put upon his trial upon the same indictment. *State v. Hall*, 9 N. J. L. (4 Halst.) 256.

An information charged the offence as of a day subsequent to the filing. The mistake was discovered on the trial and the jury discharged on motion of the prosecution. *Held*, that a plea of

Thus, the sickness of the judge,¹ or of the prisoner,² or of a juror,³ is an emergency which justifies the adjournment of the court or the discharge of the jury; and the prisoner then on trial may be subsequently tried on the same indictment. The ending of the term of court as fixed by law, before the completion of the trial, is not such a jeopardy as will bar the further prosecution of the prisoner,⁴ though if the court has power to extend the term, the discharge is not justified and further prosecution is barred.⁵ Sickness or other incapacity of a witness is not a sufficient reason for discharging the jury,⁶ unless caused by the corrupt procurement of the defendant.⁷ Incompetency⁸ or

once in jeopardy could not be based thereon. *People v. Larson*, 68 Cal. 18.

Upon a showing of reasonable grounds for so doing, the court may discharge the jury, and that, too, against the consent of the accused; but in such event the accused must be present when the order of discharge is made. *State v. Wilson*, 50 Ind. 487; s. c., 19 Am. Rep. 719; *McCorkle v. State*, 14 Ind. 40; *Com. v. Cook*, 6 Serg. & R. (Pa.) 577.

1. *People v. Hunkeler*, 48 Cal. 334; *Nugent v. State*, Stew. & P. (Ala.) 72.

The sudden calling home of the judge by a telegram on account of the illness of his wife is an emergency which justifies the adjournment of the court and the defendant, pending whose trial such adjournment has taken place, may be tried on the same indictment at a subsequent term. *State v. Tatman*, 59 Iowa 471.

2. *People v. Goodwin*, 18 Johns. (N. Y.) 187; *Sperry v. Com.*, 9 Leigh (Va.) 623; *Elizabeth Meadow's Case*, Foster's C. L. 76.

3. *Mixon v. State*, 55 Ala. 129; *People v. Hunkeler*, 48 Cal. 331; *Doles v. State*, 97 Ind. 555; *State v. Nelson*, 26 Ind. 368; *State v. Emery*, 59 Vt. 84; *U. S. v. Perez*, 22 U. S. (9 Wheat.) 579; *Whart. Cr. P.*, § 588; but see *Rulo v. State*, 19 Ind. 298.

Discharge of a sick juror after counsel had commenced to open the case, but before any evidence offered, and swearing another juror in his place, no objection being made, is no error. *Silsby v. Foote*, 14 How. (U. S.) 218; *Young v. Marine Ins. Co.*, 1 Cranch (U. S.) 566.

The fact that the court, being authorized by statute, upon sickness of a juror in a criminal cause, to summon another juror and proceed with the trial, refused to do so, but discharged the jury, does not render the discharge operative to

bar a second trial. The prisoner has not been put in jeopardy when the jury is discharged. *Mixon v. State*, 55 Ala. 129.

A discharge of the jury in a capital case, on the ground of the insanity of one of the jurors, without the consent of the prisoner or his counsel, is not a good plea in bar to a further trial of the prisoner, as such discharge is within the discretion of the court. *U. S. v. Haskell*, 4 Wash. (U. S.) 402.

4. *State v. Battle*, 7 Ala. 259; *Lore v. State*, 4 Ala. 173; *Powell v. State*, 19 Ala. 577; *Wright v. State*, 5 Ind. 290; *Re Scrafford*, 21 Kan. 735; *State v. Moor*, 1 Walk. (Miss.) 134; *State v. Tilletson*, 7 Jones (N. Car.) L. 114; *State v. McLemore*, 2 Hill (S. Car.) 680; *State v. Brooks*, 3 Humph. (Tenn.) 70; *State v. Mahala*, 10 Yerg. (Tenn.) 532.

5. *Com. v. Fitzpatrick*, 8 Phil. 613. The jury being discharged before verdict against the will of the defendant, on account of the expiration of the term of court as fixed by law, is unnecessary and amounts to an acquittal. See *Wright v. State*, 5 Ind. 290; *Com. v. Clue*, 3 Rawle (Pa.) 498; *Miller v. State*, 8 Ind. 325; *Reese v. State*, 8 Ind. 416; *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186.

Where the jury were charged at the trial of a prisoner for murder, and, before they returned their verdict, the term of the court expired, and the jury separated, it was held that the prisoner could not be tried again. *In re Spier*, 1 Dev. (N. Car.) 491; but see *Lore v. State*, 4 Ala. 173.

6. *Rex v. Wade*, 1 Wood C. C. (Eng.) 86; *Rex v. Oulagen*, Jebb., § 270.

7. See *State v. Early*, 3 Harr. (Del.) 562; *State v. Keys*, 8 Vt. 57; *People v. Cole*, 43 N. Y. 508.

8. *Stone v. People*, 3 Ill. (2 Scam.) 326; *Com. v. McCormick*, 130 Mass. 61, s. c., 39 Am. Rep. 423; *People v. Damon*,

misconduct¹ of a juror is a sufficient ground for discharging the jury, and no jeopardy will attach; and the rule is the same where the defendant tampers with the jury;² though the opinion that a mere disqualification is not a sufficient reason for a discharge has been extensively adopted.³

The withdrawal of a juror without the consent of the defendant, because of the failure of the evidence to support the prosecution, is unwarranted and the defendant is entitled to an acquittal.⁴

There is a large number of cases holding that the inability of the jury to agree does not present such a case of necessity as would authorize a court to discharge them;⁵ but the prevailing rule

13 Wend. (N. Y.) 351; *U. S. v. Morris*, 1 Curt. (U. S.) 23.

The court has full power, without a suggestion from either the prosecution or defence, to investigate and discharge a corrupt or incompetent juror at any stage of the trial, in order to protect the administration of justice. *U. S. v. Morris*, 1 Curt. (U. S.) 23; *Grable v. State*, 2 Greene (Iowa) 559.

It is no bar to an indictment against several persons jointly, that, at a previous term of court, after the jury was empanelled and the trial begun, the judge, without the consent of the defendants, stopped the trial, and took the case from the jury, because one of the jurors was found to be surety upon a recognizance entered into by one of the defendants before the trial. *Com. v. McCormick*, 130 Mass. 61; s. c., 39 Am. Rep. 423; *Henning v. State*, 106 Ind. 386.

1. *State v. Hall*, 9 N. J. L. (4 Halst.) 256; *State v. Wiseman*, 68 N. Car. 203; *State v. Bell*, 81 N. Car. 591.

If a juror has fraudulently procured himself to be put on the jury, to acquit the prisoner of murder, the judge may direct the withdrawal of a juror, even if the prisoner was innocent of the fraud, and this constitutes no jeopardy. *State v. Washington*, 89 N. Car. 535; s. c., 45 Am. Rep. 700.

2. *State v. Wiseman*, 68 N. Car. 203; *State v. Bailey*, 65 N. Car. 426.

3. *Poage v. State*, 3 Ohio St. 229; *Ward v. State*, 1 Humph. (Tenn.) 253; *Rex v. Wardel*, C. & M. (Eng.) 647.

Where a juror, after the case has progressed to the hearing of the evidence, announced that he was a member of the grand jury that found the indictment, and the court, over the objection of the defendant, discharged the jury, it was held that the defendant was entitled to his discharge. It must be observed here

that the juror was considered not liable to a challenge upon the part of the State for this cause. *O'Brian v. Com.*, 9 Bush (Ky.) 333; s. c., 15 Am. Rep. 715. But such is not the case if the defendant consents to the discharge. *Stewart v. State*, 15 Ohio St. 155; or does not object. *Kingen v. State*, 46 Ind. 132.

Where, after a jury has been empanelled and sworn, it appears that a member was disqualified because not a freeholder or householder; but the accused makes no objection, and, notwithstanding, the court discharges the jury, the accused has been in jeopardy. *Adams v. State*, 99 Ind. 244.

After a criminal trial, and while deliberating upon their verdict, the jury discovered that one of their number was not a resident of the county. Without the knowledge of the court, counsel, or defendant, the jury thereupon dispersed. The court made no effort to reassemble them. Held, that the defendant had thus been placed once in jeopardy, and could not be proceeded against further. *Maden v. Emmons*, 83 Ind. 331; *Klock v. People*, 2 Park. (N. Y.) Cr. 676; *State v. Garrigues*, 1 Hayw. (N. Car.) 241; *Thompson & Merriman on Juries*, § 312.

4. *State v. Stebbins*, 29 Conn. 463; *People v. Harding*, 53 Mich. 481; s. c., 19 N. W. 155; *People v. Barrett*, 2 Cal. (N. Y.) 304; *State v. Garrigues*, 1 Hayw. (N. Car.) 241; *18 re Spier*, 1 Dev. (N. Car.) 491; *Mount v. State*, 14 Ohio 295; *U. S. v. Shoemaker*, 2 McLean (U. S.) 114; but see *Klock v. People*, 2 Park. (N. Y.) Cr. 676; *State v. Weaver*, 13 Ired. (N. Car.) L. 203.

5. *People v. Cage*, 48 Cal. 324; s. c., 17 Am. Rep. 436; *Weinzorpfen v. State*, 7 Blackf. (Ind.) 186; *State v. Morrison*, 3 Dev. & B. (N. Car.) 115; *Spier's Case*, 1 Dev. (N. Car.) 491; *State*

would seem to be that the discharge of a jury without the consent of the defendant, because, after mature deliberation, they are unable to agree on a verdict, is not an acquittal, and does not entitle the defendant to immunity from further prosecution;¹ whether or

v. Garrigues, 1 Hayw. (N. Car.) 241; *Mahala v. State*, 10 Yerg. (Tenn.) 532; *State v. Rankin*, 4 Coldw. (Tenn.) 145; *Williams v. Com.*, 2 Gratt. (Va.) 568.

If the court, against defendant's wish, discharges the jury because, after three hours' deliberation, they cannot agree, defendant has been once in jeopardy, and cannot again be tried for the same offence. (*Overruling Moseley v. State*, 33 Tex. 671; *Taylor v. State*, 35 Tex. 97.) *Powell v. State*, 17 Tex. App. 345. Three and one-half hours, *Whitten v. State*, 61 Miss. 717; eleven hours, *State v. Shuchardt*, 18 Neb. 454.

In *People v. Cage*, 48 Cal. 324, an indictment for murder was regularly brought on for trial, a jury empanelled and sworn, evidence introduced, and the case submitted. After the jury had considered their verdict for nearly four days the court ordered the sheriff to enquire of them if they had agreed upon a verdict. They replied that they "had not and could not agree upon a verdict," which reply was reported to the court; whereupon the court adjourned for the term; it was *held* that the proceedings of the court were irregular, and operated as an acquittal of the defendant, and a bar to a subsequent trial for the same offence.

End of Term.—The discharge of the jury in a capital case on the last day of the term, after they have for five days failed to agree, is not because of an absolute necessity, in the absence of any reason why the term could not be continued, and, if made against the objection of the defendant, is a bar to another trial. *Com. v. Fitzpatrick*, 121 Pa. St. 109.

A prisoner being on trial for grand larceny, and the cause submitted to the jury, they returned into court, on the last day of the term, and reported that they could not agree, and the court discharged them. *Held*, that the discharge of the jury was equivalent to a verdict of acquittal. *Reese v. State*, 8 Ind. 416.

Absolute Necessity.—The court cannot discharge a jury in a capital case because they have not agreed upon a verdict except in a case of absolute

necessity. *Com. v. Cook*, 6 Serg. & R. (Pa.) 577; s. c., 9 Am. Dec. 465; *Com. v. Clue*, 3 Rawle (Pa.) 500.

1. *Barrett v. State*, 35 Ala. 406; *Potter v. State*, 42 Ark. 29; *Ex parte McLaughlin*, 41 Cal. 211; s. c., 10 Am. Rep. 272; *State v. Updike*, 4 Harr. (Del.) 581; *Williford v. State*, 23 Ga. 1; *Lester v. State*, 33 Ga. 329; *State v. Walker*, 26 Ind. 346; *State v. Nelson*, 26 Ind. 366; *Shaffer v. State*, 27 Ind. 131; *Hoffman v. State*, 20 Md. 425; *Com. v. Purchase*, 2 Pick. (Mass.) 521; *People v. Harding*, 53 Mich. 481; *Price v. State*, 36 Miss. 533; *People v. Goodwin*, 18 Johns. (N. Y.) 187; *Dobbins v. State*, 14 Ohio St. 493; *Benedict v. State*, 44 Ohio St. 679; *McCreary v. Com.*, 29 Pa. St. 323; *State v. M'Kee*, 1 Bail. (S. Car.) 655; *U. S. v. Perez*, 22 U. S. (9 Wheat.) 579.

Where there is no possibility of the agreement of the jury in a criminal case, they may be discharged without the defendant's consent; and a plea of "once in jeopardy" to a subsequent indictment may be overruled. *State v. Pool*, 4 Lea (Tenn.) 363.

There was no jeopardy, where, in a murder case, the jury having been out ten days, the judge withdrew a juror and ordered a mistrial. *State v. Washington*, 90 N. Car. 664; *State v. Carland*, 90 N. Car. 668; and where the jury was discharged after two days' deliberation the plea was *held* to be bad. *Smith v. State*, 24 Tex. App. 1; 2 S. W. Rep. 542.

In *Com. v. Fells*, 9 Leigh (Va.) 613, after nine days' confinement, one of the jurors suffered materially in health, it was *held* that the jury was properly discharged, and the second trial regular.

There is no former jeopardy when, on a former trial, the jury, without the consent of the defendant, has been discharged, after being out forty-six hours, without coming to an agreement. *Brady v. State* (Tex.), 1 S. W. Rep. 462.

Where a jury, having been out all night, declared to the court in the morning that they were not likely to agree, and thereupon, in spite of the objection of the prisoner's

not they can agree being a question for the sound discretion of the court;¹ but such discharge must be in the presence of the accused,² and the record must show the reason upon which it was based.³

The matter of discharging a jury seems to rest in the sound legal discretion of the court,⁴ subject to review by a higher court and governed by known rules and fixed principles.⁵

counsel, they were discharged and a mistrial ordered to be entered, the prisoner cannot claim an acquittal. *Williford v. State*, 23 Ga. 1.

Reasonable Time.—An accused has a right to a verdict when once in jeopardy on a valid indictment, *Lee v. State*, 26 Ark. 260; s. c., 7 Am. Rep. 611, and it will operate as a release if the jury be discharged before the expiration of a reasonable time. *State v. Leunig*, 42 Ind. 541; *Dobbins v. State*, 14 Ohio St. 493; *Ned v. State*, 7 Port. (Ala.) 187; *Williams v. Com.*, 2 Gratt. (Va.) 567.

1. *Barrett v. State*, 35 Ala. 406.

2. *Powell v. State*, 19 Ala. 577; *Ned v. State*, 7 Port. (Ala.) 187; *Nolan v. State*, 55 Ga. 521; s. c., 21 Am. Rep. 281; *State v. Wilson*, 50 Ind. 487; s. c., 1 Am. Cr. Rep. 529.

3. *Benedict v. State*, 44 Ohio St. 679; *U. S. v. Morris*, 1 Curt. (U. S.) 23; *Foote v. Silsby*, 1 Blatchf. (U. S.) 445; *Affirmed* in 14 How. (U. S.) 218.

To justify holding accused to a further trial, after such discharge, the records must show that an obstacle that the law will recognize as a necessity, did in fact exist, that it engaged the attention of the court, and that the order was based thereon, and was the result of consideration and decision; but it need not show all the facts and circumstances which influenced the decision, unless made part thereof by bill of exception. *Dobbins v. State*, 14 Ohio St. 493.

In regard to the necessity of making this judicial discretion matter of record, JUSTICE WILSHIRE in *Lee v. State*, 26 Ark. 260; s. c., 7 Am. Rep. 611, says that "whenever after a trial has commenced, the judge discovers any imperfection which will render a verdict against the defendant, either void, or voidable, by him, he may stop the trial, and what has been done will be no impediment in the way of any further proceedings. Whenever, also, anything appears showing plainly that a verdict cannot be reached within the time assigned by law for the holding of the court, he may adjudge this fact to

exist; and on making the adjudication matter of record, stop the trial with the like result as before. But without the adjudication the stopping of the trial operates to discharge the prisoner.

4. *Atkins v. State*, 16 Ark. 568; *State v. Walker*, 26 Ind. 346; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Price v. State*, 36 Miss. 531; *People v. Green*, 13 Wend. (N. Y.) 55; *Hurley v. State*, 6 Ohio 399; *U. S. v. Perez*, 22 U. S. (9 Wheat.) 580.

As there was, at the time the fifth amendment to the constitution was adopted, no definite rule of the common law determining when the discharge of the jury in a criminal case was improper, but it was a matter of fluctuating judicial practice, an improper discharge of the jury is not, under the constitution, a bar to further jeopardy. *U. S. v. Bigelow*, 3 Mackey (D. C.) 393.

As there are circumstances under which it is proper to discharge a jury against defendant's consent, the trial at which a discharge occurred will not be deemed to have placed defendant in jeopardy, unless an abuse of discretion in ordering the discharge clearly appears. *Schindler v. State*, 17 Tex. App. 408.

A discharge of the jury in a criminal case, in presence of all the officers of the court, except the judge, and of the defendant, but in pursuance of the consent of the court, is not a bar to a new trial. *McCorkle v. State*, 14 Ind. 39.

A discharge of the jury, in a capital or other case, after a trial has commenced, cannot be pleaded as matter of *autrefois acquit*, being matter of judicial discretion. *U. S. v. Haskell*, 4 Wash. C. C. (U. S.) 408; *State v. Woodruff*, 2 Day (Conn.) 504; *People v. Goodwin*, 18 Johns. (N. Y.) 187; *Com. v. Bowden*, 9 Mass. 494; *U. S. v. Perez*, 9 Wheat. (U. S.) 579; *Com. v. Purchase*, 2 Pick. (Mass.) 521; *Com. v. Cook*, 6 Serg. & R. (Pa.) 577; *Com. v. Olds*, 5 Litt. (Ky.) 137.

5. *Dobbins v. State*, 14 Ohio St. 496; *M'Kee's Case*, 1 Bail. (S. Car.) 651.

7. **The Rendition of a Verdict.**—A verdict of acquittal or conviction is of itself a bar to a second trial, though there be no judgment upon it,¹ and though the verdict may have been irregular, insufficient or erroneous,² but where it is so defective that no judg-

It is impossible to give what would, in any case, be held to be a correct use of this discretion. It need not be a physical necessity nor an absolute inability to pursue any other course, nor an absolute impossibility to avoid discharging the jury, but merely a need in the higher degree, or highly convenient to the purpose of justice. *Reg. v. Newton*, 73 Q. B. (Eng.) 734.

1. *State v. Benham*, 7 Conn. 414; *Brennan v. People*, 15 Ill. 517; *Wakefield v. State*, 5 Ind. 195; *Teat v. State*, 53 Miss. 453; s. c., 24 Am. Rep. 708; *Hartung v. People*, 26 N. Y. 167; s. c., 28 N. Y. 400; *Mount v. State*, 14 Ohio 295; *State v. Norvell*, 2 Yerg. (Tenn.) 24; s. c., 24 Am. Dec. 458; but see *State v. Herbert*, 5 Cranch (U. S.) 87.

The plea of *autrefois convict* is good although it appear that after verdict at the former trial the indictment was dismissed, and the defendant discharged without day. *State v. Elden*, 41 Me. 165.

Where the accused, after trial upon the merits, has been acquitted before a justice of the peace, the State cannot, upon appeal to the district court, compel him to stand a second trial. *State v. Van Horton*, 26 Iowa 402.

Where, on a trial for murder, there was an error in the sentence of death declared against the prisoner, it was held that a wrong judgment having been pronounced, although the trial and conviction were regular, the prisoner could not be subjected to another trial, and would be entitled to his discharge; but that this court had authority, under the *New York* laws of 1863, ch. 226, upon the ground that the conviction had been legal and regular, and that the error, if any, was in the sentence, to remit the record to the oyer and terminer, with directions to pronounce the judgment prescribed by the act of 1860. *Ratzky v. People*, 29 N. Y. 124.

Whether "former conviction" can be predicated of a suspended judgment, *quære*. *White v. Com.*, 79 Va. 611.

2. See *Com. v. Loud*, 3 Metc. (Mass.) 328.

In a collateral proceeding, as upon a trial for a second offence, a former conviction cannot be questioned for irregu-

larity, as that it was incompetent for the accused to waive a trial by jury in case of felony. *Kelley v. People* (Ill.), 3 West. 45. And the defendant will be discharged without day, where the original proceedings are reversed for insufficiency of a special verdict. *Rhoads v. Com.* (Pa.), 4 Cent. 725.

Although the court may have prevented the State from entering a *not. pros.*, or have misdirected the jury, or have admitted illegal or rejected legal evidence, or the verdict be against the evidence; the verdict and judgment of acquittal on an indictment, if fairly obtained, are conclusive, and the defendant cannot be again put in jeopardy for the same offence. *State v. Davis*, 4 Blackf. (Ind.) 345.

Where, on an indictment for murder, a verdict of guilty was received in the absence of the prisoner, and the verdict was, on the defendant's motion, set aside for that irregularity, it was held that he had been once in jeopardy and could not be tried again for the same offence. *Nolan v. State*, 55 Ga. 521; 21 Am. Rep. 281.

A prisoner, against whom a wrong judgment was pronounced upon a regular trial and conviction, cannot be subjected to another trial. *Shepherd v. People*, 25 N. Y. 406.

A mistrial and consequent discharge of the jury does not put the accused in legal jeopardy. *State v. Blackman*, 35 La. An. 483.

When under one indictment for selling liquor within five miles of a church, it was found that the place where the liquor was sold was more than five miles from the church; this does not estop the State from proving, in another indictment, that the same place was less than five miles from the church. *State v. Williams*, 94 N. Car. 891.

After the swearing of the jury and the opening argument for the government, in a prosecution on a consolidation of fourteen indictments, the judge discharged the jury, and they were then resworn to try one of the indictments. Held, that this discharge of the jury was not equivalent to an acquittal, and was no defence to a second trial. *U. S. v. Bigelow*, 3 Mackey (D. C.) 393.

ment could be rendered upon it the court may, over the defendant's objection, set it aside and order a new trial.¹

Trial upon the merits is sufficient jeopardy² especially if judgment thereon has been executed and performed,³ but it must appear affirmatively that the former decision was upon the merits.⁴

8. Jeopardy of a Codefendant.—An acquittal or conviction of one of two codefendants jointly indicted is no bar to a prosecution against the other.⁵

Defendant was put on trial for murder. After one of the State's witnesses had been examined and cross-examined, it appeared that the State's witnessess had not been examined before the grand jury; whereupon the jury was discharged and the case continued. *Held*, that defendant was properly put on trial again at the next term. *State v. Parker*, 66 Iowa 586.

Where an information fails through a variance, a verdict of acquittal would not benefit the defendant, as he might be again informed against by the attorney for the State. *State v. Stebbins*, 29 Conn. 463. And where judgment is properly arrested by the circuit court, on a good indictment, the conviction is a bar to a subsequent prosecution, but the supreme court may reverse the judgment of discharge and render judgment on the conviction below. *State v. Norvell*, 2 Yerg. (Tenn.) 24.

An indictment for uttering a forged check, alleged that the bank had knowledge of the falsity and forgery, instead of the accused; but, notwithstanding this defect, he was tried, and the jury, without leaving the bar, found him not guilty. *Held*, that this was a bar to a second trial under a proper indictment; it not appearing that the acquittal resulted from a variance between the indictment and the proof. *Croft v. People*, 15 Hun (N. Y.) 484.

1. *Williams v. State*, 45 Ala. 57; *State v. Underwood*, 2 Ala. 744; *Lawrence v. People*, 2 Ill. (1 Scam.) 414; *Wright v. State*, 5 Ind. 527; *State v. Redman*, 17 Iowa 320; *State v. Sutton*, 4 Gill (Md.) 494; *People v. Olcott*, 2 Johns. (N. Y.) Cas. 301; *Com. v. Hatton*, 3 Gratt. (Va.) 623; *Com. v. Percavil*, 4 Leigh (Va.) 636.

The rejection by the court of an illegal verdict does not operate as an acquittal. An informal verdict may be amended by order of court. *Robinson v. State*, 23 Tex. App. 315.

When a verdict of guilty is set aside by the court, because not in proper form

to sustain a conviction, and a new trial is granted, defendant is not regarded as having been in legal jeopardy, and cannot plead this as a former acquittal; and when this action of the court is had at his instance, it amounts to an express waiver of the right to insist on the constitutional guaranty against being placed a second time in jeopardy for the same offence. *Kendall v. State*, 65 Ala. 492.

The jury found that H, who was indicted for forging a receipt for the use of Hugh Brison, was "guilty of forging a receipt for the use of Hugh Prison," and the indictment was given up because the verdict could not be supported. This was *held* not to bar a new indictment, charging H with forging a receipt for the use of Hugh Prison. *Pensylvania v. Huffman*, Addis. 140.

In *Massachusetts* it is *held* that a verdict of guilty, upon which no judgment has been rendered, at the rulings at the trial of which exceptions are pending, is no bar to a complaint for the same offence. *Com. v. Fraher*, 126 Mass. 265.

2. *Burns v. People*, 1 Park. (N. Y.) 182; *Com. v. Loud*, 3 Metc. (Mass.) 328.

3. *Com. v. Loud*, 3 Metc. (Mass.) 328.

But in Illinois it was *held* that where a prisoner has been indicted, and found guilty by the verdict of a jury, if the judgment is arrested, even for an insufficient cause, and the defendant discharged, he has not been legally in jeopardy and cannot plead the conviction in bar to a subsequent indictment. *Gerard v. People*, 3 Scam. (Ill.) 362.

4. *Hassell v. Nutt*, 14 Tex. 260.

5. *People v. Bruzzo*, 24 Cal. 41; *State v. McClintock*, 1 Iowa (Greene) 392.

Defendant and W, partners, were jointly indicted as individuals for keeping and exhibiting a gaming table. *Held*, on the trial of defendant, that the fact that W had been tried and convicted could not operate as an acquittal of defendant. *Goforth v. State*, 22 Tex. App. 405.

9. Offences Against Different Jurisdictions.—A person may by a single act violate the laws of two or more jurisdictions, as those of the United States and those of a State. In such case the offender may be punished by either, and a prosecution by the one is no bar in a prosecution by the other.¹ So the general rule is that an acquittal or a conviction and punishment under a city ordinance is no bar to a prosecution for the same offence by the State;² and it has been announced by some of the courts that a city cannot punish an indictable offence;³ though the theory has

On indictment for murder against two, a verdict of acquittal on the evidence being rendered as to one, and the other found guilty of murder in the second degree, which judgment was reversed on error, at the instance of the latter, because the record showed a fatal defect in the formation of the grand jury by which the indictment was found, though no objection was raised to it in the court below on that account, the verdict and judgment operate as a bar to another prosecution of the defendant, who was acquitted, and are available to him under the plea of former acquittal; and as to the other defendant, when again indicted, operate as a bar to a prosecution for murder in the first degree. *Berry v. State*, 65 Ala. 117.

1. *Re Esmond* (D. C.), 3 Cent. 523; *State v. Rankin*, 4 Coldw. (Tenn.) 145.

One act may be contrary to the law of the United States, and also of the State or of a municipality. In that case each authority may punish for the violation of its law. *Hughes v. People*, 8 Colo. 536.

One indicted in the United States court for killing an Indian in "Indian country" on the Umatilla reservation in Oregon, for instance, cannot plead a former acquittal in the State court. *U. S. v. Barnhart*, 22 Fed. Rep. 285; s. c., 10 Sawy. (U. S.) 491.

A conviction and sentence of one, not a member of congress, by the house of representatives, for a breach of privilege, by assault and battery on one of its members for words spoken in debate, are not a bar to a criminal prosecution by indictment for the same assault and battery. *U. S. v. Houston*, 4 Cranch (U. S.) 261.

2. *Mobile v. Allaire*, 14 Ala. 400; *Hughes v. People*, 29 Cal. 257; *McRea v. Mayor*, 59 Ga. 168; s. c., 27 Am. Rep. 390; *Wragg v. Penn Township*, 94 Ill. 11; s. c., 34 Am. Rep. 199; *Amboy v. Sleeper*, 31 Ill. 499; *Waldo v.*

Wallace, 12 Ind. 582; *Ambrose v. State*, 6 Ind. 351; *Levy v. State*, 6 Ind. 281; *State v. Moore*, 6 Ind. 436; *Preston v. People*, 45 Mich. 486; *State v. Lee*, 29 Minn. 445; s. c., 13 N. W. 913; *State v. Oleson*, 26 Minn. 507; *Greenwood v. State*, 6 Baxt. (Tenn.) 567; *Cooley on Const. Lim.* 199; *Bishop Cr. L.*, § 1068.

Grant of power to a city to punish for misdemeanors,—as here, keeping a gaming house,—is no surrender of the power of the State to also punish for the same offence. *Hankins v. People*, 106 Ill. 628.

A conviction under a city ordinance for "disturbing the peace," or for "fighting in the streets," cannot be pleaded in bar to an indictment in the circuit court for the assault and battery committed at the same time. The two offences are not identical. *State v. Sly*, 4 Oreg. 277; s. c., 2 Am. Cr. Rep. 51.

It seems that the imposition of a fine by the mayor of a city in the exercise of his police power will not relieve the offender from liability to the State. *Shafer v. Munma*, 17 Md. 331.

Conviction before the mayor of a town, under an ordinance against gaming, is not a bar to a subsequent indictment under the State law for the act for which he was convicted. *Johnson v. State*, 59 Miss. 543.

A city ordinance and State law both prohibited the keeping of a bawdy house; the former imposing a fine and the latter either a fine or imprisonment, or both, as a punishment. *Held*, that as the offences under the ordinance and under the State law were distinguishable, and proceeded upon different grounds, the State having no jurisdiction of offences under the former, and the city none of offences under the latter, a trial and conviction under the ordinance constituted no bar to the prosecution under the State law. *Kemper v. Com.* (Ky.), 3 S. W. 159.

3. *State v. Welch*, 36 Conn. 216; *Ind.*

been adopted to some extent that the municipality is the agent of the State, and the prosecution of an offender under its ordinances is a bar to a prosecution under the laws of the State, because it is virtually the exercise of the power of the State in either case, in the one directly, and in the other by means of its delegated agencies.¹

Mere jeopardy in another State without conviction and punishment is of no avail,² and a prosecution in one county is no bar to an indictment in another county, unless it appears that the offence was committed in the former county.³

VI. WAIVER OF JEOPARDY—1. Consent to Discharge of the Jury.—If the jury is discharged at the request or with the concurrence of the defendant, he has waived any right he might have had to insist, on a second trial, that he had been in former jeopardy;⁴ so if

v. Blythe, 2 Ind. 75; *Madison v. Hatcher*, 8 Blackf. (Ind.) 341; *Municipality v. Wilson*, 5 La. An. 747; *People v. Jackson*, 8 Mich. 110; *Slaughter v. People*, 2 Doug. (Mich.) 324; *State v. Thornton*, 37 Mo. 360; *Jefferson City v. Courtmire*, 9 Mo. 683; *Commrs. v. Harris*, 7 Jones (N. Car.) L. 281; 4 Crim. L. Mag. 496.

1. *State v. Cowan*, 29 Miss. (8 Jones) 330; *Gowan v. State*, 29 Mo. 330.

When a properly constituted court acting under the authority of an ordinance of a municipal corporation punishes a person for violation of that ordinance, he cannot be again punished for the same offence under the general laws of the State. *State v. Thornton*, 37 Mo. 360.

2. *Marshall v. State*, 6 Neb. 120; s. c., 29 Am. Rep. 363.

3. *Campbell v. People*, 109 Ill. 565; s. c., 50 Am. Rep. 621.

4. *State v. Slack*, 6 Ala. 676; *Lee v. State*, 26 Ark. 260; s. c., 7 Am. Rep. 611; *Spencer v. State*, 15 Ga. 562; *McCorkle v. State*, 14 Ind. 39; *Com. v. Sholes*, 13 Allen (Mass.) 554; *Com. v. Stowell*, 9 Metc. (Mass.) 572; *People v. White* (Mich.), 37 N. W. Rep. 34; *People v. Gardner*, 62 Mich. 307; *Klock v. People*, 2 Park. (N. Y.) Cr. 676; *Hilands v. Com.*, 111 Pa. St. 1; *Com. v. Cook*, 6 Serg. & R. (Pa.) 577; *State v. McKee*, 1 Bail. (S. Car.) 651; *Elijah v. State*, 1 Humph. (Tenn.) 102; *Moore v. State*, 3 Heisk. (Tenn.) 493; *Williams v. Com.*, 2 Gratt. (Va.) 567; *Kinloch's Case*, *Foster* (Eng.) 16, 22; s. c., 18 How. St. Tr. (Eng.) 395; *Rex v. Stokes*, 6 Car. & P. (Eng.) 151.

Where, after the evidence is in, the State seeks to introduce additional evidence, and defendant demands a con-

tinuance, he cannot object to another trial on the ground that he has been once in jeopardy. *State v. Falconer*, 70 Iowa 416.

Before going to trial the State asked for a continuance; thereupon the prisoner agreed to go to trial and have the case withdrawn from the jury on a certain contingency. When that arose the prisoner objected to the withdrawal. *Held*, that he was bound by his agreement and could be convicted on a second trial. *Hughes v. State*, 35 Ala. 351.

The plea of once in jeopardy was not adopted for the benefit of the defendant; consequently when he has consented to the act, which gives rise to the plea, he cannot take advantage of it. If the jury are sworn, the case is continued or the jury are discharged without rendering a verdict, with his consent, or the judgment is reversed on his application, the plea will not avail him. *Peiffer v. Com.*, 15 Pa. St. 468; *Sanders v. State*, 85 Ind. 318; *People v. Gardner*, 62 Mich. 307; 29 N. W. 19; *State v. Falconer*, 70 Iowa 416; *Haskins v. Com.* (Ky.). 1 S. W. Rep. 730.

The defendant below was put on trial for a penitentiary offence. After a jury had been empanelled and sworn a juror arose in open court and stated that he had been one of the grand jurors by whom the indictment had been found. Pertinent enquiries had been openly made upon this subject by counsel for the State before the jury was sworn, to which the juror had failed to respond. The defendant's counsel thereupon, in answer to an enquiry by the court, objected to proceeding on the trial with the jury then empanelled, at the same time declining to waive any of the defendant's rights.

he voluntarily absent himself from the court at the time of the return of the verdict;¹ and his consent to the withdrawal of a juror will have the same effect.²

2. Dismissal on Defendant's Motion.—A plea of former jeopardy cannot avail the defendant on the second trial where the verdict on the former trial has been set aside on his own motion,³ and where judgment is arrested on motion of the defendant, a subse-

The jury was thereupon discharged by the court, and another jury was empanelled in the usual mode and the trial proceeded, the defendant objecting thereto. *Held*, that the discharge of the jury first empanelled was the necessary result of sustaining the objection interposed by the defendant himself, and so did not take place without his consent, but was an act done at his own instance and would not, therefore, operate as an acquittal, nor a bar, to further prosecution. *Stewart v. State*, 15 Ohio St. 155.

P was put on trial on an indictment for murder, and one witness was examined, when it was discovered that none of the witnesses had been examined before the grand jury, which had returned the indictment on the minutes of the committing magistrate. An application was made by the district attorney to compel P to elect either to allow the cause to be continued or the witnesses to testify, and P moved the court to direct the jury to return a verdict of "not guilty" which being overruled, he elected to continue the case and the jury was discharged. *Held*, that P had not been put in jeopardy of life and liberty on the first abortive trial and could be tried a second time. *State v. Parker*, 66 Iowa 586.

1. *State v. Battle*, 7 Ala. 259; *State v. Hughes*, 2 Ala. 202; and see *Sneed v. State*, 5 Ark. 431; *State v. Hurlbut*, 1 Root (Conn.) 90; *Andrews v. State*, 2 Sneed (Tenn.) 550.

Defendant, while on trial, ran away. *Held*, that he could not be heard to plead "former jeopardy" in bar of another trial. *People v. Higgins*, 59 Cal. 357.

Another view which is sometimes taken is that the accused, by voluntarily absenting himself, has waived his right to be present at the receipt of the verdict and cannot insist upon error if the court received it. *Price v. State*, 36 Miss. 531; *Fight v. State*, 7 Ohio, pt. 1, p. 180. See *Russell v. State*, 11 Tex. App. 288.

2. *Stewart v. State*, 15 Ohio St. 155. But see *Rex v. Perkins*, Holt (Eng.) 403; *Rex v. Kell*, 1 Craw. & Dix. C. C. 151.

3. *Turner v. State*, 40 Ala. 21; *Waller v. State*, 40 Ala. 325; *Sanders v. State*, 85 Ind. 318; s. c., 16 Cent. L. J. 476; *State v. Redman*, 17 Iowa 329; *State v. Patterson* (Mo.), 3 West. 226; *State v. Blaisdell*, 59 N. H. 328; *People v. Casborus*, 13 Johns. (N. Y.) 351; *State v. Lipsey*, 3 Dev. (N. Car.) 485; *State v. Jeffreys*, 3 Murph. (N. Car.) 480; *Com. v. Clue*, 3 Rawle (Pa.) 500; *Com. v. Brown*, 3 Rawle (Pa.) 207; *State v. Sims*, 2 Bail. (S. Car.) 29; *State v. Greenwood*, 1 Hayw. (N. Car.) 141; *Dubose v. State*, 13 Tex. App. 418; *Ball's Case*, 8 Leigh (Va.) 726; *Coleman v. Tennessee*, 97 U. S. 509; *U. S. v. Perez*, 22 U. S. (9 Wheat.) 579.

A plea of former acquittal is not sustained by evidence of a record entry showing a verdict of not guilty by consent, but that judgment was to abide the decision of the supreme court in a like case, it not appearing that the supreme court had decided favorably to defendant. *State v. Bradley*, 45 Ark. 31.

If the jury come to court and render a verdict of guilty, and are discharged, in the absence of the prisoner, who is in the custody of an officer in another room, the prisoner is entitled to a new trial, but he is not entitled to a final discharge. *State v. Hayes*, 2 Lea (Tenn.) 156; s. c., 2 Am. Cr. Rep. 630.

An informal and, with greater reason, an illegal verdict may be rejected by the court, and will not operate as an acquittal unless that is plainly intended; and where an informal verdict has been amended, and, therefore, a new trial granted, a plea of acquittal and jeopardy should be stricken out on motion for the State. *Robinson v. State*, 23 Tex. App. 317.

A former conviction or acquittal will bar a subsequent prosecution. But the conviction or acquittal must be a legal one, upon trial by verdict of a petit

quent trial may be had for the same crime.¹ So a prisoner cannot plead former jeopardy in any case if his former conviction was reversed or set aside on a proceeding instituted by himself, even though a part of the punishment may have been inflicted;² as in case of a new trial granted upon his motion,³ or the reversal of

jury. The verdict must be a valid one, not subject to be set aside. If the court award a new trial upon quashing the verdict, whether at the instance of the prisoner or on special application, on the application of the prosecution; it is evident, in the eye of the law, the accused has not been in jeopardy. *State v. Walters*, 16 La. An. 400.

1. *Morissette v. State*, 77 Ala. 71; *People v. Olwell*, 28 Cal. 456; *People v. Barric*, 49 Cal. 342; *Gerard v. People*, 4 Ill. (3 Scam.) 362; *Phillips v. People*, 88 Ill. 160; *State v. Clark*, 69 Iowa 196; *People v. Casborus*, 13 Johns. (N. Y.) 351; *State v. Norvell*, 2 Yerg. (Tenn.) 24; *Com. v. Hatton*, 3 Gratt. (Va.) 623; *Coleman v. Tennessee*, 97 U. S. 509.

A former trial upon a valid indictment, in which an improper verdict has been rendered, but from which the accused has been released upon a motion for a new trial and one in arrest of judgment, cannot authorize the plea of once in jeopardy, and will not bar a further prosecution on the same indictment. *State v. Oliver*, 39 La. An. 470.

If a defendant moves in arrest or to vacate a judgment already rendered he will be presumed to waive any objection to being put a second time in jeopardy, and if, after verdict, he obtains an arrest of judgment on a good indictment the court supposing it to be bad, he may be again placed on trial. *Joy v. State*, 14 Ind. 139.

Defendant was tried for assault with a deadly weapon, and was found guilty of an assault and battery; judgment, upon his motion, was arrested, because only an assault was charged. *Held*, that he could be tried again for a simple assault. *Spipple v. People*, 110 Ill. App. 144.

A verdict of guilty upon a former indictment, where there was no judgment upon the verdict, but where the court virtually set the verdict aside by sustaining a motion in arrest of judgment, and also set the indictment aside was not such a former conviction as to bar a prosecution upon a new indictment for the same offence, under § 4364 of the

Iowa code. *State v. Clark*, 69 Iowa 196.

The offence of assault does not include battery, though the latter includes the former. When, therefore defendant, indicted for assault, was convicted of the battery, and obtained a new trial, his conviction, especially as it had been set aside on his own motion, could not be pleaded in bar to a second trial upon the indictment. *People v. Helbing*, 61 Cal. 620.

2. *Jeffries v. State*, 40 Ala. 381.

On a trial for murder in the first degree, defendant withdrawing his plea of guilty in the lesser degree, and pleading not guilty of the higher degree, cannot on a trial on the latter plea, plead acceptance of his former plea as an acquittal of the higher degree. *People v. Cignarale*, 110 N. Y. 23.

3. *Kendall v. State*, 65 Ala. 492; *State v. Slack*, 6 Ala. 676; *People v. Larson*, 68 Cal. 18; *People v. Keefer*, 65 Cal. 232; *Packer v. People* (Colo.), 8 Pac. Rep. 564; *In re Garvey* (Colo.), 3 Pac. Rep. 903; *Lane v. People*, 10 Ill. (5 Gilm.) 305; *Sellers v. People*, 6 Ill. (1 Gilm.) 183; *Gerard v. People*, 4 Ill. (3 Scam.) 362; *Joy v. State*, 14 Ind. 139; *State v. Clark*, 69 Iowa 196; *State v. Hart*, 33 Kan. 218; *Haskins v. Com.* (Ky.), 1 S. W. Rep. 730; *State v. Byrd*, 31 La. An. 419; *State v. Oliver* (La.), 2 So. Rep. 194; *People v. White* (Mich.), 37 N. W. Rep. 34; *State v. Anderson*, 89 Mo. 312; *State v. Patterson*, 88 Mo. 88; *Sutcliffe v. State*, 18 Ohio 469; *Hines v. State*, 24 Ohio St. 134; *Stewart v. State*, 15 Ohio St. 155; *Hilands v. Com.*, 114 Pa. St. 372; *State v. Commrs.*, 3 Hill (S. Car.) 239; *Livingston v. Cone*, 14 Gratt. (Va.) 593; *U. S. v. Harding*, 1 Wall. Jr. (U. S.) 127.

The constitutional provision that defendant shall not be twice put in jeopardy for the same offence does not operate to prevent a new trial of a charge on which the defendant has once been convicted, after a new trial has been granted on his own motion. *Johnson v. State*, 29 Ark. 31; s. c., 2 Am. Cr. Rep. 430.

the judgment of conviction upon his appeal.¹ And this is the rule, even though he does not ask for a new trial, but only for a reversal and discharge from imprisonment.² Neither is the former

One convicted for manslaughter on an indictment for murder, and obtaining a new trial, thereby waives his constitutional right to stand upon his implied acquittal of murder in the first, and may be convicted of murder on the second. *Veatch v. State*, 60 Ind. 291.

In all cases of prosecutions for matters criminal, in which the accused has been tried and acquitted, and his acquittal has not been procured by his own fraud or evil practice, he shall not again be put in jeopardy by a new trial, granted at the instance of the public prosecutor; though, in all cases of conviction, in such prosecutions, the accused is entitled to a new trial, in the same manner as in civil actions. *State v. Brown*, 16 Conn. 54. See *State v. Anderson*, 3 Smed. & M. (Miss.) 751.

No jeopardy attaches until the case is ripe for trial and the trial actually entered upon; and here the case was not ripe for trial, because the plea extorted from the appellant by fear of violence at the hands of a mob, was null, and he was, therefore, not in legal jeopardy. The proceeding adopted by the appellant is, in its general feature, and in its consequences, closely analogous to a motion for a new trial, and as a defendant who takes a new trial granted at his own request, cannot claim that the finding set aside constitutes a prior jeopardy, he cannot do so in a proceeding like this. *Sanders v. State*, 85 Ind. 318, 332; s. c., 16 Cent. L. J. 476; 44 Am. Rep. 29; 4 Cr. L. Mag. 359.

In Kansas.—After a new trial is granted, the state's attorney, the court consenting, may enter a *not. pros.* without prejudice to a fresh prosecution. *State v. Rust*, 31 Kan. 509.

1. *Ned v. State*, 7 Port. (Ala.) 187; *State v. Abram*, 4 Ala. 272; *Territory v. Dorman*, 1 Ariz. 56; *People v. Travers* (Cal.), 19 P. 268; *People v. Olwell*, 28 Cal. 456; *People v. Hardisson*, 61 Cal. 378; *In re Garvey* (Col.), 3 Pac. Rep. 903; *Haskins v. Com.* (Ky.), 1 S. W. Rep. 730; *State v. Stephens*, 13 S. Car. 285; *Thompson v. State*, 9 App. 649.

A first trial of a criminal case, the judgment in which has been reversed in consequence of an error of the judge in charging the jury, does not bar a

second trial on the same indictment. As to second jeopardy, the New Jersey constitution goes no further than to forbid the retrial of a person who has been acquitted. *Smith v. State*, 41 N. J. L. 598.

The plea of "once in jeopardy," or former "conviction," is not permissible where defendant has been found guilty of murder on a previous trial, but the judgment has been set aside on appeal, the case remanded for further proceedings, and dismissed for a defect in the information. *People v. Schmidt*, 64 Cal. 260.

A conviction for manslaughter, reversed on appeal, does not sustain pleas of former acquittal and once in jeopardy, on a retrial for murder. *People v. Carty* (Cal.), 19 P. 490.

Where a judgment of conviction has been reversed on appeal, the case remanded for a new trial, and a *not. pros.* entered to the second indictment, the defendant may, under 2 Indiana Rev. St. 1876, p. 408, § 141, be tried and convicted upon a third indictment. *Patterson v. State*, 70 Ind. 341.

Defendant was convicted of a misdemeanor before a justice of the peace. He appealed to the district court. In that court the county attorney filed an information for the same offence, and dismissed the appeal. *Held*, that defendant could not plead the proceedings in the former case as a bar to the information. *State v. Curtis*, 29 Kan. 384.

The Record.—Where the record on appeal does not show any action taken on a demurrer to defendant's plea of former jeopardy, and the matter is not mentioned by counsel, defendant will be held to have waived the plea. *Johnson v. State* (Tex.), 10 S. W. Rep. 235.

2. *State v. Abram*, 4 Ala. 272; *People v. Travers* (Cal.), 19 P. 268; *People v. Barric*, 49 Cal. 342; *People v. Olwell*, 28 Cal. 456.

Where the defendant appeals from a judgment and procures a reversal, one of the effects of which is the ordering of a new trial, the judgment and verdict in such case must be assumed to be set aside at the instance of the defendant, upon the theory that he who procures the reversal or affirmance of a judgment impliedly assents to all the

conviction any bar to a prosecution for a higher degree of the same offence.¹

3. Fraudulent Procurement of Defendant.—A former conviction or acquittal is no defence to a second indictment if the former trial was brought about by the procurement of the defendant,² or if the conviction or acquittal was the result of fraud and collusion on his part.³ But it is said that where the legal penalty, in such

consequences legitimately following such reversal or affirmance. *Bish. Cr. L.*, §§ 1004, 10016.

An indictment contained two counts for the same murder; the plea of not guilty was filed and a jury sworn; upon an order of the court the case elected to go upon the first count which was then quashed; by leave of court the second count was *not proessed* and the defendant discharged on the indictment, but remanded to await the action of the grand jury; a new indictment was found, containing two counts similar to the former ones, and also a third count, charging the murder by a combination of the two means first alleged. *Held*, that the prisoner had not been in jeopardy under the second count of the indictment, because the allowance of his motion to compel the State to elect amounted to a declaration by him and the court, binding on him, that the two counts set out different offences, and the result of the order was that, by the jury then empanelled, he could be tried on the first only and not on the second; so that he was never in jeopardy as to the second count because not brought to trial on it, nor as to the first because it was bad. *Joy v. State*, 14 Ind. 139.

1. *People v. McCarty* (Cal.), 19 P. 490; *Veatch v. State*, 60 Ind. 291; *State v. Miller*, 35 Kan. 328.

2. *Halloran v. State*, 80 Ind. 586; *State v. Green*, 16 Iowa 239; *State v. Little*, 1 N. H. 257; *Com. v. Alderman*, 4 Mass. 477; *State v. Yarbrough*, 1 Hawks (N. Car.) 78; *State v. Atkinson*, 9 Humph. (Tenn.) 677; *State v. Lowry*, 1 Swan (Tenn.) 34; *State v. Clenny*, Head (Tenn.) 270; *State v. Colvin*, 11 Humph. (Tenn.) 599; *Burdett v. State*, 9 Tex. 43; *Com. v. Jackson*, 2 Va. Cas. 501.

In a prosecution for an aggravated assault, a plea of a former conviction cannot be based on a justice's judgment imposing a nominal fine, and rendered on the submission and demand of the accused, without examination of wit-

nesses. *Watson v. State*, 5 Tex. App. 271.

3. *State v. Reed*, 26 Conn. 202; *State v. Brown*, 16 Conn. 54; *Hylliard v. Nickols*, 2 Root (Conn.) 176; *Pruden v. Northrop*, 1 Root (Conn.) 93; *Hannaball v. Spalding*, 1 Root (Conn.) 86; *State v. Jones*, 7 Ga. 422; *State v. Green*, 16 Iowa 239; *Com. v. Alderman*, 4 Mass. 477; *State v. Cole*, 48 Mo. 70; *State v. Little*, 1 N. H. 257; *State v. Yarbrough*, 1 Hawks (N. Car.) 78; *State v. Wright*, 2 Tread. (S. Car.) 517; *State v. Colvin*, 11 Humph. (Tenn.) 599; *State v. Epps*, 4 Sneed (Tenn.) 552; *State v. Atkinson*, 9 Humph. (Tenn.) 677; *State v. Clenny*, 1 Head (Tenn.) 270; *Com. v. Jackson*, 2 Va. Cas. 501; *Rex v. Taylor*, 5 D. & R. (Eng.) 521; *Rex v. Davis*, 12 Mod. 9; *Rex v. Bear*, 2 Salk. 646; 1 *Bish. Cr. L.*, § 1010; *Whart. Cr. Pl.*, § 451.

A plea of former conviction, where it appeared that the defendant had made complaint against himself, and in the absence of the injured party was convicted on his own testimony and suffered a fine imposed by the magistrate, is not sufficient as a defence. *State v. Simpson*, 28 Minn. 66.

Conviction for a misdemeanor, procured by collusion of defendant with the prosecuting witness, and upon which the full penalty for the offence was not imposed, is not a bar to a subsequent prosecution for the same offence. *McFarland v. State*, 68 Wis. 400.

Where an indictment was brought against a husband for an assault and battery upon his wife, *held*, that a former conviction for the same offence before a justice of the peace was not a good plea in bar, where said conviction was procured by defendant's father fraudulently and at defendant's request complaining of him, so as to avoid the effect of a complaint which he had reason to believe would be preferred against him by the injured party. *Watkins v. State*, 68 Ind. 427.

If a witness who has been summoned

case, is an exact and certain one, and the accused has borne it in full, it is not fraud, and a subsequent prosecution is barred.¹

VII. THE DEFENCE, HOW MADE.—The general rule is that former conviction or acquittal, to be available as a defence, must be pleaded,² and cannot be considered on a motion to arrest judgment or otherwise;³ but in some of the States the courts will take notice of a former acquittal, although not presented by a former plea.⁴ A former acquittal, if it cannot be pleaded in bar to a subsequent indictment, cannot be taken advantage of as an estoppel.⁵

1. Allegations of the Plea.—Technical accuracy is not required in setting out a former conviction.⁶ It must appear, however, that, in the former case, the court had full legal jurisdiction over the prisoner and the offence at the time of the trial, and that there

before the grand jury to testify as to the unlawful sales of liquor, afterwards institutes proceedings before a justice of the peace against one whom he knows to be guilty, and the person thus accused is brought before the justice, pleads guilty, and is fined under the "act for the punishment of small offences," the proceeding is a fraud upon the jurisdiction of the circuit court. And if the accused be afterwards indicted for the same offence by the grand jury before whom the witness had been summoned, and upon the testimony of said witness, the plea of *autrefois convict* is no bar to the presentment, the proceedings before the justice being in fraud of the law, and in contempt of the court to which the presentment was made. *State v. Lowry*, 1 Swan (Tenn.) 34.

1. *Com. v. Loud*, 3 Metc. (Mass.) 328; *Raynham v. Rousenville*, 9 Pick. (Mass.) 44; *State v. Alderman*, 4 Mass. 477; *State v. Little*, 1 N. H. 257; *State v. Casey*, 1 Busb. (N. Car.) 209; *State v. Atkinson*, 9 Humph. (Tenn.) 677; *Hamilton v. Williams*, 1 Tyler (Vt.) 15; *McFarland v. State*, 68 Wis. 400.

2. *State v. Barnes*, 32 Me. (2 Red.) 530; *State v. Morgan*, 95 N. Car. 641; *Zachary v. State*, 7 Baxt. (Tenn.) 1; *Justice v. Com.*, 81 Va. 209.

Where, on an indictment for murder, the defendant, who on a previous trial had been convicted of murder in the second degree, does not specially plead the former conviction, but merely pleads not guilty, the plea of *autrefois acquit* as to murder in the first degree will be deemed waived, the record of the former conviction will be excluded, and the same proceedings will be had in organizing the jury as if there had not

been a former trial or verdict amounting to an acquittal of murder in the first degree. *Jordan v. State*, 81 Ala. 20.

3. *State v. Barnes*, 32 Me. (2 Red.) 530; *State v. Morgan*, 95 N. Car. 641; *Zachary v. State*, 7 Baxt. (Tenn.) 1.

4. *Johnson v. State*, 29 Ark. 31; s. c., 21 Am. Rep. 154; *People v. Cignarale*, 110 N. Y. 23.

Under the plea of not guilty, the defendant may, it seems, avail himself of the fact that he has been previously put in jeopardy on the same charge. *Danneburg v. State*, 20 Ind. 181; *Veatch v. State*, 60 Ind. 291.

In *Reg. v. Stanton*, 5 Cox C. C. 324, the defendant did not plead his former conviction before two magistrates, the fact, however, appeared on trial, and EARLE, J., said: "In my opinion the conviction (of assault) would have been an estoppel to the indictment for the felonious assault and wounding (with intent to murder), if pleaded, and although it has not been pleaded, I am bound to consider the charge as already adjudicated upon, the prisoner as having undergone the punishment allotted for it," and the prisoner was therefore discharged upon his own recognizance. See for American authorities to the same effect, *Wininger v. State*, 13 Ind. 540; *McGinnis v. State*, 9 Humph. (Tenn.) 43; *State v. Gleason*, 56 Iowa 203.

5. *State v. Jesse*, 3 Dev. & B. (N. Car.) 98.

6. *State v. Welch*, 79 Me. 99.

Where a plea of former acquittal is defective in form, the plea must be aided by the record, and should be sustained if the record of the court in the same case contains everything neces-

was due opportunity to enquire into the real merits of the charge.¹

The facts constituting the jeopardy should be alleged.² Thus the former indictment should be set out in full,³ and a lawful conviction or acquittal under it;⁴ together with averments showing with reasonable certainty, the identity of the person,⁵ and that the offence charged in each case was precisely the same, both in law and in fact.⁶

sary to sustain it. *Johnson v. State*, 29 Ark. 31; s. c., 2 Am. Cr. Rep. 430.

1. *Burk v. State*, 81 Ind. 128; *State v. Hodgkins*, 42 N. H. 474.

When the defendant pleads to an indictment, that he has been tried by a justice of the peace and fined under the *Tennessee* act of 1848, ch. 55, the plea must state that the justice heard the evidence. *State v. Spencer*, 10 Humph. (Tenn.) 431.

2. *Atkins v. State*, 16 Ark. 568; *Wilson v. State*, 16 Ark. 601.

A plea of former conviction, setting out neither the record of the former trial and conviction, the judgment, nor the term of its rendition is insufficient. *Blair v. State* (Ga.), 7 S. E. Rep. 855.

Such plea, which does not set forth the court, nor the time, nor other circumstances of the trial or acquittal, nor vouch the record, nor show it, when in another court, should be rejected on motion, without plea or demurrer. *Wortham v. Com.*, 5 Rand. (Va.) 669.

3. *Henry v. State*, 33 Ala. 389; *Burk v. State*, 81 Ind. 128; *Williams v. State*, 13 Tex. App. 285.

In a plea of *autrefois acquit*, it is necessary to set out the indictment; but a variance in the description of the goods stolen in the two indictments is no objection to the plea, when the averment shows that the takings described in the two indictments belonged to the same transaction, and that there was only one larceny. *Foster v. State*, 39 Ala. 229.

4. *Henry v. State*, 33 Ala. 389; *Burk v. State*, 81 Ind. 128; *Williams v. State*, 13 Tex. App. 285.

A plea of *autrefois convict* which does not aver that the prior conviction was lawful is insufficient. *Stage v. Salge*, 2 Nev. 321.

The plea must set forth the cause of the discharge procured by consent of the respondent, in order that the court may be advised whether it was by his consent or not. The discharge of the jury by the consent of the accused is not an acquittal. *People v. White*

(Mich.), 13 West. Rep. 762; 37 N. W. Rep. 34.

Indictment for Assault and Battery.

—Plea of a former conviction before a justice of the peace. Demurrer that the plea does not aver that the proceeding before the justice was not had by the procurement of the defendant. *Held*, that the plea is good, and that if the State intend to rely on a case of fraud in the former proceeding to avoid the force of the plea, it must be by replication, not by demurrer. *State v. Clenny*, 1 Head (Tenn.) 271.

To an indictment for larceny, the defendant filed a plea in bar, averring that he had been arraigned on a complaint before a municipal court, "and said complaint was dismissed; and he was lawfully discharged and acquitted on said complaint of the same offence of which he is now charged in said indictment." *Held*, that a demurrer to the plea was properly sustained. *Com. v. Bressant*, 126 Mass. 246.

Result of Former Trial.—A plea of former jeopardy must show the result of the former trial. *Hensley v. State*, 107 Ind. 587.

A plea to an indictment of a former conviction and sentence before a justice of the peace should set forth the amount of the fine imposed. *State v. Atkinson*, 9 Humph. (Tenn.) 677.

5. *Baysinger v. State*, 77 Ala. 60; *Henry v. State*, 33 Ala. 389; *Williams v. State*, 13 Tex. App. 285.

6. *Henry v. State*, 33 Ala. 389; *Baysinger v. State*, 77 Ala. 60; *Hensley v. State* (Ind.), 5 West. Rep. 827; *Burk v. State*, 81 Ind. 128; *McQuoid v. People*, 8 Ill. (3 Gilm.) 76; *People v. Saunders*, 4 Park. (N. Y.) C. R. 106; *State v. Stewart*, 11 Oreg. 52; *Williams v. State*, 13 Tex. App. 285.

A plea of prior conviction of an offence, a part of which is charged in the present indictment, is sufficient on demurrer. *State v. Locklin*, 59 Vt. 654.

A plea of former conviction to an indictment for gaming which does not aver the identity of the offence charged in the indictment with that for which

A plea of former jeopardy, which is bad upon its face, is properly stricken out on motion.¹

2. The Replication.—The proper mode of replying to a plea of former jeopardy is to traverse the alleged identity,² or other material allegations of the plea;³ and when a demurrer to the plea is overruled, the defendant is not entitled to be discharged, but the prosecution may rejoin.⁴

It is held in *Kentucky* that a plea of former jeopardy need not be traversed by the commonwealth.⁵

3. Evidence in Support of the Plea.—Whether the accused has been previously tried for the same offence is a question to be determined partly by the record of the previous trial,⁶ and partly

the former conviction was had is fatally defective. *Pope v. State*, 63 Miss. 53; *Brothers v. State*, 22 Tex. App. 447.

On an indictment for involuntary manslaughter, a plea of a discharge or former acquittal under an indictment for murder is demurrable. *Hilands v. Com. (Pa.)*, 5 Cent. Rep. 264.

To an indictment for rape, the prisoner pleaded that he had been convicted before W. B., a justice of the peace, on the oath of the prosecutrix, E. R. J., of an assault and battery upon her, and fined twenty dollars, which fine was paid by him, and that the assault and battery of which he was so convicted, was the same assaulting, etc., charged in the indictment for rape. On demurrer to such plea, it was adjudged bad, on the ground that the facts set forth in it constituted no defence to the indictment for rape. *People v. Saunders*, 4 Park. (N. Y.) C.R. 196.

In a complaint for search and seizure, an averment of prior conviction that "defendant has been before convicted of unlawfully keeping and depositing in this State intoxicating liquors, with intent that the same should be sold in this State in violation of law," and stating the time, place, and court in which conviction was had, *held* sufficient. *State v. Longley*, 79 Me. 52.

1. *Shubert v. State*, 21 Tex. App. 551; *Wortham v. Com.*, 5 Rand. (Va.) 669.

2. *Duncan v. Com.*, 6 Dana (Ky.) 295.

3. **Fraud.**—A plea of *autrefois convict* being replied to specially, and the fraudulent conviction being well set forth in the replication, such replication should be adjudged good, on demurrer. *Com. v. Jackson*, 2 Va. Cas. 501.

A replication, to a plea of former conviction before a justice of the peace,

that the conviction was had by collusion of the accused with the prosecutor; and that the justice did not hear the evidence, is good. *State v. Colvin*, 11 Humph. (Tenn.) 599.

Arrest of Judgment.—A replication of an arrest of judgment is bad; it should show that the indictment was bad, or that a conviction could not have been had under it for the offence charged in the second indictment. *Henry v. State*, 33 Ala. 389.

No Jurisdiction.—To an indictment for larceny in a dwelling house, the defendant pleaded a former conviction of pilfering, on a complaint before a police court, averring that the articles and the stealing mentioned in the indictment were the same mentioned in said complaint, and that the police court had jurisdiction of the offence. The replication averred that the stealing charged in the said complaint was a larceny in a dwelling house, which was a high and aggravated crime, and that the police court had not jurisdiction thereof. The rejoinder traversed the several averments in the replication. It was *held*, on special demurrer, that the rejoinder was good, being neither a departure, nor double; and that though the plea was defective in form, for not directly traversing the charge of larceny in a dwelling house, yet that the defect was cured by the pleading over. *Com. v. Curtis*, 11 Pick. (Mass.) 134.

4. *State v. Nelson*, 7 Ala. 610.

5. *Vowells v. Com.*, 83 Ky. 193.

6. *Bailey v. State*, 26 Ga. 579; *Campbell v. State*, 109 Ill. 565; *Walter v. State*, 105 Ind. 589; *Marshall v. State*, 8 Ind. 498; *Grisham v. State*, 19 Tex. App. 504.

The omission of the warrant from the transcript of a judgment of conviction for assault and battery is immaterial, in

by parol evidence in connection with it for the purpose of identification.¹

The burden of maintaining the defence of former jeopardy is upon the person pleading it;² the record of a conviction of one of

evidence to show a former conviction. *Jenkins v. State*, 78 Ind. 133.

If a plea of former jeopardy be tendered by the prisoner, and the attorney for the commonwealth demur to it, this is an admission that the record of acquittal or conviction was produced as it ought to have been. *Com. v. Myers*, 1 Va. Cas. 188.

It is not essential to the sufficiency of a plea of former jeopardy that a record of the proceedings on the former trial shall be perpetuated by bill of exceptions. *Pizano v. State*, 20 Tex. App. 139.

An indictment and docket entries are sufficient evidence of a prior conviction, there being no other record and no question of identity. *State v. O'Connell* (Me.), 6 N. Eng. Rep. 558; 14 Atl. Rep. 291.

On an indictment for assault and battery, it is no objection to the admission in evidence of a justice's record, in order to prove a former conviction, that it does not find that a person present at the commission of the offence was examined as a witness. *Goudy v. State*, 4 Blackf. (Ind.) 548.

A party being indicted for a misdemeanor pleaded a former acquittal, but his counsel could not find the record, nor could the solicitor general find the former indictment. The court ordered the trial to proceed and the prisoner was found guilty. Afterwards the former indictment and record of acquittal were found, the two indictments being identical with the exception that in the former the offence was charged on the first of June instead of May, and the words "a wagoner" were added to the description of a negro. *Held*, that there could be no doubt of the identity of the offence, and a new trial must be granted notwithstanding the laches of counsel. *Dacy v. State*, 17 Ga. 439.

1. *Emerson v. State*, 43 Ark. 372; *Swalley v. People*, 116 Ill. 247; s. c., 2 West. 39; *Walter v. State*, 105 Ind. 589; *Marshall v. State*, 8 Ind. 498; *Dunn v. State*, 70 Ind. 47; *Com. v. Dillane*, 11 Gray (Mass.) 67; *Gresham v. State*, 19 Tex. App. 504; 1 Bish. Cr. L., § 1050; *Whart. Cr. Pr.*, § 481.

Parol Evidence.—The facts relative to the evidence given on the trial before a

justice may, in such case, be proved by parol. *Goudy v. State*, 4 Blackf. (Ind.) 548.

Where a person is convicted before a justice and appeals to the district court, and pleads a former conviction, he may, by the testimony of the justice, show the identity of the offences. *State v. Maxwell*, 51 Iowa 314.

Where a party indicted for an affray pleads that he has been convicted of the same offence upon an indictment, parol proof is admissible to show that the records cannot of themselves sufficiently show, that the two offences were, or were not, identical. *Duncan v. Com.*, 6 Dana (Ky.) 295.

To sustain a plea of *autrefois acquit*, it is not sufficient merely to put in the record of the first indictment and acquittal. Some evidence must be given to show that the offences charged in the former and present indictments are the same, and this may be done by showing, by some person present at the former trial, what was the offence actually investigated there; and if that is consistent with the charge in the second indictment, it will be a presumptive case, which must be met by the prosecution by proof that the offence charged in the second indictment was not the same as that charged in the first. *Regina v. Bird*, 2 Eng. Law and Eq. 439.

2. *Emerson v. State*, 43 Ark. 372; *Vowells v. Com.*, 83 Ky. 193.

To sustain a plea of former conviction, the defendant must not only produce the record of conviction, but show that he has been tried for the same offence for which he is being prosecuted. *State v. Blahut*, 48 Ark. 34.

Burden of Proof as to Identity of Offences.—In a plea of former conviction, the burden of proof is on the defendant to show the identity of the offences. *Jenkins v. State*, 78 Ind. 133.

To sustain a plea of former conviction, the burden of proof is devolved upon the defendant to show that the offence charged is the same of which he was formerly convicted; it will not be sufficient to show that the testimony adduced was the same as that introduced on the former trial, where such

the same name raises a presumption of identity,¹ and where the offence proved on the former trial corresponds with that alleged in the complaint, the presumption is that they are the same.²

While the record of the former trial is necessary, if it is not accompanied by other evidence, it will be insufficient to sustain the plea,³ it being equally necessary to produce proof that the former prosecution was for the same identical offence;⁴ and it must not only be shown that jeopardy had once attached, but also that it

testimony shows several distinct and separate offences. *State v. Small*, 31 Mo. 197.

In pleading *autrefois acquit* or *convict*, the prisoner must be prepared to prove on the spot the truth of his plea by the record, which he must have in *poigne*, and vouch in support of his plea; and if this proof be not instantly given, the court will overrule the plea; although, for good cause shown, it will give time to plead until the record can be procured. *Com. v. Myers*, 1 Va. Cas. 188.

The prisoner pleading a former conviction must show the record of the former proceedings, and, especially where the offence is in its nature capable of repetition; there is no presumption that the two indictments, though similar, charge the same offence, as the selling liquors to A B. He must also show by extrinsic evidence that the offence of which he was convicted is the one now charged; if that be proved, then, if upon any state of the evidence he could have been convicted of that offence under the first indictment, the second cannot be maintained. *Rocco v. State*, 37 Miss. 357.

1. *State v. Kelsoe*, 11 Mo. App. 91; s. c., 76 Mo. 505.

2. *Com. v. Dillane*, 11 Gray (Mass.) 67.

3. *Boyer v. State*, 16 Ind. 451.

Evidence of an order setting aside an indictment and submitting the case to another grand jury. *Held*, not to sustain a plea of former acquittal. *People v. Varnum*, 53 Cal. 630.

Where a defendant, indicted in the supreme court, pleads a former conviction in the municipal court of Boston, with a profert of the record, and the prosecuting officer suggests a diminution of the record, and moves for a *certiorari* to the judge below, commanding him to certify the whole record, the supreme court will grant the motion. *Com. v. Roby*, 12 Pick. (Mass.) 496.

The record must show that the de-

fendant pleaded, and in felony cases the pleading cannot be waived. *People v. Heller*, 2 Utah 133.

In *Tennessee* a plea of former conviction can only be sustained by proof of a conviction of record. *Jacobs v. State*, 4 Lea (Tenn.) 196.

In *England* there can be no plea of *autrefois acquit*, where there is no judgment on the record, in the former trial. *Regina v. Reid*, 1 Eng. Law & Eq. Rep. 595.

4. A judgment of conviction of an offence on a specified day, rendered upon a plea of guilty, will not sustain a plea of former conviction in bar of another indictment for a like offence at a different time, without proof that both indictments were for the same offence. *State v. Blahut*, 48 Ark. 34.

In a plea of *autrefois convict* to a prosecution for selling liquor without a license, in *Vermont*, the respondent must show that the conviction was for the same act of selling now complained of. It is not sufficient for him to show that he had been indicted and convicted since the date of the offence now proved against him. *State v. Ainsworth*, 11 Vt. 91.

If the respondent in the prosecution for the unlawful sale of intoxicating liquor plead guilty to a certain number of offences, without specifying the times at which such offences were committed, the record becomes conclusive, under the act of 1855 (Acts of 1855, No. 3, p. 8; Gen. Stat. *Vermont*, ch. 94, §§ 37, 38), that such offences were committed on the day set forth in the complaint; and in another prosecution for offences committed previously to the day alleged in the complaint first tried, the respondent cannot prove by parol that any of such offences are the same ones to which he pleaded guilty in the former prosecution. *State v. Haynes*, 35 Vt. (6 Shaw) 565.

A plea of *autrefois acquit* to an indictment for maiming and disabling A, by fracturing his skull, is not supported

had not been discharged by operation of law or waived by some act of the defendant.¹

4. The Trial of the Issue.—The issue joined upon a plea of former jeopardy must be tried by a jury; the consent of the defendant cannot confer jurisdiction upon the court to try it;² if the plea is sufficient to admit evidence, the court is bound to submit the issue to the jury.³

But the court may pass upon the question of former jeopardy when there is no question of identity;⁴ and in a proper case it is no invasion of the province of the jury for the court to instruct them that there is no evidence to sustain a plea of former jeopardy.⁵

5. The Determination of the Issue.—The issue raised by the plea of former jeopardy must be determined before any examination can be had on the general issue,⁶ and

by a record of acquittal on a charge of feloniously, by lying in wait, disabling the head and right arm of A; the record not showing a good charge of mayhem. *Com. v. Somerville*, 1 Va. Cas. 164.

1. *Hensley v. State*, 107 Ind. 587.

2. *Buhler v. State*, 64 Ga. 504; *Grant v. People*, 4 Park. (N. Y.) C. R. 527.

The Verdict.—If, to the second indictment, the defendant plead that he had been indicted and acquitted of the shooting of S. W., and that the shooting of which he is now indicted is the same of which he had been acquitted, and no other, and the jury "find that he hath not been before acquitted of the same offence," this verdict is sufficiently responsive to the issue on that plea, and therefore good. *Vaughan v. Com.*, 2 Va. Cas. 273.

Where, upon a plea of former acquittal, a jury was empanelled, and evidence put in by the prosecution. *Held*, that defendant was entitled to a verdict one way or the other, and if, in the absence of overruling necessity, the jury was discharged without having rendered a verdict, defendant was entitled to a final discharge. *People v. Jones*, 48 Mich. 554.

3. *Grisham v. State*, 19 Tex. App. 504.

The court erred in striking out a plea of former acquittal, setting up facts which, if true, would have constituted a bar to the prosecution. The issue should, under proper instructions, have been presented to the jury. *Troy v. State*, 10 Tex. App. 319.

4. *State v. Haynes*, 36 Vt. 667.

Wherever the offences charged in the first and second indictments are capable

of being legally identified as the same offence, by averment, it is a question of fact for the jury to determine, whether the averments are supported, and the offences are the same. In such cases, the replication ought to conclude to the country. But where the plea of *autrefois acquit*, upon its face, shows that the offences are legally distinct, and incapable of identification by averments, the replication of *nul tiel record* may conclude with a verification, and the court may decide the issue. *Hite v. State*, 9 Yerg. (Tenn.) 357.

5. *State v. Pritchard*, 16 Nev. 101.

The court cannot instruct the jury to find the prisoner guilty where the plea of former conviction is not conclusively disproved. *Nonemaker v. State*, 34 Ala. 211.

It is the duty of the court to declare the legal effect of a record which is offered to sustain the plea of *autrefois acquit* or discontinuance, and the record itself cannot be gainsaid by parol evidence; therefore the court may charge the jury that the pleas are not sustained by the proof, when that is the fact. *Martha v. State*, 26 Ala. 72.

6. *DeArman v. State*, 77 Ala. 10; *Sipple v. People*, 10 Ill. App. 144.

If the defendant in an indictment pleads a former conviction, and also that he is not guilty, he cannot be put on trial, against his objection, upon the last plea, until the first has been decided against him; and, if he is put to trial upon both pleas at once and is found guilty, under a ruling of the judge, that the evidence produced by him does not sustain the plea of former conviction, he will be entitled to a new trial, although

upon overruling the plea judgment should be *respondeat ouster*.¹

JETSAM—(See JETTISON ; WRECK).—Goods cast on the sea to lighten the ship, and which sink and remain under water.²

JETTISON—(See GENERAL AVERAGE ; SHIPPING).

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I. Definition.—Jettison is "the throwing overboard of a part of the cargo, or any article on board of a ship, or a cutting and casting away of masts, spars, rigging, sails, or other furniture for the purpose of lightening or relieving the ship in case of necessity or emergency."³

"Jettison, in its largest sense, signifies any throwing overboard; but in its ordinary sense, it means a throwing overboard for the preservation of the ship and cargo."⁴

II. Kinds of Jettison.—The ordinary case is of a jettison of

the evidence did not sustain his plea of former conviction. *Com. v. Merrill*, 8 Allen (Mass.) 545.

In *Massachusetts*, on a plea of *autrefois acquit* or *convict*, it is not necessary to plead over to the offence, since, if the plea be found against the defendant, he will be put to plead again to the indictment. *Com. v. Goddard*, 13 Mass. 455.

And in *Dakota*, after the issue has been found against one who has entered a plea of former conviction or acquittal alone, he will not be permitted to plead "not guilty;" he must unite the two, if he does not wish to stand on the former. *People v. Briggs*, 1 Dak. Ter. 289.

1. *People v. Saunders*, 4 Park. (N.Y.) C. R. 106.

2. 1 Bl. Com. 292; *Legge v. Boyd*, 1 C. B. 93.

3. *Gourlie*, Gen. Ave. 74; Phillips on Ins. (4th ed.), § 1278.

The word is variously defined: "The casting out of a vessel from necessity a part of the lading." *Bouvier*, Law Dict. (15th ed.)

"The voluntary throwing overboard of goods, in a case of extreme peril, to lighten and save the ship." *Burrill*, Law Dict.

"The throwing overboard of goods from necessity to lighten the vessel in a

storm or to prevent capture, or for any other sufficient cause." *Rapalje & Lawrence*, Law Dict.

See also *Abbott*, Law Dict.; *Mozeley & Whitely*, Law Dict.; *Lawson's Concordance*; *Butler v. Wildman*, 3 B. & Ald. 398 (1820), at 402; *Lawrence v. Aberdeen*, 5 B. & Ald., at 115 (1821); *The Enrique*, 7 Fed. Rep. 490, at 495 (1881).

The word is derived, through the French "*jet*," from the Latin "*jactus*," which means a voluntary casting away.

4. Per *ABBOTT*, C. J., in *Butler v. Wildman*, 3 B. & Ald. 398 (1820), at 402. See also *Winfield*, *Adjudged Words and Phrases*.

In that case it was decided that casting overboard a bag of specie to prevent its capture by an enemy was a jettison within the meaning of a policy insuring against loss by jettison, although not such a jettison as would entitle the owner to a general average contribution.

The significance of the word is well stated by *BAYLEY*, J., at 403: "Jettison, in its largest sense, means any throwing overboard . . . But its true meaning, in a policy of insurance, seems to me to be any casting overboard *ex justa causa*." *Hallett v. Wigram*, 9 C. B. 580 (1850); 19 L. J., C. P., at 288.

cargo;¹ but casting overboard ship stores,² cutting away masts or tackle,³ abandoning a boat,⁴ cutting a cable,⁵ or sacrificing an anchor,⁶ have all been held jettison. So any removing of cargo from the vessel and exposing it to a different peril for the sake of the vessel and cargo is an act of jettison;⁷ and the voluntary injury or destruction of the vessel may amount to a jettison.⁸

1. *Lex Rhodia*, Paulus Sententiæ, lib. 2. The cases of jettison of cargo are, of course, very numerous. The following, not cited elsewhere in this article, are instances: *Fletcher v. Alexander*, L. R., 3 C. P. 375 (1868); *Williams v. Suffolk Ins. Co.*, 3 Sumn. (U. S.) 510 (1838); *The Ship Nathaniel Hooper*, 3 Sumn. (U. S.) 543 (1839); *Griswold v. Union Mutual Ins. Co.*, 3 Blatchf. (U. S.) 231 (1854); *Whitteridge v. Norris*, 6 Mass. 125 (1809); *Tudor v. Macomber*, 14 Pick. (Mass.) 34 (1833); *Le Roy v. Gouverneur*, 1 Johns. Cas. (N. Y.) 226 (1800); *Hotchkiss v. Commercial Mut. Ins. Co.*, 1 Robt. (N. Y.) 489 (1863); *Gazzam v. Cincinnati Ins. Co.*, 6 Ohio 71 (1833).

2. *Price v. Noble*, 4 Taunt. 123 (1811); *Lewis v. Williams*, 1 Hall (N. Y.) 430 (1829); *Lowndes Gen. Av.* (4th ed.) 92.

3. *Birkley v. Presgrove*, 1 East 220 (1801); *Price v. Noble*, 4 Taunt. 123 (1811); *Shepherd v. Kattgen*, 2 C. P. Div. 578 (1877); *Potter v. Providence Washington Ins. Co.*, 4 Mason (U. S.) 208 (1826); *Rogers v. Mechanics' Ins. Co.*, 1 Story (U. S.) 604 (1841); *Patten v. Darling*, 1 Cliff. (U. S.) 254 (1859); *The Margarethe Blanca*, 12 Fed. Rep. 728 (1882); *The Mary Gibbs*, 22 Fed. Rep. 463 (1884); *Nickerson v. Tyson*, 8 Mass. 467 (1812); *Maggrath v. Church*, 1 Cai. Cas. in error (N. Y.) 196 (1803); *Saltus v. Ocean Ins. Co.*, 14 Johns. (N. Y.) 138 (1817).

4. *Blackett v. Royal Exchange Ass. Co.*, 2 Co. & J. 244 (1832); *Lenox v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 178 (1802); 2 Arnould, Mar. Ins. (5th ed.) 833.

5. *Birkley v. Presgrave*, 1 East 220 (1801); *Maggrath v. Church*, 1 Cai. Cas. in error (N. Y.) 196 (1803); *Bradhurst v. Columbian Ins. Co.*, 9 Johns. (N. Y.) 9 (1812); *Walker v. United States Ins. Co.*, 11 S. & R. (Pa.) 61 (1824); *Lowndes Gen. Av.* (4th ed.) 92.

6. *Walker v. U. S. Ins. Co.*, 11 S. & R. (Pa.) 61 (1824).

7. *Gourlie, Gen. Av.* 75; 1 Parsons, Sh. & Adm. 348.

The intent to destroy the goods is not essential to a jettison. *The Star of*

Hope, 9 Wall. (U. S.) 203 (1869), at 232.

If the goods removed are replaced in the ship without damage, obviously no question for a court of law is likely to arise; but if the goods are damaged, the case is otherwise. It has often been decided that a right to a general average contribution exists in such a case, and if this is so, the act must be lawful. That it is essentially a jettison appears from the following cases: "If the object of the removal has been the lightening of the ship for the common safety, and the object of effecting the removal in such a fashion as to avoid jettison has been to do that which must be got overboard something less wasteful than actual jettison, there seems to be no reason whatever for drawing a distinction between such a case, and that of actual jettison, so far as liability to general average is concerned." *Per WILLS, J.*, in *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro*, 19 Q. B. Div. 362, at 372 (1887); *Moran v. Jones*, 7 El. & Bl. 523 (1857); *The Joseph Farwell*, 31 Fed. Rep. 844 (1887); *Hennen v. Monro*, 16 Mart. (La.) 449 (1826); *Dilworth v. McKelvy*, 30 Mo. 149 (1860); *Lewis v. Williams*, 1 Hall (N. Y.) 430 (1829); cf. *Nelson v. Belmont*, 5 Duer (N. Y.) 316 (1856); *citing* 1 Mageus 160.

8. It is so referred to by *BLATCHFORD, J.*, in *Rathbone v. Fowler*, 6 Blatchf. (U. S.) 294 (1869), where a vessel in danger of foundering was run aground in shallow water to save the cargo and ship. "The injury to the ship by her lying on the uneven bottom of the flats where she was stranded, was a voluntary *jactus* of the ship." No case denies the right of the master so to deal with his vessel. The controversy is in regard to whether the cargo saved must contribute in general average for the loss on the vessel.

Contribution has been allowed in the following cases of voluntary stranding or scuttling: *Caze v. Reilly*, 3 Wash. (U. S.) 298 (1814); *Columbian Ins. Co. v. Ashby*, 13 Pet. (U. S.) 331 (1839); *Mutual Safety Ins. Co. v. Cargo of*

So, also, a destruction of cargo or supplies for the preservation of the rest; as, for instance, burning spare masts and spars to provide fuel for an engine to be used in pumping a leaking vessel.¹

III. When Justifiable.²—The right to jettison exists at common law,³ and no action can be maintained for casting articles

Brig George, Alc. Adm. 89 (1845); Barnard v. Adams, 10 How. (U. S.) 270 (1850); Rathbone v. Fowler, 6 Blatchf. (U. S.) 294 (1869); The Star of Hope, 9 Wall. (U. S.) 203 (1869); Fitzpatrick v. 800 Bales of Cotton, 3 Ben. (U. S.) 42 (1868); s. c., *nom.* 800 Bales of Cotton, 8 Blatchf. (U. S.) 221 (1871); O'Connor v. Schooner Ocean Star, 1 Holmes (U. S.) 248 (1873); Northwestern Trans. Co. v. Continental Ins. Co., 24 Fed. Rep. 171 (1885); Merithew v. Sampson, 4 Allen (Mass.) 192 (1862); Gray v. Waln, 2 S. & R. (Pa.) 229 (1816); Sims v. Gurney, 4 Binn. (Pa.) 513 (1812); cf. Delons v. Cargo of the Gallatin, 1 Woods (U. S.) 642.

It was refused on grounds not affecting the statement in the text in Steinhoff v. Royal Canadian Ins. Co., 42 Q. B. (U. C.) 307 (1877); Crockett v. Dodge, 12 Me. 190 (1835); Bradhurst v. Columbian Ins. Co., 9 Johns. (N. Y.) 9 (1812); Walker v. United States Ins. Co., 11 S. & R. (Pa.) 61 (1824).

English Law.—The law in England is doubtful, as no case has ever been decided upon it, but the practice is opposed to granting a general average in such a case. See Lowndes, Gen. Av. (4th ed.) 120 *et seq.*, which cites the earlier writers. There can be little doubt that the act does not subject the ship owner to liability.

1. This was the final decision in Harrison v. Bank of Australasia, L. R., 7 Ex. 39 (1872), where spare spars were used to mix with coal and keep a donkey engine running. The evidence was that there was danger of foundering unless the pumps were kept going. KELLY, C. B., and BRAMWELL, B., were of opinion that the loss must be made good by a general average contribution, while MARTIN and CLEASBY, B. B., held that the loss should fall on the ship owners.

A similar decision was rendered by LUSH, J., in Robinson v. Price, L. R., 2 Q. B. 91 (1876).

Clearly in both cases the act of destroying part for the safety of the

whole was essentially jettison. It would seem immaterial whether goods are thrown overboard, or into the furnace of an engine. Compare Sproat v. Donnell, 26 Me. 185 (1846); Lowndes, Gen. Av. (4th ed.) 79.

2. A distinction between the right to make a jettison and the right to claim a general average contribution for the loss occasioned by it must be kept constantly in mind. The two rights are not co-extensive. A jettison is justifiable in many cases where no right to contribution exists. Accordingly the right to a general average contribution furnishes only a partial test of the propriety of the jettison. The true test is the liability of the person responsible for the jettison in an action of tort brought by the owner of the thing sacrificed for its full value.

The only question not amenable to this test is that of the liability for the jettison of a deck load where no usage to carry such load exists and the shipper has not assented to it. The shipowner is held liable in such a case without regard to the propriety of his action in making the jettison, on the ground of negligence in stowing the goods. It has been suggested, though no case has yet so decided, that under circumstances which justify a jettison of cargo laden under the deck as well, the ship owner may not be liable for jettison of cargo improperly stowed on deck. Royal Exchange Shipping Co. v. Dixon, 12 Ap. Cas. 11 (1886); 3 Asp. Mar. Law Cas. 92; The Wellington, 1 Biss. (U. S.) 279 (1859); Pateron v. Black, 5 U. C. Rep. (Can.) 481 (1848); Carver, Carriage of Goods by Sea, § 15 and notes.

3. This appears clearly from Mouse's Case, 12 Rep. 63 (1609), which was an action of trespass brought by Mouse, a passenger on a ferry boat at Gravesend, against another passenger, for the value of a casket and £113 thrown overboard by the latter in a sudden tempest which arose while being ferried across. "It was resolved, *per totam curiam*, that in case of necessity, for the saving of the lives of the passengers, it was lawful to

away in order to save the lives of crew or passengers,¹ or even of those not at the time passengers;² to save the ship and remaining cargo;³ or to prevent the article from falling into an enemy's hands.⁴

a. Peril.—There must, however, be an imminent danger at the time,⁵ which does not result from any preceding negligence or

the defendant, being "a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it; for *quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur.*" It was proved that it was necessary to throw out the cargo.

The same case is referred to in *Bird v. Astock*, 2 Buls. 280; in *Kenrig v. Eggleston*, Aleyn 93, and as the *Gravesend Barge Case* in 1 Roll. Rep. 79; *Lowndes, Gen. Av.* (4th ed.) 47; *Story, Bailments* (9th ed.), § 531; *Angell, Carriers* (5th ed.), § 215. *Rossiter v. Chester* 1 Dougl. (Mich.) 154 (1843); *Whitteridge v. Norris*, 6 Mass. 125 (1809); *Price v. Hartshorn*, 44 N. Y. 94 (1870).

1. *Mouse's Case*, 12 Rep. 63 (1609); *Whitteridge v. Norris*, 6 Mass. 125 (1809).

2. *Dabney v. New England Mut. Mar. Ins. Co.*, 14 Allen (Mass.) 300 (1867).

In that case a shipmaster, in order to obtain room to accommodate a large number of people rescued by him from a sinking vessel, jettisoned a large part of his cargo. The court held the act justifiable, but a majority decided that no claim for a general average contribution against the insurers of the cargo existed.

3. There can be no necessity of a special citation of cases to this point, as it is universally recognized. *Lowndes, Gen. Av.* (4th ed.) 44 *et seq.* The law is well stated by *MARSHALL, C. J.*, in *Bentley v. Bustard*, 16 B. Mon. (Ky.) 643 (1855), at p. 680: "Surely the master would not be justified in abandoning the ship and cargo to a total loss merely because he and all on board could save themselves without difficulty, or were in no danger, when by the sacrifice of a small portion of the cargo the entire residue, with the ship, might be saved. The fact that the hazard of life to the crew and others is involved in the danger of the vessel would, doubtless, increase the importance of the crisis, and render more urgent the necessity of doing whatever might be done to insure the common

safety; but we do not perceive that it should be absolutely essential to the justification of a jettison."

4. *Butler v. Wildman*, 3 B. & Ald. 398 (1820).

5. That only an imminent danger will justify the act, appears from all the cases. *Price v. Noble*, 4 Taunt. 123 (1811); *Pirie v. Middle Dock Co.*, 4 Asp. Mar. Law Cas. 388 (1881); 44 L. J. 426; *Lowndes, Gen. Av.* (4th ed.) 39; *Emerigon XII*, § 29; *Story, Bailments* (9th ed.), § 525; *Angell, Carriers* (5th ed.), § 215. All practicable means of relieving the vessel must be tried before resorting to a jettison. *Bentley v. Bustard*, 16 B. Mon. (Ky.) at 643 (1855).

It is not essential that the danger be immediate at the moment of the jettison. In the case of *Lawrence v. Minutusa*, 17 How. (U. S.) 100 (1854), where a heavy iron boiler and chimneys, stowed on deck, were jettisoned in calm weather after the action of the vessel in a storm had proved them a source of grave danger, *CURTIS, J.*, said, at page 110: ". . . We find no reason to doubt that this jettison was thus necessary. It is true that when it was actually made the sea was smooth and the ship in no immediate danger; but it satisfactorily appears that these boilers and chimneys could not be thrown overboard, without the greatest risk, when there was any considerable sea. To require delay until a storm would be, in effect, to prohibit the sacrifice. Precaution against dangers, which are certain to occur, is surely proper."

And in *Harrison v. Bank of Australasia*, L. R., 7 Ex. 39 (1872), at 52, *KELLY, C. B.*, says: ". . . "A certainty of destruction within a short time, unless prevented, is an emergency and imminent. Suppose a vessel ran for shelter into a river where no supplies could be obtained; suppose she would have to stay a fortnight, unless she got out at the then spring tides; suppose her provisions would fail her in that time; suppose, to get out, she lightens herself by throwing some heavy cargo overboard; would not that be a

unskilfulness on the part of the ship owners, or their agents or servants.¹ The evidence of experts is admissible to prove or disprove the peril and establish its cause.²

case of emergency and imminent danger? We think it would, and that such is the result of all the authorities."

1. It is imperative that the necessity for the jettison does not arise from the negligence or other wrong doing of the ship owner. If it does, he will be liable.

This was laid down forcibly in *Mouse's Case*, 12 Rep. 63 (1609), already cited. It was there "resolved, that although the ferryman surcharge the barge, yet for safety of the lives of passengers in such a time and accident, of necessity, it is lawful for any passenger to cast the things out of the barge; and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge." *The Merionethshire*, 23 Mitch. Mar. Reg. 1331 (1878); *Schloss v. Heriot*, 14 C. B. (N. S.) 59 (1863).

So in *The Jennie Jones, Deady* (U. S.) 82 (1864), where a ship master, who tried to enter the Columbia river without a pilot, was forced to jettison part of the cargo to lighten his vessel after running aground, *DEADY, J.*, said: "I find that the jettison of the libellant's goods, although unavoidable at the time, was nevertheless the direct consequence of the conduct of the master, in entering the river at an improper time of tide and wind, which might have been avoided by waiting a reasonable time for a qualified pilot, and that, therefore, the claimant and schooner are both liable to the libellants for the value of the goods."

The law is admirably stated by *MARSHALL, C. J.*, in *Bentley v. Bustard*, 16 B. Mon. (Ky.) at 643 (1855): "The act itself must be shown to have been caused by one of the dangers of the river, which could not have been avoided, and to have been rendered necessary by circumstances over which the defendants and their agents and servants employed in the navigation of the boat, had no control, which they could not have foreseen and guarded against by the exercise of that vigilance which was appropriate to their respective stations, and called for by the character of the navigation in which they were engaged, and which, when they actually occurred, left no reasonable means of escaping a total loss but by sacrificing a part of the property at risk for the safety

of the residue. . . . The single fact that the boat is in such a situation at the time of the jettison, as that, in all reasonable probability, a total loss of both vessel and cargo must ensue if immediate relief be not afforded, will not justify the carrier or his agents in resorting to the extreme measure of casting overboard . . . a portion of the cargo, so as to throw the loss upon all who may be benefited by the sacrifice (though it is at the moment necessary, and prove successful), unless the crisis came without fault, that is, without the want of due care in avoiding and due skill, and diligence, and exertion in overcoming the evil. If, by the use of proper care, and skill, and diligence, and exertion, or activity, the necessity for the sacrifice might have been avoided; or if, though the danger and the crisis could not have been avoided, the sacrifice is thought necessary, and is made only to prevent harm to the boat, or to expedite her on her voyage, the carrier, on account of his fault in the first case, and because in the other he alone is benefited by the sacrifice, must alone bear the consequent loss."

In full accord see also *The Hattie Ellis*, 22 Fed. Rep. 350; s. c., 20 Fed. Rep. 393, 507 (1884); *The Portsmouth*, 9 Wall. (U. S.) 682 (1869); *Barber v. Brace*, 3 Conn. 9 (1819); *Chamberlain v. Reed*, 13 Me. 357 (1836); *Sayward v. Stevens*, 3 Gray (Mass.) 97 (1854); *Gardner v. Smallwood*, 2 Hayw. (N. Car.) 534 (1805).

One ground of the liability of the ship owner for articles loaded on deck and jettisoned is the negligence presumed by law from such stowing. The cases dealing with this are treated later.

2. *Malton v. Neshit*, 1 C. & P. 70 (1824); *Fenwick v. Bell*, 1 C. & K. 312 (1844); but see *Sills v. Brown*, 9 C. & P. 601 (1840); *Price v. Powell*, 3 N. Y. 322 (1850); *Price v. Hartshorn*, 44 N. Y. 94, at 101 (1870).

Such evidence is not favored, however. *GROVE, J.*, in *Shepherd v. Kottgea*, 2 C. P. Div. 578 (1877) at 584: "In our judgment the beneficial objects of the doctrine and law of general average would be frittered away if, where a sacrifice is made, as seems obviously the case here, to save the whole adventure,

b. Common Danger.—It is not essential that the danger be common to ship and cargo.¹

c. Life.—A jettison to save life is justifiable.²

d. Vice Propre, etc.—When an article becomes in itself a source of danger, its jettison is justifiable.³

IV. Who May Jettison.—The *master*⁴ is ordinarily the proper person to make the jettison, but either *crew*⁵

the showing the burden of such sacrifice could be made to depend upon nice questions of probability afterwards discussed, as to whether the thing might or might not be saved;" and he cited LORD CHIEF JUSTICE COLERIDGE in *Corry v. Caulhard*, "It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into; it is enough if he exercise his judgment under all the circumstances."

That the act will be presumed proper, see *Lawrence v. Minturn*, 17 How. (U. S.) 100 (1854). "It will be deemed to have been necessary . . . because the person to whom the law has entrusted authority to decide upon it and make it has duly exercised that authority," *per* CURTIS, J., at p. 110. See also *Cameron v. Damville*, 1 P. & B. (N. B.) 647 (1878), and *Patten v. Darling*, 1 Cliff. (U. S.) 254 (1859), at 264, where CLIFFORD, J., says: "In contemplation of law he [the master] derives this authority from the implied consent of all concerned, and, in the absence of proof to the contrary, it must be presumed that his decision was wisely and properly made."

1. To entitle the owner of the article jettisoned to contribution, the danger must be common to vessel and cargo; but the cases already cited in the notes to this section of the text make it clear beyond question that a mere danger to life, or to either cargo or vessel, by itself, will be sufficient to justify a jettison. *Dabney v. New England Mut. Mar. Ins. Co.*, 14 Allen (Mass.) 300 (1867).

2. *Dabney v. New England Mut. Mar. Ins. Co.*, 14 Allen (Mass.) 300 (1867); *Mouse's Case*, 12 Rep. 63 (1609). But it is not essential to justify jettison that life is endangered. *Bentley v. Bustard*, 13 B. Mon. (Ky.) 643 at 680 (1855).

3. *Taylor v. Dunbar*, L. R., 4 C. P. 206 (putrid meat) (1869); *Pirie v. Middle Dock Co.*, 4 Asp. Mar. Law Cas. 388 (coal on fire) (1881); *Da Costa v. Edmunds*, 4 Camp. 142; s. c., 2 Chitty 227 (carboys of vitriol loose) (1865);

Johnson v. Chapman, 35 L. J. (N. S.) C. P. 23; s. c., 19 C. B. (N. S.) 563 (lumber loose on deck) (1865); *The Merionethshire*, 23 Mitch. Mar. Reg. 1331 and 1328 (leaking cans of colodion) (1878); *The Eurique*, 7 Fed. Rep. 490 (cattle loose on deck) (1881); *Slater v. Hayward Rubber Co.*, 26 Conn. 128 (cargo on fire) (1857); *Parsons v. Manufacturers' Ins. Co.*, 16 Gray (Mass.) 413 (guano) (1860).

4. 1 Maude & Pollock, Mer. Ship. (4th ed.) 160; *Emerigon*, ch. 12, § 4.

The Gratitude, 3 Chr. Rob. 240, at 258 (1801). *Per* CURTIS, J., in *Lawrence v. Minturn*, 17 How. (U. S.) 100 (1854) at 109. "The nature of the case imposes on the master the duty and clothes him with the power to judge and determine upon the facts before him, whether a jettison be necessary. He derives this authority from the implied consent of all concerned in the common adventure." *Patten v. Darling*, 1 Cliff. (U. S.) 154, at 264 (1859); *Dupont des Nemauss v. Vance*, 19 How. (U. S.) 162 (1856).

5. The crew will be justified only in extreme circumstances.

In *The Nimrod*, Ware (U. S.) 9 (1822), suit was brought for mariners' wages, and the defence was set up that the plaintiff had been guilty of misconduct in throwing overboard part of a deck load. The evidence showed that the master left the deck and that the crew jettisoned the deck load in his absence, but probably with his assent. The language of WARE, J., at p. *13, is important on this point:

"Indeed, for the libellant, the broad ground is assumed that the crew is authorized, without the consent of the master, to throw over a deck load, if, in their judgment, the safety of the vessel requires it. I cannot assent to this doctrine in the unqualified terms in which it has been argued at the bar." And again, at p. *15: "It belongs then to the master to determine when a necessity arises for sacrificing part of the cargo for the preservation of the rest. As a general principle, the crew have no au-

or *passengers*¹ may be justified in making it.

V. Consultation.—No consultation of the master with his officers or crew is essential. It is enough that he exercise his judgment under all the circumstances.²

VI. Order.—Generally speaking, the heaviest and least valuable articles should be jettisoned first; but no particular order is essential.³

VII. Ownership of Property Jettisoned.⁴—The ownership of the property jettisoned is not affected, so that if recovered the property belongs to its original owner.⁵

VIII. Jettison as a Basis of General Average.⁶

IX. Jettison of Deck Cargo.—In the absence of usage to stow cargo upon deck, or of the shipper's consent to such storage, the

thority to do this without his orders. What they might be justified in doing in extreme cases it is not necessary to decide until those cases occur."

1. *Mouse's Case*, 12 Rep. 63 (1609), determines that passengers possess this right, and may be justified even where the ship owner will be liable.

In that case, as already stated, suit was brought by one passenger against another for the value of a casket of money jettisoned by the latter in a storm. "It was . . . resolved, that although the ferryman surcharged the barge, yet for safety of the lives of passengers in such a time and accident of necessity, it is lawful for any passenger to cast the things out of the barge."

2. The early writers and some of the foreign codes require a consultation. This is a survival of the custom existing when merchants themselves traveled with their goods (see Lowndes, Gen. Av. (4th ed.) 2, *et seq.* Gourlie, Gen. Av. 23); but it is not English or American law. A consultation is proper, but not essential.

"The rule of consulting the crew upon the expediency of such sacrifices is rather founded in precedent in order to avoid dispute than in necessity; it may often happen that the danger is too urgent to admit of any such deliberation." Per LORD KENYON, C. J., in *Birkley v. Presgrave*, 1 East 220 (1801).

"It has been said that there must be a previous consultation, but this may be doubted. Consultation indeed is demonstrative proof that the act was voluntary; but I should think that if it sufficiently appears that the act occasioning the loss was the effect of judgment, it is sufficient; for in time of imminent danger, immediate action

may be necessary, and consultation may be destruction." Per TILGHMAN, C. J., in *Sims v. Gurney*, 4 Binn. (Pa.) 513, at 524 (1812).

In a case of voluntary stranding, the objection that there had been no consultation was raised, and STORY, J., declared, "There is no weight in this objection. A consultation with the officers may be highly proper in cases which admit of delay and deliberation, to repel the imputation of rashness and unnecessary stranding by the master. But if the propriety and necessity of the act are otherwise sufficiently made out, there is an end of the substance of the objection." *Columbia Ins. Co. v. Ashby*, 13 Pet. (U. S.) 331, at 343 (1839).

A consultation is, of course, proper, and not uncommon. See *Lawrence v. Minturn*, 17 How. (U. S.) 100 (1854); *The Nimrod, Ware* (U. S.) 9 (1822); *Bentley v. Bustard*, 16 B. Mon. (Ky.) 643 (1855); *Curtis, Mer. Seamen* 227. The master is not bound by the vote of a majority in consultation. *Emerigon*, ch. 12, § 4; *The Nimrod, Ware* (U. S.) 9, (1822). On the subject of consultation generally, see *Emerigon*, ch. 12, § 40.

3. *The Gratitude*, 3 Chr. Rob. 240 (1801) at 258; *Slater v. Hayward Rubber Co.*, 26 Conn. 128 (1857).

4. 2 *Arnold, Mar. Ins.* (5th ed.) 828; 2 *Kent, Com.* (13th ed.) § 357, and cases cited in notes; *Dig. lib.* 14, tit. 2, f. 8; 3 *Hall's Law Jour.* 16; 1 *Emerigon*, ch. 12, § 40; *Marvin, Wreck & Salvage*, § 131 and note.

5. *Caze v. Reilly*, 3 Wash. (U. S.), at 208, per WASHINGTON, J. (1814).

6. See under title GENERAL AVERAGE.

law requires that all cargo shall be stowed under deck. Accordingly a ship owner is liable for the full value of articles stowed on deck, and jettison therefrom.¹

1. "In all cases he [the master] is bound to have the cargo safely secured under deck, unless he is authorized by some local or particular usage or by the consent of the shipper to do otherwise. In all other cases, if he carries the goods on deck, he does it at his own risk, and he becomes an insurer against the usual perils excepted by the bill of lading." Per WARE, J., in *The Waldo*, 2 Ware (U. S.) 165, at 166 (1841). This liability rests upon the negligence of the master in so loading the goods. To stow on deck is, of itself, bad stowage, or evidence of bad stowage. Royal Exchange Shipping Co. v. Dixon L. R., 12 App. Cas. 11; 3 Asp. Mar. Law Cas. 92 (1886); *The Rebecca*, Ware (U. S.) *188 (1831); *The Waldo*, 2 Ware (U. S.) 165 (1841); *Waring v. Morse*, 7 Ala. 343 (1845); but see *Triplett v. Van Name*, 2 Cranch C. C. (U. S.) 332 (1822); *Van Syckel v. Schooner Thomas Ewing*, Crabbe (U. S.) 405 (1840); *Borland v. Mercantile Mut. Ins. Co.*, 46 N. Y. Sup. Ct. 433 (1880).

The master will not be liable, however, unless the loss was caused by the deck loading.

"Taking a full price and stowing upon deck will subject the owner of the vessel to pay damages, if what is placed on deck be *thereby* lost or damaged; but if *that* did not occasion the loss he will be no more liable for damage to that part of the cargo than to the rest of it." Per *curiam* in *Gardner v. Smallwood*, 2 Hayw. (N. Car.) 534 (1805).

Giving a clean bill of lading implies an agreement to ship the goods under deck.

The law is well stated by CURTIS, J., in *The Peytonia*, 2 Curt. (U. S.) 21 (1854) at p. 23: "Upon a shipment being made, it is an implication of law, in the absence of a special contract, that the master is to sign bills of lading in the usual form, and the effect of such a bill of lading is to oblige the master to carry the goods under deck." By CLIFFORD, J., in *Propeller Niagara v. Cordes*, 21 How. (U. S.) 7 (1858) at p. 23: "A clear bill of lading in general imports, unless the contrary appears on its face, that the goods are to be safely and properly secured under deck." And by MILLER, J., in *The Wellington*, 1 Biss. (U. S.) 279 (1859).

This latter case was a libel for the value of 195 barrels of apples, part of a shipment of 635 barrels. The 195 were stowed on deck and jettisoned. MILLER, J., declared "The bill of lading does not state in express terms that the 635 barrels of apples shall be stowed under deck, but this is a condition tacitly annexed to the contract by operation of law; and it is equally binding on the master, and the shipper is as much entitled to its benefits as a contract as if it were stated in express terms."

Evidence.—Accordingly in the following cases, where a clean bill of lading had been given, it was *held* that the ship owner was liable for the full value of the articles jettisoned, and evidence of usage to shipdeck loads, or of an agreement that the articles should be carried on deck, or of knowledge that they were to be so carried, has been held inadmissible. *Stephens v. Australasian Ins. Co.*, L. R., 8 C. P. 18 (1872); *The Paragon*, 1 Ware (U. S.) 322 (1836); *The Wellington*, 1 Biss. (U. S.) 279 (1859); *Creery v. Holly*, 14 Wend. (N. Y.) 26 (1835).

But this rule of evidence is often disregarded, and its validity may now be doubted.

Thus in *Vernard v. Hudson*, 3 Sumn. (U. S.) 405 (1838), at 406*, STORY, J., says: "I take it to be very clear that where goods are shipped under a common bill of lading it is presumed that they are shipped to be put under deck, as the ordinary mode of stowing cargo. This presumption may be rebutted by showing a positive agreement between the parties that the goods are to be carried on deck; or it may be deduced from other circumstances, such, for example, as the goods paying the deck freight only. The admission of proof to this effect is perfectly consistent with the rules of law, for it neither contradicts nor varies anything contained in the bill of lading; but it simply rebuts a presumption arising from the ordinary course of business."

So in *Sayward v. Stevens*, 3 Gray (Mass.) 97 (1854), where the bill of lading expressly provided that part should be stowed on deck, the judge intimated that ordinarily the presumption could be rebutted by parol proof of an agreement to stow on deck, but in that case *held* no such evidence could

If, however, it is the usage in the particular trade to carry deck loads, or if the deck is the proper place to stow the goods, or if the shipper assents to a deck stowage, the ship owner is not liable for the full value, but must contribute toward the loss.¹

be admitted, since the bill of lading made a provision in regard to the deck load which precluded proof of any other.

In *The Delaware*, 14 Wall. (U. S.) 579 (1871), where a clean bill of lading had been given, and the attempt was made to show an oral agreement for deck loading, it was *held* that such evidence was inadmissible, the court, *per* CLIFFORD, J., holding, in effect, that evidence of usage may be admitted, but evidence of a particular agreement cannot be admitted to rebut the presumption.

To the same effect see *Wood v. Schooner Sallie C. Morton*, 2 N. J. Law Jour. 301 (1879).

In *Johnston v. Crane*, 1 Kerr (N. B.) 356 (1841), PARKER, J., said (at p. 362): "In regard to the bill of lading estopping the defendant from showing the assent to the goods being laden on the deck, the question whether a bill of lading operated as an estoppel was distinctly raised in *Bates v. Todd* (1 Mos. & Rob. 106), and *TINDAL, J.*, said: 'That as between the original parties the bill of lading is merely a receipt, liable to be opened by the evidence of the real facts.' *LITLEDALE, J.*, expressed a similar opinion in *Berkley v. Watling* (7 Ad. & E. 38), and I do not find that either of these opinions has been controverted."

The rule has been disregarded in the following cases: *Royal Exchange Shipping Co. v. Dixon*, L. R., 12 Ap. Cas. 11; 3 Asp. Mar. Law Cas. 92 (1886); *Cameron v. Damville*, 1 P. & B. (N. B.) 647 (1878); *Johnston v. Crane*, 1 Kerr (N. B.) 356 (1841); *Vernard v. Hudson*, 3 Sumn. (U. S.) 405 (1838); *The Waldo*, 2 Ware (U. S.) 165 (1841); *Wood v. Schooner Sallie C. Morton*, 2 N. J. Law Jour. 301 (1879); *Barber v. Brace*, 3 Conn. 9 (1819); *Sayward v. Stevens*, 3 Gray (Mass.) 97 (1854); *Doane v. Keating*, 12 Leigh (Va.) 391 (1841).

Statutory Provisions in England and Canada.—The statute 16 and 17 Vict., ch. 107, makes it illegal to carry deck loads except at certain seasons. *Wilson v. Rankin*, L. R., 1 Q. B. 162 (1865). Although illegal, such loading does not of itself render an insurance contract

on such cargo void. *Cunard v. Hyde*, 27 L. J., Q. B. 408 (1856). *Canada* passed a similar act in 1873.

1 The cases in regard to the liability of the ship owner, where either usage or the shipper's consent authorizes the stowing of cargo on deck, are in much confusion, but the statement of the text embodies the present state of the law in most jurisdictions.

That the ship owner is not liable *in solido* is clear, since his responsibility depends on whether he has been negligent; and, manifestly, there is no negligence in stowing in the manner the usage of the trade or the consent of the shipper authorizes. The question has been whether he is liable for any contribution toward the loss, and whether the other owners of cargo and the underwriters are liable.

Early English Law.—The law of most countries other than *England* with her dependencies, and the *United States*, and the early law of these as well, allows no general average or contribution for the loss of deck cargo. If improperly stowed on deck the whole loss falls on the ship owner; if on deck by the consent of the shipper or the custom of the trade, it falls on the shipper. *Lowndes, Gen. Av.* (4th ed.) 51 *et seq.*; *Gourlie, Gen. Av.* 83 *et seq.*

The reason given is that the deck is an improper place to stow the cargo, which, when stowed on deck, impedes the handling of the vessel, is greatly exposed, and, by its very position, is a standing temptation to make a jettison before one is absolutely necessary.

An exception to the rule was pointed out by Valin, Comm., tit. 8, art. 13, by which contribution was allowed in the case of "boats and other small vessels going from port to port, where the custom is to load goods on the deck as well as below"; and from this exception the modern English and American law has developed.

Underwriters.—The earliest cases involved the liability of the underwriters to make good the loss, and it was *held* that a policy in the general form did not cover goods stowed on deck, and accordingly the underwriter was not liable. In the absence of usage or consent to deck loading, the law re-

mains the same. *Ross v. Thwaite*, Park. Ins. (7th ed.) 26 (1776); *Backhouse v. Ripley*, Park. Ins. (7th ed.) 26 (1802); *Smith v. Mississippi*, M. & F. Ins. Co., 11 La. 142 (1837); *Shackelford v. Wilcox*, 9 La. 33, at 39 (1835); *Walcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429 (1827); *Taunton Copper Co. v. Merchant's Ins. Co.*, 22 Pick. (Mass.) 108 (1839); *Lenox v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 178 (1802); *Atkinson v. Great Western Ins. Co.*, 4 Daly (N. Y.) 1 (1871); *Borland v. Mercantile Mut. Ins. Co.*, 46 N. Y. Supr. Ct. 433 (1880).

Usage.—When a usage to carry deck loads obtains, the underwriter is affected with notice of it, and is liable for what the assured is compelled, or is liable, to pay.

This was first held in *Da Costa v. Edmunds*, 4 Camp. 142 (1815), which was a suit against underwriters on a policy insuring forty carboys of vitriol from London to Lisbon. The carboys were stowed on deck and properly secured, but were jettisoned in a storm. The underwriters claimed they were not liable for deck cargo. Evidence of usage to stow such goods on deck was admitted, and "LORD ELLENBOROUGH left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these carboys were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it, without any communication, and all they could require was that these carboys should be properly stowed in the usual manner. On the other hand, they were not liable if the goods were carried on the deck without such a usage, or if they were not stowed there in a skilful and proper manner." After a verdict for the plaintiff, he refused a rule for a new trial.

Later, a motion to set aside the verdict and enter a nonsuit, on the ground that it was necessary to give notice to the underwriters of the place of stowage, was refused by the court *en banc*. 2 Chitty Rep. 227 (1815). But see *Clarkson v. Young*, 24 L. J., N. S. 41 (1870).

The same conclusion was reached in *Milward v. Hibbert*, 3 Q. B. 120 (1842), where pigs carried on the deck of a steamer in accordance with usage were jettisoned. "The mere fact of stowing them on deck will not relieve the underwriter from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to

impede the navigation or in any way increase the risk." *Per* LORD DENMAN, C. J., at p. 137.

The English Courts, however, have admitted proof of a further usage that the underwriter shall not pay, although but for such usage he would be liable. *Miller v. Tetherington*, 6 H. & N. 278, and 7 H. & N. 954 (1861); *Blackett v. Royal Exchange Ass. Co.*, 2 C. & J. 244 (1832).

United States, Canada and Australia.

—The law of the United States, Canada and Australia is clear that in such a case the underwriter is liable.

The law in the United States is clearly stated by BLODGETT, J., in *Hazleton v. Manhattan Ins. Co.*, 11 Biss. (U. S.) 210 (1882); 12 Fed. Rep. 159 at p. 162. "I think the rule fairly deducible from the modern cases is that the underwriter upon the hull is liable to contribute to general average for jettison of the deck load when the custom or usage of the trade in which the vessel is employed is to carry part of her cargo on deck. *Wood v. Phoenix Ins. Co.*, 1 Fed. Rep. 235; 8 Fed. Rep. 27; 14 Phila. (Pa.) 483, 545 (1880); *Toledo F. & M. Ins. Co. v. Speares*, 16 Ind. 52 (1861); *Allegre v. Maryland Ins. Co.*, 2 G. & J. (Md.) 136 (1830); *Lapham v. Atlas Ins. Co.*, 24 Pick. (Mass.) 1 (1833); *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473 (1881); *Merchants and Manufacturers' Ins. Co. v. Shillito*, 15 Ohio St. 559 (1864); *Orient Mutual Ins. Co. v. Reymershafter*, 56 Tex. 234 (1882).

In *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473 (1881), the policy provided that the company should not be liable for deck load unless an agreement to be liable was endorsed on the policy; but the court, *per* ANDREWS, J., held that this must mean that it should not be liable for cargo carried on deck where there was no usage to carry it so, unless the special agreement be made. In *Steinhoff v. Royal Canadian Ins. Co.*, 42 Q. B. (U. C.) 307 (1877); *Marks v. Watson*, 2 Kerr (N. B.) 211 (1843); *Spooner v. Western Ass. Co.*, 38 Q. B. (U. C.) 62 (1876). The *Canadian* courts hold the underwriter liable.

The last case contains an admirable statement of the law and a careful examination of the authorities.

For the *Australian* law see *Lindsay v. Hopkins*, 3 W. W. & A'B. Law (Vict.) 5 (1866); *Warren v. Swiss Lloyd Ins. Co.*, 9 Vict. L. R. Law, 397 (1883).

The courts of the *United States*, *Canada* and *Australia* hold that a custom of underwriters not to pay for loss of deck load is immaterial.

In *Lindsay v. Hopkins*, 3 W. W. & A'B. Law (Vict.) 5 (1866), the declaration averred a usage to carry sheep on deck, and sought to recover as contribution paid for their jettison. The plea set up a custom of underwriters not to pay, and on demurrer it was *held per curiam*, "The plea does not traverse either the making the policy or the existence of the custom, but seeks to meet a conclusion of law to be drawn from a policy made subject to such a custom—it affords no answer to the declaration." *Hazleton v. Manhattan Ins. Co.*, 11 Biss. (U. S.) 210; 12 Fed. Rep. 159 (1882); *The Wm. Gilleem*, 2 Lowell (U. S.) 154 (1872); *Toledo F. & M. Ins. Co. v. Speares*, 16 Ind. 52 (1861).

Consent.—Where the deck load is carried not in accordance with a usage, but simply by the consent of the shipper, the liability of the underwriter has not been determined.

In *Smith v. Mississippi M. & F. Ins. Co.*, 11 La. 142 (1837), the bill of lading showed that the goods were to be carried on deck, but the company did not examine the bill and the application did not refer to it. The court *held*, that as the company did not know of the deck load, it was not liable for it.

In *Lenox v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 178 (1802), the policy was for staves "on the deck and in the hold," yet the company was *held* not liable for those on deck jettisoned.

In *Judah v. Randall*, 2 Cai. Cas. in Error (N. Y.) 324 (1805) the owners of a chariot shipped on deck was allowed to recover as for a total loss, but nothing was said as to the lading on deck, and probably such lading was rightful in that case.

In *Shackelford v. Wilcox*, 9 La. 33 (1835), where the bill of lading specified that part of the cotton in question should be shipped on deck, although there was no jettison and the action was not against insurers, BALLARD, J., declared, "In relation to underwriters without special agreement, and in relation to other owners of the cargo under deck, in cases of jettison, it is well settled that goods stowed on the deck form no part of the cargo."

Apparently the underwriter is liable only when he knows or ought to know of the deck load, and is held by law to assent to it. Mere knowledge is imma-

terial. *Wood v. Phoenix Ins. Co.*, 1 Fed. Rep. 235 (1880); *Atkinson v. Great Western Ins. Co.*, 4 Daly (N. Y.) 1 (1871), at p. 28.

Ship Owner.—As against the ship owner the law varies.

The early law *held* that there was no contribution for loss of a deck load. *Lowndes*, Gen. Av. (4th ed.) 53; *Gourlie*, Gen. Av. 83; *Triplett v. Van Name*, 2 Cranch C. C. (U. S.) 332 (1822). And this is still the law of *Maine*. *Dodge v. Bartol*, 5 Gr. (Me.) 286 (1827); *Cram v. Aiken*, 13 Me. 229 (1836); *Sproat v. Donnell*, 26 Me. 185 (1846).

Dodge v. Bartol, 5 Gr. (Me.) 286 (1822) was case for the nondelivery of flour, of which twenty barrels were to go under deck, and 140 barrels on deck at half freight. It was jettisoned, and the under deck load settled for in general average; but the owner claimed contribution for the deck load as well. The jury found a usage to carry deck loads, and another that the owner could not claim contribution. It was *held* no contribution was due. *Per* WESTON, J.: "We cannot find that the exception of Valin has been adopted in this country; and if it is to be considered as qualifying the law here, it cannot extend to vessels like the one in question, nor to voyages of the magnitude and importance of that in which [the vessel] was employed by the plaintiff," *i. e.*, from Georgetown, Me., to Portsmouth, N. H.

Usage.—In *England*, and elsewhere in the *United States*, the law is otherwise, and wherever the usage to carry deck load obtains, the shipowner is liable for contribution.

The English law was settled by *Gould v. Oliver*, 2 Man. & Gr. 208 (1842); 4 New Cas. 134, 5 Scott 445 (1837), where assumption was brought for a general average for jettison of a deck cargo of lumber from Quebec to London, alleging a custom to stow a reasonable part of the cargo on deck. The plea denied liability to contribute for the part on deck, and on demurrer it was *held* that the shipowner was liable. *Per* TINDAL, C. J., 5 Scott, at 451: "The question therefore before us is, not whether generally the owner of goods laden on deck, which are thrown overboard for the preservation of the ship and the rest of the cargo, is entitled to contribution against the owner of the ship and of the residue of the cargo; but whether in the special and

particular case when the ship owner has laden the goods on deck under a privilege reserved to him by the general usage and practice of the voyage, the owner of the goods may claim contribution from such ship owner. And upon the best consideration we can give to this question, referring at the same time to the foreign authorities, and to the few decisions which have taken place in our own courts, we think the plaintiff entitled in this case to contribution against the ship owner."

In full accord is *Hurley v. Milward*, 1 Jones & Carey, 224 (1839), and *Burton v. English*, 10 Q. B. Div. 426, 12 Q. B. Div. 218 (1883).

In the last case, where the charter party provided for a "deck load if required at full freight, but at merchant's risk," the court of appeals, *per BRETT, M. R.*, reversing the decision of COVE, J., held that the right to contribution did not rest upon contract, and so was not covered by the clause of the contract. Accordingly the ship owner was held liable to contribute. Cf. *Spooner v. Western Ass. Co.*, 38 Q. B. (U. C.) 62 (1876).

The law in the *United States* was settled first in *Brown v. Cornwall*, 1 Root (Conn.) 60 (1773), an action for an average loss upon horses shipped to St. Croix, W. I., upon deck. It was held, "That although stock upon deck is more exposed to danger, and in a storm exposed the vessel to greater risk than goods in the hold, yet it is the universal custom to ship goods in the hold, with stock upon deck; when the stock is thrown overboard for the express purpose of saving from destruction the cargo in the hold, it is but reasonable that the cargo saved should bear a proportion of the loss which was the price of its ransom."

Barber v. Brace, 3 Conn. 9 (1819), which denied the ship owners' liability, is not in conflict with the earlier case, as it was brought for negligent stowing, and evidence of the custom and of the shipper's assent to the deck stowage was held to disprove the negligence.

In *Gillett v. Ellis*, 11 Ill. 579 (1850), the same result was reached, the court going on the general custom of lake steamers to carry deck loads, and so in *Harris v. Moody*, 30 N. Y. 266 (1864), which disregarded *Smith v. Wright*, 1 Cai. Rep. (N. Y.) 43 (1803), (where the usage was thought hardly well established), and *Creery v. Hally*, 14 Wend.

(N. Y.) 26 (1835), (where the decision turned on the fact that a clean bill of lading was given). *Merchants & Man. Ins. Co. v. Shillito*, 15 Ohio St. 559 (1864); *Meaher v. Lufkin*, 21 Tex. 383 (1858).

In the *United States courts* the early cases denied contribution. *Triplet v. Van Name*, 2 Cranch C. C. (U. S.) 332 (1822); *The Rebecca, Ware* (U. S.) *188 (1831). But the later cases grant it. *The Paragon*, 1 Ware (U. S.) 322 (1836); *The Prop. Niagara*, 21 How. (U. S.) at 17 (1858); *The Neptune*, 6 Blatchf. (U. S.) 193 (1868); *The Wm. Gillum*, 2 Lowell (U. S.) 154 (1872); *Wood v. Schooner Sallie C. Morton* (U. S.), 2 N. J. Law J. 301 (1879); *The Schooner Mary and Eva*, 6 Fed. Rep. 628 (1881); *The Eurique*, 7 Fed. Rep. 490 (1881); *The Adele Thackera*, 24 Fed. Rep. 809 (1885); *Providence Washington Ins. Co. v. Bradley Fertilizer Co.*, 33 Fed. Rep. 685 (1888).

The *Canadian law* is the same. *Granselle v. Ferrie*, 6 Ohio St. 454 (1842); *Paterson v. Black*, 5 U. C. Rep. 481 (1848); *Gibb v. McDonnell*, 7 U. C. Rep. 356 (1850); *Cameron v. Damville*, 1 P. & B. (N. B.) 647 (1878); cf. *Stephens v. McDonnell, Rob. & Har. Dig.* 112 (1843).

It would seem that the American and Canadian courts would not follow the reasoning of the English court of appeals in *Burton v. English*, 12 Q. B. Div. 218 (1883) as to the exemption from liability. *The Eurique*, 7 Fed. Rep. 490 (1881); *Spooner v. Western Ass. Co.*, 38 Q. B. (U. C.) 62 (1876); *Steinhoff v. Royal Canadian Ins. Co.*, 42 Q. B. (U. C.) 307 (1877). Cf. also *The Merionethshire*, 23 Mitch. Mar. Reg. 1331 and 1328 (1878).

Consent.—Where the cargo is stowed on deck with the consent of the shipper, the greater number of *dicta* held that the ship owner is not liable for a loss by jettison, either *in solido* or for contribution; but the present law in the *United States* seems to hold him liable for contribution; but not in *England*.

The early law and practice in *England* was that the ship owner was not liable, the shipper being held to take all risk by consenting to the stowing on deck. This rested, in fact, on the ground that he who consented to deck stowage could not hold the master liable for negligence. *Major v. White*, 7 C. & P. 41 (1835); *Robinson v. Knights*, L. R., 8 C. P. 465 (1873); and really had nothing to do with the liability to con-

tribute. After *Gould v. Oliver*, 5 Scott 445 (1837), held the ship owner liable where a usage existed, the practice became general to hold all who consented to the deck load, liable to contribution, and to exonerate all who did not, the payment being called "general contribution," and not "general average." Lowndes, Gen. Av. (4th ed.) 55. And the liability of the ship owner was regarded as settled by *Johnson v. Chapman*, 35 L. J. (N. S.) C. P. 23 (1865); 19 C. B. (N. S.) 563, where, in an action for the freight of a cargo of lumber from Quebec to London, part of which was by consent laden on deck, the defendant claimed contribution for lumber jettisoned. The court, per WILLES, J., held him entitled to the contribution; and WILLES, J., said, at p. 28, or 583: "Then immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo, lawfully there by the contract of the parties, it becomes subject to the rule of general average."

But in *Wright v. Marwood*, Gordon v. Marwood, 7 Q. B. Div. 62 (1881), where cattle laden on deck by consent were jettisoned and suit was brought for a general average, the court reversed the judgment of BRETT, M. R., following *Johnson v. Chapman*, and held that in the absence of custom the ship owner was not liable, the shipper, by consenting to the deck load, assuming the risk.

The decision goes largely on the ground of the early law and the undoubted fact that owners of cargo under deck are not liable in such a case; and upon the nature of general average. Clearly the claim is not a proper general average, but equally clearly, it would seem, the ship owner should be liable to some extent.

In the *United States* the cases are far from satisfactory. Those which by their decision or *dicta* are cited in support of the English view relieving the ship owner of all liability are *Smith v. Wright*, 1 Cai. (N. Y.) 43 (1803); *Hampton v. Brig Thaddeus*, 4 Martin (La.) 582 (1817); *Shackelford v. Wilcox*, 9 La. 33 (1835); *The Paragon*, 1 Ware (U. S.) 322 (1836); *Doane v. Keating*, 12 Leigh (Va.) 319 (1841); *The Peytonia*, 2 Curt. (U. S.) 21 (1854); *The Wellington*, 1 Biss. (U. S.) 279 (1859); *The Milwaukee Belle*, 2 Biss. (U. S.) 197 (1869); *The Delaware*, 14

Wall. (U. S.) 579 (1871); *The Wm. Gillum*, 2 Lowell (U. S.) 154 (1872); *Wood v. Phoenix Ins. Co.*, 71 Fed. Rep. 235 (1880), (*semble*).

Smith v. Wright, 1 Cai. (N. Y.) 43 (1803), was brought by a shipper to recover the value of cotton shipped on deck by his consent. The court held that he was not entitled to recover, and, going upon the evidence of brokers, underwriters, and merchants, that no claim for contribution existed except where the deck load was according to the usage.

Hampton v. Brig Thaddeus, followed *Smith v. Wright*, and refused contribution for the loss of copper kettles jettisoned from the deck where they had been placed by the plaintiff's consent.

Shackelford v. Wilcox held that the ship owner was entitled to full freight, and refused a claim for damages for lading on deck. There was no jettison, and only a *dictum* in regard to this question.

Doane v. Keating, 12 Leigh (Va.) 319 (1841), decided squarely against the claim for contribution, the facts showing a deck load by consent, and a justifiable jettison.

The Peytonia was a libel for non-delivery of cargo carried on deck and jettisoned; and CURTIS, J., held the master liable as a consent to such stowing was not proved. The judge stated that the loss was the shipper's, if he consented, but this was *obiter*. The liability was for bad stowage.

In *The Wellington*, 1 Biss. (U. S.) 279 (1859), on a libel for the value of 195 barrels of apples shipped under a clean bill of lading and stowed on deck, MILLER, J., refused to admit evidence of a parol agreement to the deck loading, but said, 1 Biss. (U. S.) 280: "It is well understood that when goods are stowed on deck 'with the consent of the owner, no loss by justifiable jettison can be recovered for, unless the accident, by which they are lost, would have been equally fatal if they had been under deck.'" For this he cites *Lawrence v. Minturn*, 17 How. (U. S.) 100 (1854), and *The Waldo*, Davies (U. S.) 161 (1841). But in *Lawrence v. Minturn*, 17 How. (U. S.) at 115, CURTIS, J., declared that "[The plaintiff's] right to contribution is not involved in this case," and nowhere discusses that right. The case decides simply that the ship owner is not liable *in solido*. The *Waldo* was not a case of jettison or average, and, so far as it goes, is op-

posed to the statement of MILLER, J. The case of *The Wellington* rests on the technical rule excluding parol evidence of consent where a clean bill of lading has been given.

The Milwaukee Belle, 2 Biss. (U. S.) 197 (1869), is another decision by MILLER, J., deciding squarely, the plaintiff suing for contribution for the loss by jettison of pig lead, shipped on deck with his consent, that "the rule is also a general rule, that goods laden on deck and jettisoned are not contributed for, and such is particularly the rule when goods are laden on deck by consent of the shipper;" and it was said that the admiralty courts of England and America "have almost uniformly treated the owner of goods on deck with his consent, as not having a claim on the master, in case of jettison, although bound to contribute."

The decision in *The Delaware*, 14 Wall. (U. S.) 579 (1871), rests upon the same real ground as that of *The Wellington*, and the statement of CLIFFORD, J., that if goods are carried on deck by consent, the ship owner is not liable is *obiter*.

The statements in *The Wm. Gillum*, 2 Lowell (U. S.) 1874, and *The Paragon*, 1 Ware (U. S.) 322 (1836), are also purely *obiter*.

The case of *Wood v. Phoenix Ins. Co.* is against underwriters who knew of the deck stowage and obviously depends on different considerations from those against the ship owner.

That the ship owner is liable for a contribution is decided by *The Watchful*, 1 Brown Adm. 469 (1874), which was a libel for general average for loss of a deck load of iron from Frankfort to Detroit, Mich., jettisoned under such circumstances that a general average loss would have been due without question but for the fact of the deck loading. The decision by LONGYEAR, J., cites all the cases and expressly disapproves. *The Milwaukee Belle*, 2 Biss. (U. S.) 197 (1869). After stating the general rule and its exceptions, he says, p. 473: "In all these cases, it is said, the vessel is not liable for the entire loss, because the carrying of the goods on deck cannot be attributed as a fault, but if liable at all, it is for contribution or general average merely. . . . Being carried on deck was undoubtedly the cause of the necessity for the jettison; at least such is the presumption, and being so carried was no less a fault because by consent as to all persons interested not

parties or privies to the agreement. The vessel and her owner and master must, however, be held to be bound by the agreement, and as between them and the shipper the fault must be held to have been waived. As to them, therefore, the fact of the one being carried on deck, instead of under deck, must be held to be out of the question. Any other rule would make the shipper run the entire risk in a matter in regard to which the benefits are mutual, which would be unjust. The shipper by his consent waives all claim to entire compensation in case of the jettison of the goods. The master, by taking the goods on board as freight, assumes for the vessel all the ordinary relations between ship and cargo, among which is the ordinary liability to contribution in case of loss by jettison. The only variation from the general rule wrought by the agreement of the shipper, that the goods may be carried on deck, is that, in case of loss by jettison, the vessel shall not be liable for the entire loss, a variation wholly in favor of the owners."

The decision here reached is supported by *dicta* in the latest cases. *The Schooner Mary & Eva*, 6 Fed. Rep. 628 (1881); *The Eurique*, 7 Fed. Rep. 490 (1881); *The Hettie Ellis*, 22 Fed. Rep. 350 (1884).

Canadian Law.—The Canadian law holds that the loss falls on the shipper. *Johnston v. Crane*, 1 Kerr (N. B.) 356 (1841).

Usage.—In the following cases a usage was proved as well as a consent, and the decision rests on the usage. *Dorsey v. Smith*, 4 La. 211 (1832); *Dodge v. Bartol*, 5 Gr. (Me.) 286 (1827); *Meaker v. Luffkin*, 21 Tex. 383 (1858); *Granselle v. Ferrie*, 6 O. S. (Can.) 454 (1842); *Spooner v. Western Ass. Co.*, 38 Q. B. (M. C.) 62 (1876).

Owners of Under Deck Cargo—Usage.—As against the owner of cargo stowed under the deck the cases are not in full accord, yet they seem to determine that where the deck lading is according to custom the cargo under deck must contribute.

Wood v. Phoenix Ins. Co., 8 Fed. Rep. 27 (1881), *per* McKENNAN, J.: "As a general rule jettison of a deck cargo would not entitle its owners to contribution in general average from the cargo stowed below deck. But where, in pursuance of a general custom of the trade to which the special kind of cargo belongs, the vessels engaged in its transportation are loaded

JEWEL—JEWELRY.—See note 1.

partly on deck and partly under deck, and the deck cargo is necessarily sacrificed for the safety of the rest, the general cargo may be subjected to contribution to pay the loss."

Cameron v. Damville, 1 P. & B. (N. B.) 647 (1878). The question rose squarely here between the ship owners and the under deck cargo, and *DUFF, J., held*, at p. 651: "It is unnecessary to enquire how far third parties without notice would be affected, when the carrying of the articles on deck is sanctioned only by the agreement of the ship owner and freighter. In this case it is found to be sanctioned by the usage and custom of the trade; and all persons engaged in the trade must take notice of the usage."

In full accord is *Harris v. Moody*, 30 N. Y. 566 (1864), where a lien to compel under deck cargo to contribute was upheld; and the decisions in the following cases seem also in accord: *Brown v. Cornwell*, 1 Root (Conn.) 60 (1773); *Gillett v. Ellis*, 11 Ill. 579 (1850).

In *Milward v. Hibbert*, 3 Q. B. 120 (1842), *LORD DENMAN, C. J.*, declared that usage would affect the question of liability, whoever were the parties, while the owner's consent only when it happened to arise between him and the ship owner.

The following cases, however, hold that the under deck cargo is not liable. In the *Providence Washington Ins. Co. v. Bradley Fertilizer Co.*, 33 Fed. Rep. 685 (1888), the issue was squarely presented, and *CARPENTER, J.*, after finding as a fact that it was a custom to carry deck loads in the trade, and that the under deck cargo owners knew it, said: "The question, then, is whether the existence of this custom is to be held to impose a liability to contribute on the under deck cargo. After mature consideration I am satisfied that it cannot be so held. I see no consideration moving to the shippers of the under deck cargo which could furnish an equitable ground for the imposition of increased liability on them. When a custom exists as in this case to carry a particular kind of goods on deck under particular circumstances, I think the shippers of under deck cargo might be so far affected as that they could not maintain any claim for the increased risk resulting from such shipment."

Granselle v. Ferrie, 6 O. S. (Can.) 454 (1842), contains a statement to the

same effect, but refuses to decide the point. *Gibb v. McDonnell*, 7 U. C. Rep. (Can.) 356 (1850).

Consent.—Where the deck load is carried by the consent of its owners and so by special agreement, all the cases hold that the owner of under deck cargo is not affected and is not liable. *Wright v. Marwood*, *Gordon v. Marwood*, 7 Q. B. 62 (1881); *Lenox v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 178 (1802); *Doane v. Keating*, 12 Leigh (Va.) 391 (1841); *Gibb v. McDonnell*, 7 U. C. Rep. (Can.) 356 (1850).

The usage to carry the deck load must be well established and not too recent. *The Eurique*, 7 Fed. Rep. 490 (1881); *Smith v. Wright*, 1 Cal. (N. Y.) 43 (1803); *per CLIFFORD, J.*, in *the Propeller Niagara*, 21 How. (U. S.) 17 (1858).

The codes of *California* and of *Dakota* provide that the owner of things stowed on deck, in case of their jettison, is entitled to the benefit of a general average contribution only in case it is usual to stow such things on deck upon such a voyage. *Stim. Am. St.*, § 4345; *Cal. Civil Code*, § 2154; *Dak. Civil Code*, § 1251.

Authorities.—There is no work on *Jettison*. It is generally treated under *General Average*, and the text books on that subject may be referred to. *Lowndes, The Law of General Average* (4th ed.); *Gourlie, General Average*, and *Hopkins, Law of Average* (4th ed.), deal best with it. There is a good collection of cases in *Pritchard's Admiralty Digest* (3rd ed), vol 1, pp. 67 *et seq.*

1. A watch and chain are not jewels within a statute relieving hotel keepers from liability for loss of "money, jewels or ornaments" of guests when they have provided a safe for the deposit of such. "All that which is useful or necessary to the comfort or convenience of the guest, that which is usually carried and worn as part of the ordinary apparel and outfit, or is ordinarily used, and is convenient for use by travellers as well in as out of their rooms, is left, as before the statute, at the risk of the inn keeper. The words of the statute must be taken in their ordinary sense, in the absence of any indication that they were used either in a technical sense or in a sense other than that in which they are popularly used. A watch is neither a jewel or ornament,

JOB.—The whole of a thing which is to be done.¹

as these words are used and understood either in common parlance or by lexicographers. It is not used or carried as a jewel or ornament, but as a time-piece, or chronometer, an article of ordinary wear by most travellers of every class, and of daily and hourly use by all. It is as useful and necessary to the guest in his room as out of it, in the night as in the daytime. It is carried for use and convenience, and not for ornament. But it is enough that it is neither a jewel or ornament in any sense in which these words have ever been used." *Ramaley v. Leland*, 43 N. Y. 539; s. c., 6 Robt. (N. Y.) 358. The same was *held* in *Bernstein v. Sweeny*, 33 N. Y. Super. Ct. 271, where Webster's definition of *jewel*, "an ornament of dress in which the precious stones form a principal part," was quoted with approval. So it was said in *Gile v. Libby*, 36 Barb. (N. Y.) 70, "the watch and pen and pencil case are certainly valuables, and perhaps might be called jewels, but I think should be considered a part of the traveller's personal clothing or apparel. The legislature certainly did not expect the traveller, after retiring, to send down his ordinary clothing or apparel to be deposited in the safe." See generally on this statute *Hyatt v. Taylor*, 42 N. Y. 258. Under a statute of similar purport, but whose language was "money, jewelry and articles of gold and silver manufacture," a gold watch was *held* to be included as an article of gold manufacture. *Stewart v. Parsons*, 24 Wis. 241.

As to the distinction between a jeweler and a watchmaker, see *Howard v. Williams*, 2 Pick. (Mass.) 80.

Plain gold earrings and knobs without precious stones are jewelry within the meaning of an act prohibiting the peddling of the same. "*Jewelry* is not found in any English dictionary, and is probably an Americanism. It is defined in Webster to be jewels in general. He defines a jewel to be 'an ornament worn by ladies,' 'a pendant in the ear.' It is manifest, however, that these are put by way of instances, and not intended as strict definitions.

On the best consideration we have been able to give the subject, we are satisfied that the legislature, in the use of the word 'jewel,' intended to employ it as a generic term, of the

largest import, including all articles under the genus." Com. v. Stephens, 14 Pick. (Mass.) 370.

In discussing the use of the term in the custom laws, LACOMBE, J., says: "The word 'jewelry' is generally used as including articles of personal adornment, and the word further imports that the articles are of value in the community where they are used. A belt of cowry shells, a necklace of bears' claws, a head ornament of sharks' teeth, though possessing no value in themselves, are esteemed valuable in the communities where they are worn; and we therefore constantly find them referred to in books written in the English language—books of travel, standard works, encyclopædias, and scientific dissertations upon sociology—we find those articles described in those books as 'jewelry.' The articles of value used for personal adornment in our civilization, are, and for centuries have been, the precious metals—gold and silver, to which, I think, platina is now generally added—and what are known as the precious stones—the diamond, sapphire, ruby, etc. Articles manufactured from these for the purpose of personal adornment are known, as the witnesses on the stand told you, as articles of jewelry, and such testimony is accordant with your own knowledge as to what is the ordinary use of the term 'jewelry.'

"We have found, however, that besides jewelry, there is such a thing as imitation jewelry. Jewelry is of course an expensive article, and as many people desire to wear ornaments without being able to pay the price required for real jewelry, the manufacture and use of imitation jewelry have come into existence. Now, what is an imitation piece of jewelry? It need not necessarily be a counterfeit—that is, it need not be an exact simulation of a particular article, which it is intended to take the place of. If, by a pleasing combination of appropriate materials, by an attractive arrangement of parts, an article is produced bearing a general resemblance to real jewelry ornaments, and suitable for similar uses, it may fairly be called imitation jewelry." *Robbins v. Robertson*, 33 Fed. Rep. 709; s. c., 37 Alb. L. J. 328.

1. Bouv. Law Dict.; *Dixon v. Cory*, Penn. (N. J.) 1043.

JOBBER.—A merchant who purchases goods from importers and sells to retailers.¹

JOCKEY.—See note 2.

JOINDER.—(See ACTIONS; DECLARATION; EQUITY PLEADINGS; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; PARTIES TO ACTIONS; PLEADING, and the respective actions; ASSUMPSIT; ACCOUNT; CASE; COVENANT; DEBT; DETINUE; EJECTMENT; REPLEVIN; TRESPASS; TROVER and WASTE).

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5. Joinder in Action on Bonds

I. JOINDER DEFINED.—For the purposes of this article the subject of joinder is restricted to actions and pleas at law, and concerns only the power of the plaintiff to unite in his declaration or complaint, several separate counts and causes of action, and

1. Webster quoted in *Stewart v. Winters*, 4 Sandf. Ch. (N. Y.) 587. In this case there being a provision in the lease that the premises should be occupied for a regular dry goods business, and for no other, the lessee was enjoined from conducting therein the business of an auctioneer. An auctioneer does not purchase at all; he sells on commission.

In *Mollett v. Robinson*, L. R., 7 C. P. 104, BLACKBURN, J., defines a jobber as one who buys at a fraction below the market price and sells at a fraction above that price.

He is defined in the law dictionaries (*Bouv. Repalcé & L.*) to be one who buys and sells articles for others, which is inconsistent with the cases cited.

2. Where one of the conditions of a race was that the riders should be "gentlemen, farmers or tradesmen, never having ridden as regular jockeys or paid riders, one who had been in the habit of riding in races, but had never been paid for so doing, though he had received his expenses, is not a regular jockey or paid rider, which evidently means one who follows the business of

- and Recognizances, 1015k.
 6. Joinder of Statutory and Common Law Actions, 1015l.
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 1. Actions By Executors or Administrators, 1015m.
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the power of the defendant to unite in his plea or answer several distinct pleas and defences.¹ Joinder by the plaintiff may be of counts or causes of action in the same or in different rights.

II. JOINDER OF CAUSES OF ACTION IN THE SAME RIGHT—1. **Same Cause in Different Counts**—(a) **AT COMMON LAW**.—At common law a plaintiff in personal actions was allowed to set forth a single cause of action in as many different counts as he desired,² provided that there was a substantial variation between the counts.³ Each count was required to disclose a distinct right of action,

a jockey for a livelihood. *Walmsley v. Mathews*, 3 M. & G. 133.

1. For joinder in equity pleadings, see **EQUITY PLEADINGS**, vol. 6, p. 758; subtitle, IV. A, 3 b. **MULTIFARIOUSNESS**. For joinder of counts in an indictment, see **INDICTMENT**, vol. 10, p. 599; subtitle, VIII, 16. For joinder of parties, see **PARTIES TO ACTIONS**. See also the titles above referred to.

2. **Joinder of Counts Stating Same Cause of Action at Common Law**—In England, before the pleading rules, Hil. T. 4 W. IV. r. v. 5 (1833-4), a declaration might consist of numerous counts, and the jury might assess entire or distinct damages on all the counts; and it was usual, particularly in assumpsit and in actions on the case, to set forth the plaintiff's cause of action in various shapes in different counts, so that if he failed in the proof of one count he might succeed on another. *Chitty's Pleadings* (16th ed.), p. *424; 3 Black. Com. *295; *Gould's Pleadings* (5th ed.), p. 159, § 5, and p. 513; *Stephens on Pleading* (9th Am. ed.) App., note 4; *Onslow v. Horne*, 3 Wils. 177, 185; *King v. Archbishop of York*, 1 Ad. & Ell. 394 (28 E. C. L.); *Steuben Co. Bank v. Stephens*, 14 Wend. (N. Y.) 243; *Neal v. Lewis*, 2 Bay (S. Car.) 204.

The plaintiff may, also, for the same cause or right of action, insert different counts, setting forth the cause or right of action in various shapes. *Shepherd v. Staten*, 5 Heisk. (Tenn.) 79.

Where in trespass for breaking the plaintiff's close and carrying away his chattels, the declaration does not contain account for only taking the chattels, the plaintiff cannot recover for taking them unless he proves a breach of the close. *Ropps v. Barker*, 4 Pick. (Mass.) 239.

3. **Variations in Counts Stating Same Cause of Action**.—The variations between these counts must be substantial, otherwise they might be stricken out. *Chitty's Plead.* (16th ed.), p. *424; *Gould's Plead.* (5th ed.), p. 159, 160; 3 Black. Com. (Shars.) *295, note 5; *Tidd's Practice* (3rd Am. ed.), *616; *Meeke v. Oxlade*, 1 New Rep. (Bos. & Pull.) 289; *People v. New York C. P.*, 19 Wend. (N. Y.) 113. But where there is a material difference between the counts, the courts will not determine upon affidavits whether they are well founded in point of fact, for if not, the plaintiff will be sufficiently punished by being deprived of costs, on such of the counts as are found for the defendant. *Tidd's Practice* (3rd Am. ed.) *616.

though it was sufficient to state matters of inducement in the first count and refer to them in the subsequent counts.¹

(b) **STATUTORY AND CODE MODIFICATIONS.**—The abuse of the right exercised by the plaintiff at common law of joining different counts setting forth the same cause of action, led in England, to the adoption in 1833-4 of the Hilary Rules, which prohibited such joinders, unless a distinct subject matter of complaint is intended to be established in respect of each,² while the code adopted in England in 1873 requires that each paragraph shall as nearly as may be contain a separate allegation.³ In the United States, the

1. Form of Counts Stating Same Cause of Action at Common Law.—"In framing a second or subsequent count for the same cause of action, care was, and still is, essential to avoid any unnecessary repetition of the same matter, and by an inducement in the first count, applying any matter to the following counts and by referring concisely in the subsequent counts to such inducement, much unnecessary prolixity may be avoided." Chitty's Pleadings (16th ed.), *428; Gould's Pleadings (5th ed.), p. 158, § 3 and p. 513.

If the prior counts in a declaration in assumpsit set out a consideration, and the last count refers to them, and is founded on the consideration specified in them, it incorporates so much thereof in the last count as to render it valid. *Dent v. Scott*, 3 Har. & J. (Md.) 28.

In declaring upon a contract, which is sufficiently stated in the first count, it need not be repeated in the subsequent counts of the same declaration, but it is enough to declare that it is the same as is set forth in the first count. *Griswold v. Nat. Ins. Co.*, 3 Cow. (N. Y.) 96.

In an action of slander, it is unnecessary to preface each count with all the inducements and allegations contained in the first; a reference in the second count to the allegations in the first is sufficient. Chitty's Pleadings, *supra*; *Loomis v. Swick*, 3 Wend. (N. Y.) 205; *Nestle v. Van Slyck*, 2 Hill (N. Y.) 282.

"In order to avoid any objection on the ground of duplicity, it is advisable to insert in the second count for the same cause of action the word 'other goods,' etc. Chitty's Pleadings (16th ed.) *429; Gould's Pleadings (5th ed.), p. 513. But the second count in a writ need not allege that it is for a cause of action other than that of the first count. *Ware v. Webb*, 32 Me. 41.

2. Same Cause in Different Counts—

Hilary Rules.—The right to state the same cause of action in different counts was so abused and produced such redundancy in pleading, and the necessity for permitting such duplicity having been removed by the statute 3 & 4 Wm. IV, ch. 42, § 23, giving the judge power to amend pending the trial of an action in almost every case of *variance*, not prejudicing the opponent on the trial of the merits, the rules adopted at Hilary Term, 4 Wm. 4, Reg. 5 (1833-4), after reciting that consequence, then provided that "Several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each. . . . Therefore counts founded on one and the same principal matter of complaint, but varied in statement, description or circumstances only, are not to be allowed." Then follows a number of examples in which it is expressly stated that several counts would not be allowed, viz: contract alleged to be with and without a condition; nondelivery of bill in payment and price of goods sold; not accepting and paying for goods sold; bills and notes, and the consideration therefor; policy of insurance; on policy and common counts to recover premium paid; charter party; demise and use and occupation; misfeasance; nonfeasance; trespass; indebitatus, assumpsit and account stated. But it was expressly provided that "The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract in the same count." See these rules given at length in Chitty's Pleadings (16th ed.), *430; Stephens on Pleading (9th Am. ed.), App., note (57), p. lxxvii.

3. English Code.—The English procedure act of 1873 (38 & 39 Vict., ch. 77), order XIX, § 4, provides that "Every pleading shall contain, as con-

codes have been construed, except in Indiana and Iowa, to prohibit setting forth the same cause of action in different counts,¹ except where that would harass and affect injuriously the rights of the plaintiff.² When such counts are erroneously joined, the remedy is by a motion to elect and strike out, not by demurrer.³ In some other States not practicing under code rules, there are, nevertheless, statutory provisions which seem applicable to this question.⁴

cisely as may be, a statement of the material facts on which the party pleading relies; . . . such statement being divided into paragraphs, . . . and each paragraph containing, as nearly as may be, a separate allegation." L. R., 10 Stat. 796.

1. Same Causes of Action Stated Differently under the United States Codes.

"Since the codes require the facts to be averred as they actually took place it does not in general permit a single cause of action to be set forth in two or more different forms or counts." Pomeroy's Remedial Rights and Remedies (2nd ed.) 640, § 576. Bliss on Code Pleading (2nd ed.) 197, § 119. Nevada Co. & S. Canal Co. v. Kidd, 37 Cal. 282; People v. Slocum, 1 Idaho 62; Stockbridge Iron Co. v. Mellen, 5 How. Pr. (N. Y.) 439; Sipperly v. Troy & Boston R. Co., 9 How. Pr. (N. Y.) 83; Churchill v. Churchill, 9 How. Pr. (N. Y.) 552; Lackey v. Vanderbilt, 10 How. Pr. (N. Y.) 155; Dunning v. Thomas, 11 How. Pr. (N. Y.) 281; Dickens v. N. Y. Central R. Co., 13 How. Pr. (N. Y.) 228; Ford v. Mattice, 14 How. Pr. (N. Y.) 91; Whittier v. Bates, 2 Abb. Prac. (N. Y.) 477; Nash v. McCauley, 9 Abb. Prac. (N. Y.) 159; Pickering v. Miss. Val. Nat. Tel. Co., 47 Mo. 457; Sturges v. Burton, 8 Ohio St. 215; Ferguson v. Gilbert, 16 Ohio St. 88; Muzzy v. Ledlie, 23 Wis. 445.

In *Indiana*, as the plaintiff is not required to swear to his complaint, he may state one cause of action in different forms. Snyder v. Snyder, 25 Ind. 399; Stearns v. Dubois, 55 Ind. 257.

And in *Iowa*, the common law rule allowing the same cause to be pleaded in different forms applies. Pearson v. Milwaukee & St. Paul R., 45 Iowa 497; VanBrunt v. Mathers, 48 Iowa 503.

2. United States Codes Exception.—

"Under peculiar circumstances, however, when the exact nature of the plaintiff's right and of the defendant's liability depends upon facts in the sole possession of the defendant and which will not be developed until the trial, the

plaintiff may set forth the same single cause of action in varied counts and with differing averments so as to meet the possible proofs which will for the first time fully appear on the trial." Pomeroy's Remedial Rights and Remedies (2nd ed.) 640, § 576; Whitney v. Chicago & N. W. R. Co., 27 Wis. 327. Compare Brinkman v. Hunter, 73 Mo. 173; Williams v. Lowe, 4 Neb. 382; Jones v. Palmer, 1 Abb. Prac. (N. Y.) 442; Smith v. Douglass, 15 Abb. Prac. (N. Y.) 266; Meade v. Mali, 15 How. Pr. (N. Y.) 347; Birdseye v. Smith, 32 Barb. (N. Y.) 217; Longprey v. Yates, 31 Hun (N. Y.) 433; Velie v. N. C. Ins. Co., 65 How. Pr. (N. Y.) 1; Supervisors of La Pointe v. O'Malley, 46 Wis. 35.

3. Remedy for Such Misjoinder.—The misjoinder must be made to appear by affidavit, and the remedy is by motion to elect and not by demurrer. M. H. etc. Co. v. Maupin, 79 Ky. 101; Hawley v. Wilkinson, 18 Minn. 525; Hause v. Hause, 29 Minn. 252; Farmers' Bank v. Bayliss, 41 Mo. 274; Strange v. Manning, 99 N. Car. 165; s. c., 5 S. E. Rep. 900; Hillman v. Hillman, 14 How. Prac. (N. Y.) 456; Fern v. Vanderbilt, 13 Abb. Prac. (N. Y.) 72; Sturges v. Burton, 8 Ohio St. 215; Muzzy v. Ledlie, 23 Wis. 445; Brown v. Carbonate Bank, 34 Fed. Rep. (U. S. C. C. Col.) 776.

4. Statutory Regulations in Other States.—In *Pennsylvania* and *Mississippi*, where the practice is not under code regulations, there are statutes providing that the plaintiff's declaration or complaint shall consist of "a concise statement of his demand," or "a statement of facts constituting the cause of action in ordinary and concise language without repetition." See Rev. Code Mississippi 1880, § 1536. Laws of Pennsylvania 1887, p. 271. These provisions would seem to forbid a statement of the same cause of action in different forms.

In *Massachusetts*, it is provided that "one count only need be inserted for each cause of action, but any num-

2. Joinder of Different Causes of Action—(a) ADMISSIBILITY OF IN PERSONAL ACTIONS AT COMMON LAW—(1) General Principle.—While the right of a plaintiff to join different causes of action in one declaration at common law in certain cases has long been recognized, the rule governing such joinder has been variously stated at various times.¹ The latest authorities state the rule to

ber of breaches may be assigned in each count, and where the nature of the case requires it, breaches may be assigned in the alternative. Pub. Stat. 1882, p. 964-5, § 2, par. 4. This does not prevent a statement of the same cause in different forms. *Lovett v. Salem & South D. R. Co.*, 9 Allen (Mass.) 557; *Downs v. Hawley*, 112 Mass. 237.

In *Tennessee*, "the declaration shall state the plaintiff's cause of action. It may contain several statements or counts." Code 1884, p. 675, § 3606.

1. Joinder of Different Causes of Action at Common Law—History of Principle.—Perhaps the earliest attempt to lay down a rule regulating joinder of actions is to be found in 34-35 Charles II (1683), where an action had been brought in which plaintiff declared first on a contract to deliver merchantable goods and a breach, and second in a sale of goods with a warranty as to merchantable quality and a delivery of unmerchantable goods. Defendant demurred. The court allowed the joinder, basing the rule upon the different process required in bringing the suit. The court said: "Causes upon contract which are in the right and causes upon a tort cannot be joined, for they do not only require several pleas, but there is several process, the one summons, attachment, etc., the other attachment, etc." *Denison v. Ralphson*, 1 Vent. 365. See Gilbert's History of the Common Pleas, p. 6.

In 1749 *LEE*, C. J., said: "The true way to judge of this matter is this, that whenever the same *process and judgment* are in two counts, they may be joined; otherwise they cannot." *Duke of Bedford v. Alcock*, 1 Wils. 248, 252.

WILMOT, C. J., in 1766 laid down the rule as follows: "The true test to try whether two counts can be joined in the same declaration is to consider and see whether there be the same judgment in both, and not whether they require the same plea, and wherever there is the same judgment in both I think they may well be joined." *Dickon v. Clifton*, 2 Wils. 319, 321.

This rule was held to be too large

and not universally true, though a good rule among others to determine the question in *Mast v. Goodson*, 3 Wils. 348, 354 (1772).

In 1786 *BULLER*, J., criticised this as follows: "Perhaps the rule of judging whether two counts can be joined, by considering whether the same judgment can be given on both, is not true in its extent; but by adding another requisite it is universally true. For wherever the same plea may be pleaded and the same judgment given on two counts, they may be joined in the same declaration." *Brown v. Dixon*, 1 Tenn. Rep. 274, 276.

In 1836 in the United States, *CHURCH*, J., went further still: "The general rule on this subject, or the rule controlling the greatest class of cases, probably is, that causes of action, which at common law require the same judgment and the same general issue, may be joined in several counts in one declaration. But to this rule there are many exceptions. Therefore actions of debt on bond and covenant broken, cannot be joined, although the general issue of *non est factum* and the common law judgment of *miser cordia* are common to both. Neither can actions of account or replevin, or an action on book, in this State, be joined with any other cause of action. And the reason is that the forms of proceeding in some, as well as the essential nature and forms of the judgment in others, of these actions are different from the forms of proceeding and judgments in all other cases." *Whipple v. Fuller*, 11 Conn. 582, 586.

And in the fifth edition of *Saunders' Reports*, published in 1846, the annotator, having criticised at some length the rule that counts may be joined wherever the same plea may be pleaded and the same judgment given (vol. 2, p. 117 d), concludes his note as follows: "The result of all these cases seems to be that wherever the same plea may be pleaded and the same judgment given in all the counts of the declaration; or whenever the counts are of the same nature, and the same judgment is given

be that at common law, when the same plea may be pleaded and the same judgment given on all the counts of the declaration, or whenever the counts are of the same nature, and the same judgment is to be given on them all, though the pleas be different, as in the case of debt upon bond and on simple contract, they may be joined, the best test, perhaps, being the nature of the causes of action.¹

(2) *When and When Not Admissible in the Personal Actions.*—

At common law, the plaintiff in any of the personal actions may join as many counts as he has causes of action of the same nature.² This has been expressly decided in all the personal actions *ex contractu*, viz., *assumpsit*; ³

on them all, though the pleas be different, as in the case of debt upon bond and on a *mutuatus* already mentioned, they may well be joined." *Coryton v. Lithebye*, 2 Saund. (5th ed.), p. 117 h.

Mr. Chitty, having used the language in the text and quoted the above authority, then says: "Perhaps the latter, that is, the *nature*, of the causes of action is the best test or criterion by which to decide as to the joinders of counts." *Chitty's Pleadings* (16th ed.) * 222.

Mr. Tidd concludes his review of the question by saying, "The *nature* of the causes of action, therefore, should be attended to in order to determine whether different counts may or may not be joined in the same declaration; and, with the exceptions which have been noticed, it may safely be laid down as a general rule that wherever the causes of action are of the same nature, and may properly be the subject of counts in the same species of action, they may be joined, otherwise they cannot. *Tidd's Practice* (9th ed.) * 12.

1. *Chitty's Pleadings* (16th ed.) * 222; *Tidd's Practice* (9th ed.) 12. See also *Gould's Pleadings* (5th ed.), p. 512. An article on *Gould's Pleadings* in 8 *Am. Jurist* (No. 15), p. 74, 92-97.

For statement and applications of the general rule as to joinder, see *Pettigrew v. Pettigrew*, 1 Stew. (Ala.) 580; *Berry v. Linton*, 1 Ark. 252; *Mahaffey v. Petty*, 1 Kelly (Ga.) 261; *Hays v. Borders*, 1 Gilm. (Ill.) 46; *Brady v. Spurck*, 27 Ill. 478; *Williams v. Bramble*, 2 Md. 313, 318; *Fairfield v. Burt*, 11 Pick. (Mass.) 244; *Tregent v. Maybee*, 54 Mich. 226; *Morrison v. Bedell*, 22 N. H. 234, 243; *Lovett v. Pell*, 22 Wend. (N. Y.) 369; *Brumbaugh v. Keith*, 31 Pa. St. 327; *Angus v. Dickerson*,

Meigs (Tenn.) 459. See also *Am. & Eng. Encyc. of Law*, title ACTIONS, vol. 1, p. 184 b; subtitle 10, Joinder, and also title DECLARATION, vol. 5, p. 359; subtitle 5 (1), Joinder of Counts.

2. See *Chitty's Pleadings* (16th ed.) * 222; *Gould's Pleadings* (5th ed.) 512; *Tidd's Practice* (3rd Am. ed.) * 11, 12.

3. *Assumpsit*.—The common counts in *assumpsit* may be joined with a special count. *Sheldon v. Cox*, 5 Dowl. & Ryl. 277; *Struthers v. Drexel*, 7 Sup. Ct. Rep. 1293; *Boylston v. Sherran*, 31 Ala. 538; *Intendant and Town Council of Livingston v. Pippin*, 31 Ala. 542; *Tuskaloosa County v. Logan*, 57 Ala. 296; *Cobb v. Charter*, 32 Conn. 358; *Hitt v. Lippitt*, Geo. Dec., part 2, 89; *Powell v. Kinney*, 6 Blf. (Ind.) 359; *Consolidation Coal Co. v. Shannon*, 34 Md. 144; *Appleman v. Michael*, 43 Md. 269, 282; *Hart v. Summers*, 38 Mich. 399; *Tregent v. Maybee*, 54 Mich. 226; *Perrine v. Hankinson*, 6 Halst. (N. J. L.) 181; *Ruckman v. Bergholz*, 8 Vr. (37 N. J. L.) 437; *Bruen v. Ogden*, 3 Haw. (18 N. J. L.) 124; *Rogers v. Phinney*, 1 Gr. (N. J. L.) 1; *Jack v. McKee*, 9 Pa. St. 225; *Bash v. Dash*, 9 Pa. St. 260; *McDowell v. Oyer*, 21 Pa. St. 417; *Walter v. Walter*, 1 Whart. (Pa.) 292; *Kennaird v. Jones*, 9 Gratt. (Va.) 183.

This practice was common to all good pleaders, because a plaintiff may, in many cases, recover in a common count, though there were a special contract, and a common count may therefore sometimes save a verdict. *Stephens on Pleading* (9th Am. ed.), Second App., note (4), p. cxix.

A plaintiff may join counts on different promissory notes, when the maker is the same and all payable to plaintiff. *Berry v. Ferguson*, 58 Ala. 314; *Hanger v. Dodge*, 24 Ark. 205; *Little v. Blunt*, 13

case; ¹ covenant; ² debt; ³

Pick. (Mass.) 473; *Wilson v. Tucker*, 9 R. I. 137.

Since the judgment given on a note containing a waiver of exemption is different from the judgment on a claim without such waiver, counts on such different claims cannot be joined. *McCrummen v. Campbell*, 2 South Rep. (Ala.) 482; s. c., 82 Ala. 566.

The common counts may be joined with a special count on a promissory note. *Bogardus v. Trial*, 1 Scam. (Ill.) 63; *Felton v. Dickinson*, 10 Mass. 287; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158; *Beardsley v. Southmayd*, 2 Greene (14 N. J. L.) 534; *Halleran v. Field*, 23 Wend. (N. Y.) 38; *Kennel v. Muncey*, Peck (Tenn.) 273. Money loaned at different times to same person may all be recovered in one action by joining different counts to cover each loan. *Hinsdale v. Eells*, 3 Conn. 377.

In *Texas*, suit may be brought upon a judgment obtained in a justice's court which remains unsatisfied. Several of such judgments may be joined and sued upon in the district court. *Lander v. Rounsaville*, 12 Tex. 195. But when the defendant appeals, he cannot join the several judgments in one certiorari, at least not in a case where some of the judgments sought to be joined are not within the jurisdiction of the county courts. *G. H. & S. A. R. R. Co. v. Ware*, 2 Ct. of App. C. C. (Tex.) § 357.

A count charging a sale of stock to defendant at a fixed price which defendant promised to pay, may be joined with a count that defendant as agent undertook and promised to sell the same. *Martin v. Stille*; 3 Whart. (Pa.) 336.

Counts in book debt and assumpsit cannot be joined in *Connecticut*. *Phelps v. Hurd*, 31 Conn. 445.

Upon the question when the action, of assumpsit lies, see Am. & Eng. Encyc. of Law, vol. 1, p. 882, *et seq.*, title ASSUMPSIT.

1. Case.—Different counts in case may be joined. *Hensworth v. Fowkes*, 1 Nev. & Man. 321; *Gillet v. Stone*, 1 Scam. (Ill.) 539; *Cole v. Sprowl*, 35 Me. 161; *Pierce v. Thompson*, 6 Pick. (Mass.) 193; *Lansing v. Wiswall*, 5 Denio (N. Y.) 213; *Miles v. Oldfield*, 4 Yeates (Pa.) 423; *Lane v. Hogan*, 5 Yerg. (Tenn.) 290.

Counts for breaches of a contract and counts for rescinding the contract itself

cannot be joined, since the one affirms the contract and the other denies it. *Toledo, Wabash & Western R. Co. v. Jacksonville Depot Building Co.*, 63 Ill. 308; *Heastings v. McGee*, 66 Pa. St. 384. But a count for a rescission provided for by contract and for a rescission because of the fraud would not be repugnant. *Pearsoll v. Chapin*, 44 Pa. St. 9. Upon the question when this action lies, see Am. & Eng. Encyc. of Law, title TRESPASS ON THE CASE.

2. Covenant.—Breaches of the various covenants contained in a deed may all be joined in the same action. *Brady v. Spurck*, 27 Ill. 478; *Angell v. Kelsey*, 1 Barb. (N. Y.) 16; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207.

In actions on contract in a penal sum for performance of covenants or agreements, and in actions of covenant, several breaches may be assigned, and in defence, performance generally, both in affirmative and negative covenants, may be alleged. Rev. Stat. Maine 1883, p. 697, § 20. Upon the question when this action lies, see Am. & Eng. Encyc. of Law, vol. 4, p. 463, *et seq.*, title COVENANT, ACTION OF.

3. Debt.—The plaintiff may declare upon several bonds in the same declaration. *Cabell v. Vaughan*, 1 Saund. 288 §; *Jarrett v. Nickell*, 4 W. Va. 276; *Jones v. Cox*, 7 Mo. 173. In an action of debt claims on a specialty and on a simple contract may be joined. *Parker v. Taylor*, Cro. Car. 316; *Barclay v. Moore*, 17 Ala. 634; *Tillotson v. Stipp*, 1 Blf. (Ind.) 77; *Flood v. Yandes*, 1 Blf. (Ind.) 102; *Farnham v. Hay*, 3 Blf. (Ind.) 167; *Brown v. Warnock*, 5 Dana (Ky.) 492, 494; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595; *Mardis v. Terrell*, 1 Walk. (Miss.) 327; *Wagle v. Bartley*, 11 Atl. Rep. (Pa.) 223; *Eib v. Pindall*, 5 Rand. (Va.) 109.

In *Pennsylvania*, count expressly laid in debt cannot be joined with counts expressly laid in covenant, because the judgments are different. *Brumbaugh v. Keith*, 31 Pa. St. 327. But in an action of debt, claims on a specialty and in a simple contract may be joined. *Wagle v. Bartley*, 11 Atl. Rep. (Pa.) 223.

Counts for debt upon a contract implied in law may be joined with a count on an express contract. *Duke of Bedford v. Alcock*, 1 Wils. 248, 252; *Mahan v. Sherman*, 8 Blf. (Ind.) 63; *Norris v. School District*, 12 Me. 293; *Smith v. First Cong. Meeting House in Lowell*, 8 Pick. (Mass.) 178; *Van Deusen v.*

replevin;¹ *scire facias*;² trespass;³ and trover.⁴ But a count in one form of action may not be joined with a count in another form of action,⁵ except that trover, being in its nature an action

Blum, 18 Pick. (Mass.) 229, 231; Gray v. Johnson, 14 N. H. 414.

A count on a judgment may be joined with a count on a simple contract. *Stewart & Co. v. Sonneborn*, 49 Ala. 178; *Nat. Exchange Bank v. Abell*, 63 Me. 346; *De Proux v. Sargent*, 70 Me. 266; *Hogsett v. Ellis*, 17 Mich. 351; *Downer v. Shaw*, 23 N. H. 125; *Morrison v. Bedell*, 22 N. H. 234, 243; *Union Cotton Mfy. v. Lobdell*, 13 Johns. (N. Y.) 462. Upon the question when this action lies, see Am. & Eng. Encyc. of Law, vol. 5, p. 165, title DEBT, ACTION OF.

1. **Replevin.**—"A man may count of several takings, part at one day and place and part at another." Buller's *Nisi Prius* 54. Fitzherbert's *Natura Brevium* (7th ed.), 156 [*68], note (a).

See an early case (1807) to the contrary. *Hart v. Fitzgerald*, 2 Mass. 509.

Where part of the property claimed by a writ of replevin cannot be found, and there is personal service, the plaintiff may add a count in trover. *Dart v. Horn*, 20 Ill. 212.

2. **Scire Facias.**—See Chitty's *Pleadings* (16th ed.), *222.

A number of judgments against the same person may be consolidated and revived in one amicable action of *scire facias*. *Reed's Appeal*, 7 Pa. St. 65; *Yeager's Appeal*, 18 Atl. Rep. (August 28th. 1889), 137. But when several writs have issued, the court refused to consolidate them in *Mickle v. Brewer*, 3 Hal. (8 N. J. L.) 85. See also Am. & Eng. Encyc. of Law, titles JUDGMENTS; SCIRE FACIAS.

3. **Trespass.**—"And in personal actions the plaintiff may comprehend several wrongs, and several causes of actions, as one action of trespass for several trespasses committed at several days and in several places." *Buckmere's Case*, 8 Coke *87 b; *Oglesby v. Stodghill*, 23 Ga. 590; *Wilson v. Johnson*, 1 G. Greene (Iowa) 147; *Shepherd v. Slaten*, 5 Heisk. (Tenn.) 79. They may be included in one count with a *continuando*. *Butler v. Hedges*, 1 Lev. 210; *Monckton v. Pashley*, 2 Ld. Raym. 974; *Pierce v. Pickens*, 16 Mass. 470; *Folger v. Fields*, 12 Cush. (Mass.) 93; *Smith v. Brazelton*, 1 Heisk. (Tenn.) 44. Thus counts for a trespass q. c. f. and for a rescue may be joined.

Alwayes v. Broome, 2 Lutw., fo. 1259; s. c., 1 Ld. Raym. 83; *Baker v. Dumbolton*, 10 Johns. (N. Y.) 240.

Counts in trespass q. c. f. and for debauching plaintiff's daughter, beating his servant etc., may be joined. *Woodward v. Walton*, 2 New Rep. (Bos. & Full.) 476; *Ditcham v. Bond*, 2 M. & Sel. 436.

Counts for seizing and carrying away several slaves at different times. *Kennedy v. McArthur*, 5 Ala. 151.

The plaintiff, in actions of trespass, may join counts for trespass to land and for trespass to person, and to personal property, and in such case, each count being an independent cause of action, he may recover upon such counts as are sustained by poof, although he fail as to others. *Reed v. Peoria and Oquawka R. Co.*, 18 Ill. 403, 404; *Arnold v. Maudlin*, 6 Blf. (Ind.) 187; *Sawyer v. Goodwin*, 34 Me. 419, 421; *Barton Coal Co. v. Cox*, 39 Md. 1, 17; *Parker v. Parker*, 17 Pick. (Mass.) 236; *Bishop v. Baker*, 19 Pick. (Mass.) 517; *McClees v. Sikes*, 1 Jones (N. Car.) 310; *Ripley v. Miller*, 1 Jones (N. Car.) 479.

Upon the question when this action lies, see Am. & Eng. Encyc. of Law, title TRESPASS.

4. **Trover.**—Several causes of action in trover may be joined. *Munson v. Munson*, 24 Conn. 115. See *Wheeler v. Wallace*, 53 Mich. 364.

Upon the question when this action lies, see Am. & Eng. Encyc. of Law, title TROVER.

5. **Assumpsit and case** cannot be joined. *Corbett v. Packington*, 6 B. & C. 268; *Orton v. Butler*, 2 Chitty 343. Not even under the Alabama code. *Munter v. Rogers*, 50 Ala. 283; *Wilson v. Stewart*, 69 Ala. 302; *Chambers v. Seay*, 73 Ala. 372. In Connecticut, allowed by act of 1875. See *Sellick v. Hall*, 47 Conn. 260; *McWheeny v. Waterbury City*, 46 Conn. 295; *Noetting v. Wright*, 72 Ill. 390; *Bodley v. Roop*, 6 Blf. (Ind.) 158; *Carstarphen v. Graves*, 1 A. K. Marsh. (Ky.) 435; *White v. Swell*, 5 Pick. (Mass.) 425; *Friend v. Dunks*, 37 Mich. 25; *Friend v. Dunks*, 39 Mich. 733; *Crooker v. Willard*, 28 N. H. 134; *Peabody v. Kinsley*, 40 N. H. 416; *Green v. Morris & Essex R. Co.* 4 Zab. (24 N. J. L.) 486; *Wilson v. Marsh*, 1

on the case, may be joined with case,¹ and with the further sin-

Johns. (N. Y.) 503; Martin v. Mayor etc. of Brooklyn, 1 Hill (N. Y.) 545; Penna. R. v. Zug, 47 Pa. St. 480; Noble v. Laley, 50 Pa. St. 281; Tucker v. Gordon, 2 Brev. (S. Car.) 136; Holland v. Pack, Peck (Tenn.) 151; Creel v. Brown; 1 Rob. (Va.) 265.

Counts for damages for breach of contract not to sue and for malicious prosecution *held* improperly joined. Clinton v. Hopkins, 2 Root (Conn.) 225.

Assumpsit cannot be joined with covenant. Phillips & Colby Construction Co. v. Seymour, 91 U. S. 646; Fletcher v. Piatt, 7 Blackf. (Ind.) 522; Lovett v. Pell, 22 Wend. (N. Y.) 369, rev. 19 Wend. (N. Y.) 546; Maguire v. Rabenan, 16 Weekly Notes (Pa.) 479. See Smaltz v. Hancock, 118 Pa. St. 550.

Assumpsit and debt cannot be joined. Brill v. Neele, 3 Barn. & Ald. 208; Metcalf v. Robinson, 2 McLean (U. S. C. C.) 363; Cruikshank v. Brown, 5 Gilm. (10 Ill.) 75; McGinnity v. Laguerune, 5 Gilm. (10 Ill.) 101; Adams v. Hardin, 19 Ill. 273; Guinnip v. Carter, 68 Ill. 206; Flood v. Yandes, 1 Blackf. (Ind.) 102; Canton Nat. Bld. Asso. v. Weber, 34 Md. 669; Smith v. State, 66 Md. 215; s. c., 7 Atl. Rep. 49; Ruten v. Hinchman, 5 Dutch. (29 N. J. L.) 112; American Line Thread Co. v. Sheldon, 2 Vr. (31 N. J. L.) 420.

Assumpsit and trespass cannot be joined. A demand for damages caused by a trespass on land cannot be joined with a demand for the use and occupation of such land. McLendon v. Atlanta and West Point R. Co., 54 Ga. 203. Compare Oglesby v. Stodghill, 23 Ga. 590.

Assumpsit and trover cannot be joined. Taylor v. Holmes, Sir Thomas Raymond, 233; Dalston v. Eyenston, 12 Mod. 73; s. c., 1 Salk. 10; Dalson v. Tyson, 3 Salk. 204; Copeland v. Flowers, 21 Ala. 472. Not even under the Alabama Code. Wilson v. Stewart, 69 Ala. 302; Mobile Life Ins. Co. v. Randall, 74 Ala. 170; Beebe v. Knapp, 28 Mich. 53; Howe v. Cook, 21 Wend. (N. Y.) 29.

Contra in New Hampshire, when for a single cause of action. Rutherford v. Whitcher, 60 N. H. 110; Peaslee v. Dudley, 63 N. H. 220.

Covenant and case may be joined if for a single cause of action. Crawford v. Parsons, 63 N. H. 438.

Case and trespass cannot be joined. Courtney v. Collet, 1 Ld. Raym. 272; Sheppard v. Furniss, 19 Ala. 760; Bell's Admr. v. Troy, 35 Ala. 184. Not even under the Alabama statute. Guilford & Co. v. Kendall, 42 Ala. 651; Cadwell v. Farrell, 28 Ill. 438; Dalson v. Bradberry, 50 Ill. 82; Dale Mfg. Co. v. Grant, 5 Vr. (34 N. J. L.) 138; Sollenberger v. Schnader, 4 L. Barr (Pa.), Dec. 14th, 1872; s. c., 1 Kulp (Pa.) 6; Brant v. Lorenze, 17 Phila. (Pa.) 2.

Contra in Maryland, because the judgment in both actions is the same. Williams v. Bramble, 2 Md. 313; Gent v. Cole, 38 Md. 110, 113.

Actions for injuries to property and for personal injuries could not be joined. Boenun v. Taylor, 19 Conn. 122; Havens v. Hartford & N. H. R. Co., 26 Conn. 220.

Case and debt cannot be joined. Confrey v. Stark, 73 Ill. 187, 190. *Contra*, Whitaker v. Warren, 60 N. H. 20.

Trespass and trover may not be joined. Weeton v. Woodcock, 5 Mee. & Wel. 587; Belden v. Granniss, 27 Conn. 511, 514; Crenshaw v. Moore, 10 Ga. 384; Hines v. Kinnison, 8 Blackf. (Ind.) 119; Cooper v. Bissell, 16 Johns. (N. Y.) 146.

Contra in Maryland, because the judgment in both actions is the same. Williams v. Bramble, 2 Md. 313; Gent v. Cole, 38 Md. 110, 113. And in Texas, because the common law forms of pleading are not recognized, and the two actions, though distinct, are not inconsistent. Carter v. Wallace, 2 Tex. 206.

Trover and detinue may not be joined. Kettle v. Bromsall, Willes 118. Not even under the Common Law Procedure act of 1860, unless specially allowed. Mockford v. Taylor, 10 C. B., N. S. 209 (115 E. C. L. R.).

Forcible entry and unlawful detainer cannot be joined. Grice v. Ferguson, 1 Stew. (Ala.) 36; McGuire v. Cook, 13 Ark. (8 Eng.) 448; Liddon v. Hodnett, 22 Fla. 271.

In California, under the code, it has been *held* that forcible entry and detainer constitute separate causes of action which may be joined if separately stated. Shelby v. Houston, 38 Cal. 410; Valencia v. Crouch, 32 Cal. 339; Treat v. Forsyth, 40 Cal. 484. See Colton v. Jones, 7 Robt. (N. Y. Super. Ct.) 164.

1. **Case and trover** may be joined. Brown v. Dixon, 1 Term Rep. 274, 277; Mast v. Goodson, 3 Wils. 348; Smith v.

gular exception that detinue, though held to be an action *ex delicto*, may be joined with debt, an action *ex contractu*, but may not be joined with an action *ex delicto*.¹ In certain cases at common law, sounding in either tort or contract, the plaintiff was allowed to sue either in case or *assumpsit*, and could join other causes of action in the same form as that in which he elected to bring suit,²

Goodwin, 4 B. & Ad. 413; Samuel v. Judin, 6 East 333; Whyte v. Rysden, Cro. Car. 20; Dobbin v. Foyles, 2 Cr. (C. C. U. S.) 65; Dixon v. Barclay, 22 Ala. 370; Wilkinson v. Moseley, 30 Ala. 562; Rees v. Coats, 65 Ala. 256; Elmore v. Simon, 67 Ala. 526; Mobile Life Ins. Co. v. Randall, 74 Ala. 170; Ferrier v. Wood, 9 Ark. 85; Southern Express Co. v. Palmer & Co., 48 Ga. 85; Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 626; s. c., 18 N. E. Rep. 322; Googins v. Gilmore, 47 Me. 9; Moulton v. Witherell, 52 Me. 237; McConnell v. Leighton, 74 Me. 415; Ayer v. Bartlett, 9 Pick. (Mass.) 156, 161; Beebe v. Knapp, 28 Mich. 53; Bearss v. Preston, 66 Mich. 11; McCahan v. Hirst, 7 Watts (Pa.) 175; Winder v. Northampton Bank, 2 Pa. St. 446; Patterson v. Anderson, 40 Pa. St. 359; Horsely v. Branch, 1 Humph. (Tenn.) 199.

1. **Debt and Detinue.**—"So, debt and detinue may be joined in the same writ, because there are writs in the register in which they are both comprised in the same writ." Bacon's Abridgment, tit. Actions in General, C., p. 69. "So debt and detinue may be joined in the same action, for they are of the same nature; though in 5 Mod. 89 [92], Dalton v. Janson, it was said by the court that it seems strange that debt and detinue should be joined, because those actions have different judgments." Coryton v. Lithebye, 2 Saund. 117 d. "In order to join debt and detinue it seems they must be both founded on contract." Tidd's Practice (9th ed.) *11, note b. Counts in debt and detinue were held to be properly joined in Calvert v. Marlow, 18 Ala. 67; Rucker v. Hamilton, 3 Dana (Ky.) 36, 44; Whitney v. Whitney, 5 Dana (Ky.) 327, 330. See Morrison v. Bedell, 22 N. H. 234, 243; Dame v. Dame, 43 N. H. 37, 43.

Detinue is usually considered an action *ex delicto*. See the article on DETINUE, Am. & Eng. Encyc. of Law, vol. 5, p. 651, § 1.

Trover and detinue may not be joined. Kettle v. Bromsall, Willes 118; Hood v. Hanning, 4 Dana (Ky.) 21. Not

even under the Common Law Procedure act of 1860, unless specially allowed. Mockford v. Taylor, 10 C. B., N. S. 209 (115 E. C. L.).

2. **Causes of Action Joined with Either Counts in Assumpsit or Case.**—In 1802, in an action against a common carrier for negligence, LORD ELLENBOROUGH, C. J., having examined the authorities and decided that the action could sound either in tort or contract, continues: "What inconvenience is there in suffering the party to allege his *gravamen*, if he please, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire. By allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided; and the plaintiff, according as the convenience of his case requires, frames his principal count in such a manner as either to join a count in trover therewith, if he have another cause of action for the consideration of the court other than the action of assumpsit; or to join with the assumpsit the common counts, if he have another cause of action to which they are applicable." Govett v. Radnidge, 3 East 62, 70. Compare Hensworth v. Fowkes, 1 Nev. & Mann. 321; Cobb v. Charter, 32 Conn. 358; Stoyel v. Westcott, 2 Day (Conn.) 418; Bulkley v. Stover, 2 Day (Conn.) 531; Norden v. Jones, 33 Wis. 600; s. c., 14 Am. Rep. 782; Southern Express Co. v. Palmer & Co., 48 Ga. 85; Tregent v. Maybee, 54 Mich. 226; Church v. Mumford, 11 Johns. (N. Y.) 479; Pettit v. Sanger, 2 Pears. (Pa.) 84; Kennaird v. Jones, 9 Gratt. (Va.) 183.

So, it would seem that detinue may be either *ex delicto* or *ex contractu*. See Elger v. Lovell, 1 Woolw. (U. S. C. C.) 102; Shippen v. Tankersley, 13 Fed. Rep. 537. See the Am. & Eng. Encyc. of Law, vol. 1, p. 882, *et seq.*, title ASSUMPSIT; vol. 5, p. 651, *et seq.*, title

and a count will be construed, if possible, to be in the same form as those with which it is joined.¹

(b) JOINDER OF COUNTS IN MIXED AND REAL ACTIONS AT COMMON LAW.—In mixed actions at common law, joinder of actions occurs, but not frequently.² But in real actions there could be but one count.³

3. Joinder as Affected by Statutory Changes in Forms of Action.—

The joinder of different causes of action frequently depending upon the form in which the action had been brought and the several counts framed,⁴ many of the States have greatly modified⁵ the strict rules of common law pleading by abolishing the distinction between various common law actions. These States are Alabama, Delaware, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, Pennsylvania, Tennessee, Vermont, Virginia and West Virginia. The provisions upon this subject in the respective States are

DETINUE, and title TRESPASS ON THE CASE.

1. **Construction of Counts.**—Where a count distinctively in one form of action is joined with counts which are not distinctively in the same form of action, or in a form which may be joined therewith, and at the same time are not clearly in a different form, but allege a cause of action for which suit could be brought in the same form of action as that in which the first count is framed, or in a form which could be joined therewith, the latter counts will be construed to be in the same form of action as the first count, or in a form which could be joined therewith, and objection on the ground of a misjoinder will not be allowed after judgment. *Hensworth v. Fowkes*, 1 Nev. & Mann. 321; *Pharr v. Bachelor*, 3 Ala. 237; *Cobb v. Charter*, 32 Conn. 358; *Talbot v. Brockman*, 1 A. K. Marsh. (Ky.) 555; *Norris v. School District*, 12 Me. 292, 298; *Nat. Exchange Bank v. Abell*, 63 Me. 346; *Swem v. Sharretts*, 48 Md. 408; *Soper v. Jones*, 56 Md. 503; *Phila., Wilmington & Baltimore R. Co. v. Constable*, 39 Md. 149; *Beebe v. Knapp*, 28 Mich. 53; *Bruen v. Ogden*, 3 Harr. (18 N. J. L.) 124; *Church v. Mumford*, 11 Johns. (N. Y.) 479; *Hinds v. Tweddle*, 7 How. Pr. (N. Y.) 278; *Booth v. Farmers & Mech. Nat. Bank*, 65 Barb. (N. Y.) 457; *Miles v. Oldfield*, 4 Yeates (Pa.) 423; *Smith v. Rutherford*, 2 S. & R. (Pa.) 358; *Martin v. Stille*, 3 Whart. (Pa.) 337; *Angus v. Dickerson*, Meigs (Tenn.) 459.

In the same manner, in an action on a false warranty, one may sue in assumption and join the common counts, or in case

and join a count in deceit, etc. *Chitty's Pleadings* (16th ed.) *154; *Lassiter v. Ward*, 11 Ired. L. (N. Car.) 443; *Chamberlain v. Robertson*, 7 Jones L. (N. Car.) 12; *Place v. Merrill*, 14 R. I. 575. The same principle was applied to an action for a deceit in *Jones v. Conoway*, 4 Yeates (Pa.) 109. Though some of the counts in a warranty are in one form of action, and others in another form which cannot be joined to the first, the writ will not be quashed if there be any count which may be sustained, and a recovery in either form would be a bar to an action in the other. The warranty should be amended. *McIntire v. Westmoreland Coal Co.*, 118 Pa. St. 108.

2. *Bouvier's Law Dict.*, tit. JOINDER.

Several counts for waste may be joined in one action. *Haycock v. Warnford*, Poph. 24; s. c., Cro. Eliz. 290.

3. *Bouvier's Law Dict.*, tit. JOINDER.

4. "The joinder in action often depends on the form of the action rather than on the subject matter or cause of action." *Chitty's Pleadings* (2nd ed.), vol. 1, § 222; *Selby v. Hutchinson*, 4 Gilm. (Ill.) 319.

5. **History of Changes in Pleading.**—SIR HENRY MAINE has demonstrated that law has progressed in a certain well defined manner, and this demonstration applies as well to pleading as to any other branch of the law.

A certain system of arbitrary rules having been established, new necessities are met.

1st. By the use of fictions or fictitious forms which evade the existing arbitrary rules, but appear to preserve them.

2nd. By the introduction of equitable

different, but the decisions of the courts have been uniform that in so far as the distinctions between the common law actions have been abolished, the joinder of counts in different forms is admissible, but no further.¹ Many of the States that now practice under

modes of procedure in which the arbitrary rules are openly and avowedly abandoned.

3rd. By the use of direct and positive legislation.

As to these three methods of modifying the arbitrary rules, SIR HENRY MAINE says: "Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted." Ancient Law, ch. 2, p. 25. See Pomeroy's Remedies and Remedial Rights, introductory chapter, pp. 6-9.

1. Distinction Between Forms of Actions.—In so far as distinctions between actions have been abolished by code provisions, the common law rules as to joinder are modified.

Thus, in *Alabama*, the distinction between debt and assumpsit has been abolished. *Knapp's Exr. v. Kingsbury*, 51 Ala. 563. And "all actions on contracts, express or implied, for the payment of money, whether under seal or not, may be united in the same action." Code of Alabama, 1886, § 2672. This, however, does not permit the joinder of counts *ex delicto* with counts *ex contractu*. *Munter v. Rogers*, 50 Ala. 283; *Whilden & Sons v. Merchants and Planters' Nat. Bank*, 64 Ala. 1; *Guilford & Co. v. Kendall*, 42 Ala. 651; *Wilson v. Stewart*, 69 Ala. 302.

By the act of February 17th, 1885, page 125, in Alabama, counts in trespass and trespass on the case may be joined, when they relate to the same subject matter. Code of 1886, p. 594, § 2673.

Delaware.—The distinction between case and trespass has been abolished. Rev. Stat. 1874, p. 648, § 11.

Florida adopted a code in 1870 similar to the code of Dakota, except in (5) the words "or for waste committed thereon" were omitted. Code of Proc. of Florida, § 117. This code was repealed and the old practice revived by the act of February 24th, 1873, P. L. p. 15.

Georgia.—"All claims arising *ex contractu* between the same parties may

be joined in the same action, and all claims arising *ex delicto* may in like manner be joined. Code, 1882, § 3261 (3196) (3185).

A count on an implied contract may be joined with one on a special contract. *Gray v. Bass*, 42 Ga. 270.

Counts for interfering with a right of common of pasturage and to recover damages for killing stock may be joined. *Davis v. Gurley*, 44 Ga. 582.

An action *ex delicto* cannot be joined with a count on an express contract, nor amended so as to be an action *ex contractu*. *Croghan v. New York Underwriters' Agency*, 53 Ga. 109.

In an action of libel a count in trespass for personal injuries in the same transaction cannot be joined. *Ransone v. Christian*, 56 Ga. 351.

Illinois.—The distinctions between the actions of trespass and trespass on the case are abolished. Anno. Stat. (Starr and Curtis), vol. 2, p. 1787, par. 22. Counts in case and trespass therefore may be joined. *Krug v. Ward*, 77 Ill. 603; *Barker v. Koozier*, 80 Ill. 205; but not counts in case and debt. *Confrey v. Stark*, 73 Ill. 187, 190.

Maine.—The distinction between the actions of trespass and trespass on the case is abolished. Rev. Stat. 1883, p. 696, § 15. Counts in case and trespass may therefore be joined. *Moulton v. Smith*, 32 Me. 406; but not counts in trespass *q. c. f.* and case. *Sawyer v. Goodwin*, 34 Me. 419.

Maryland.—In 1856 an act was passed providing that "causes of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment." Acts of 1856, p. 147, § 33.

See *Barr v. White*, 22 Md. 259. This provision was, however, omitted from the codes adopted in 1860 and 1888, which, however, provided certain forms for pleading, and specially provided that those forms or the common law forms could be used at the election of the plaintiff. Pub. Gen. Laws, 1860, p. 523, § 107; *Ibid*, 1888, p. 1114, § 107. This provision of the code was construed to preserve the common law

forms of action and not to permit of joinders forbidden at common law. *Stirling v. Garritee*, 18 Md. 468; *Smith v. State*, 66 Md. 215; s. c., 7 Atl. Rep. 49.

Massachusetts.—"There shall only be three divisions of personal actions:

"*First*. Actions of contract, which shall include those heretofore known as actions of assumpsit, covenant and debt, except for penalties. *Second*. Actions of tort, which shall include those heretofore known as actions of trespass, trespass on the case, trover, and all actions for penalties. *Third*. Actions of replevin.

"The form of declaring in personal actions shall be according to the following particulars:

"4. One count only need be inserted for each cause of action, but any number of breaches may be assigned in each count, and, when the nature of the case requires it, breaches may be assigned in the alternative. Two causes of action not arising on the same contract shall not be embraced in one count except in the count on an account annexed as hereinafter provided.

"5. Any number of counts for different causes of action belonging to the same division of actions may be inserted in the same declaration. Actions of contract and actions of tort shall not be joined; but when it is deemed doubtful to which of those classes a particular cause of action belongs, a count in contract may be joined with a count in tort, averring that both are for one and the same cause of action. Pub. Stat. 1882, pp. 964, 965, §§ 1, 2.

"6. The common counts shall not be used unitedly, but each one of those counts may be used in the form hereinafter prescribed, when the natural import of its terms correctly describes the cause of action. Pub. Stat. 1882, pp. 964-5, §§ 1-2."

The fifth provision above given was construed in *Cunningham v. Hall*, 7 Gray (Mass.) 559; *Hulett v. Pixley*, 97 Mass. 29; *Morse v. Hutchinson*, 102 Mass. 439; *Atwater v. Clancy*, 107 Mass. 369; *Jenkins v. Bacon*, 111 Mass. 373; *May v. Western Union Tel. Co.*, 112 Mass. 90; *Mason v. Field*, 119 Mass. 585; *Clapp v. Campbell*, 124 Mass. 50; *Mahon v. Blake*, 125 Mass. 477; *New Haven & Northampton Co. v. Campbell*, 128 Mass. 104; *Teague v. Irwin*, 134 Mass. 303.

By the act of June 8th, 1887, to go into effect January 1st, 1888, "All

civil actions, whether at law or in equity, except replevin, may be commenced by a bill or petition," and relief both at law and in equity may be asked. There is no express provision as to joinder, but it is provided that all provisions of law relating to pleadings shall apply to such proceedings so far as the same are applicable. Acts Massachusetts, 1887, p. 993, ch. 383.

Michigan.—The action of detinue is abolished. Injuries to person, personal property or rights, or to servant, child or wife, are recovered by an action of trespass on the case, whether the injury was wilful, accompanied by force or not, and whether it was direct or consequential. In all cases arising upon contracts under seal or upon judgments, when an action of covenant or of debt may be maintained, an action of assumpsit may be brought. Howell's Anno. Stat. 1882, § 7758, 7759, 7778, pp. 1942, 1945.

Notwithstanding the above provisions an action of debt may be brought upon a contract under seal or upon a judgment. *Goodrich v. Leland*, 18 Mich. 110. But a count on a judgment, and counts in assumpsit at common law may be joined. *Hogsett v. Ellis*, 17 Mich. 351.

Mississippi.—Adopted a code in 1850 similar to that of Dakota, omitting clauses 1 and 7, and the provisions as to foreclosure of mortgages. Acts of 1850, p. 57, 61, § 9.

This was omitted in the code of 1857, which contained a provision abolishing the distinction between case and trespass, p. 492, § 86. This provision does not seem to be included in the code of 1880.

New Hampshire.—There seems to be no statutory provisions, but it has been decided that counts in contract and tort may be joined in a declaration on a single cause of action. *Whitaker v. Warren*, 60 N. H. 20; *Rutherford v. Whitaker*, 60 N. H. 110; *Crawford v. Parsons*, 63 N. H. 438.

New Jersey.—Since the adoption of the new rules, the joinder of covenant with debt, assumpsit, or trespass on the case, for injuries arising from breaches of contract, is permissible. *Smith v. Miller*, 49 N. J. Law (20 Vr.) 521; s. c., 13 Atl. Rep. 39.

Pennsylvania.—"All demands heretofore recoverable in debt, assumpsit or covenant shall hereafter be recovered in one form of action, to be called an action of assumpsit. And all damages

code provisions had previously passed laws abolishing the distinction between various actions, which laws had been construed in the same manner.¹ The rules of the common law seem still to prevail in New Mexico and Rhode Island, while the practice in Louisiana is peculiar, and is based on the Code Napoleon.²

heretofore recoverable in trespass, trover or trespass on the case shall hereafter be sued for and recovered in one form of action, to be called an action of trespass." Act of May 25th, 1887, P. L. 271; Bright. *Purd. Dig.*, sup. 2369.

Tennessee.—"All contracts may be sued on in the same form of action. All wrongs and injuries to the property and person in which money only is demanded as damages, may be redressed by an action on the facts of the case. Penal actions may be brought in the same form. Whenever the facts of the case entitle the plaintiff to sue for breach of contract, or, at his election, for the wrong and injury, he may join statements of his cause of action in both forms or either." Code 1884, pp. 639, 640, §§ 3440-2.

Under the above provisions counts in assumpsit, tort, and upon the facts of the case, may be joined. *L. & N. R. Co. v. Guthrie*, 10 Lea (Tenn.) 432; and claims for damages by the same trespass to the freehold, to personal property, and to plaintiff himself, may be joined in the same declaration, and even in one count upon the facts of the case. *Shoemaker v. Atkin*, 11 Heisk. (Tenn.), 294; *Burson v. Cox*, 6 Bax. (Tenn.) 360. But see *Waggoner v. White*, 11 Heisk. (Tenn.) 741.

But a count in trespass for personal injuries and a count upon a contract made in settlement of plaintiff's claim for damages for such injuries, is bad for repugnancy. *Henderson v. Boyd*, 85 Tenn. 21.

Vermont.—"Counts in trespass may be joined with counts in trespass on the case, including trover, in one declaration, if for the same cause of action." Rev. Laws Vermont 1880, p. 228, § 912. It is not necessary that the declaration should contain any special allegation that they are for the same cause of action. *Alger v. Curry*, 38 Vt. 382; but it must satisfactorily appear from the declaration itself that the several counts are for the same cause of action. *Black v. Howard*, 50 Vt. 27; *Templeton v. Clogston*, 59 Vt. 628, s. c., 10 Atl. Rep. 594.

Trespass on the freehold and on the

case may be joined. *Hagar v. Brainerd*, 44 Vt. 204.

Virginia.—"In any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." Code of Virginia, 1887, p. 603, § 2901.

Under this section counts in trespass may be joined with counts in case. *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Wornack v. Circle*, 29 Gratt. (Va.) 192.

West Virginia.—Same provision as in Virginia, *supra*. Code, p. 709, § 8. And construed in the same way. *Beckwith v. Mollahan*, 2 W. Va. 477; *Lively v. Ballard*, 2 W. Va. 496. There is but one form of action in justice courts. Code, p. 437, § 49.

1. **States Now Practicing Under Codes**
—**Arkansas.**—All forms of action were abolished, and therefore trespass and case could be joined. *Chrisman v. Carney*, 33 Ark. 316; *Gibbs v. Dickson*, 33 Ark. 107.

Connecticut.—By acts passed in 1836 and 1875 the joinder of case with trespass or assumpsit was allowed when the counts are for the same cause of action. These acts were construed not to allow the joinder of trespass and assumpsit. *McWheeney v. City of Waterbury*, 46 Conn. 295, and it was required that the counts should be for the same cause of action, and an averment that they were for the same cause was not sufficient, if the declaration was repugnant to such an averment. *Boenun v. Taylor*, 19 Conn. 122; *Havens v. Hartford & N. H. R. Co.*, 26 Conn. 225; *Belden v. Granniss*, 27 Conn. 511; *Griffin v. Gilbert*, 28 Conn. 493; *Winnie v. Pond*, 34 Conn. 391.

Indiana.—A statute providing that if a writ is in trespass and the declaration in case, or *vice versa*, the variance is immaterial, was held not to authorize a joinder of counts in trespass and case. *Hines v. Kinnison*, 8 Blf. (Ind.) 119.

Ohio.—When claims, recoverable at common law in an action of trespass, are made recoverable in an action on the case, the two claims may be joined.

2. **New Mexico.**—"The pleadings and practice shall be according to the forms

4. Joinder Under Codes—(a) **PROVISIONS OF THE CODES.**—The joinder of causes of action is regulated by express provisions in the codes of Arizona, Arkansas, California, Colorado, Connecticut, Dakota, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Utah, Washington, Wisconsin and Wyoming.¹ Codes have also been adopted in the District of Columbia, Florida, Maryland and Mississippi, but they

and rules of the common law." Comp. Laws 1884, § 1907. The practices in Louisiana is treated in a separate section, *infra*.

1. Code Provisions as to Joinder—
Arizona.—By the code of 1877 the provisions of the California code were adopted *ipsissimis verbis*, except the last clause as to an action for malicious arrest and prosecution. Compiled Laws Arizona, 1877, § 2500, p. 417. In the code adopted February 14th, 1887, that provision is omitted, and the following adopted: "Only such causes of action may be joined as are capable of the same character of relief. But actions *ex contractu* shall not be joined with actions *ex delicto*. In actions *ex delicto* there shall not be joined actions to recover for injuries to the person, to property or to character, but they shall be sued for separately. Rev. Stat. Arizona, 1877, § 670.

Arkansas.—Several causes of action may be united in the same complaint where each affects all the parties to the action, may be brought in the same county, be prosecuted by the same kind of proceedings, and all belong to one of the following classes:

1st. Claims arising out of contract, express or implied.

2nd. Claims for the recovery of specific real property and the rents, profits and damages for withholding the same.

3rd. Claims for the recovery of specific personal property and damages for the taking or withholding the same.

4th. Claims for partition of real or personal property, or both.

5th. Claims arising from injuries to character.

6th. Claims arising from injuries to person and property.

7th. Claims against a trustee by virtue of a contract or by operation of law." Dig. Stat. Ark., § 5014, p. 982.

California.—"The plaintiff may unite several causes of action in the same complaint where they all arise out of—

"1st. Contracts, express or implied.

"2nd. Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

"3rd. Claims to recover specific personal property, with or without damages, for the withholding thereof.

"4th. Claims against a trustee by virtue of a contract or by operation of law.

"5th. Injuries to character.

"6th. Injuries to person.

"7th. Injuries to property.

"The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

Code of 1851, § 64; code of 1872, § 427.

Colorado.—"The code of civil procedure of Colorado differs from all the rest, and by class first actions may be united for the recovery of real property with damages, rents, profits, etc.; by class second, actions for the recovery of personal property, with damages, etc., and by class third, all actions for damages, whether upon contract or for injuries to property, person or character." Code, § 71 (1883, § 73); Bliss on Code Pleading (2nd ed.), § 112, p. 185.

Connecticut.—"In every civil action not brought before the justice of the peace the plaintiff may include in his complaint both legal and equitable rights and causes of action, and demand both legal and equitable remedies; but where several causes of action are united in the same complaint they must all be brought to recover, either (1) upon contract, express or implied, or (2) for injuries, with or without force to person and property, or either, including a conversion of property to the defendant's use; or (3) for injuries to character; or (4) upon claims to re-

cover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or (5) upon claims to recover personal property specifically, with or without damages for the withholding thereof; or (6) claims arising by virtue of a contract or by operation of law, in favor of or against a party in same representative or fiduciary capacity; or (7) upon claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with the same subject of action. The several causes of action so united must all belong to one of these classes, and, except in actions for foreclosure of mortgages or liens, must affect all the parties to the action, and not require different places of trial, and must be separately stated; and in all cases where several causes of action are joined in the same complaint, or as matter of counter claim or set-off in the answer, if it appear to the court that they cannot all be conveniently heard together, the court may order separate trials of any such causes of action, or may direct that any one or more of them may be expunged from the complaint or answer." Gen. Stat. of Conn. 1888, § 878, p. 211. Adopted in 1879.

Dakota.—The plaintiff may unite in the same complaint several causes of action whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of—

1st. The same transaction or transactions connected with the same subject of action.

2nd. Contract, express or implied; or

3rd. Injuries, with or without force, to person or property, or either; or

4th. Injuries to character; or

5th. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same, or for waste committed thereon; or

6th. Claims to recover personal property with or without damages for the withholding thereof; or

7th. Claims against a trustee by virtue of a contract or by operation of law.

But the causes of action, so united, must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. Dakota Code (Levi-see, vol. 1), § 136, p. 41.

Idaho.—Same as California. Rev. Stat. 1887, § 4169.

Indiana.—"The plaintiff may unite several causes of action in the same complaint when they are included in either of the following classes:

1st. Money demands on contract.

2nd. Injuries to property.

3rd. Injuries to person or character.

4th. Claims to recover the possession of personal property, with or without damages for the withholding thereof, and for injuries to the property withheld.

5th. Claims to recover the possession of real property, with or without damages, rents and profits for the withholding thereof, and for waste or damages done to the land; to make partition of and to determine and quiet the title to real property.

6th. Claims to enforce the specific performance of contracts, and to avoid contracts for fraud or mistakes.

7th. Claims to foreclose mortgages, to enforce or discharge specific liens; to recover personal judgment upon the debt secured by such mortgage or lien; to subject to sale real property upon demands against decedent's estates, when such property has passed to heirs, devisees or their assigns; to marshal assets, and to substitute one person to the rights of another; and all other causes of action arising out of a contract or a duty, and not falling within either of the foregoing classes. But causes of action so joined must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered.

When the plaintiff desires to recover the possession of title papers or other instruments of writing, or correct any mistakes therein, a separate action may be brought therefor; or the possession of such title papers or other instruments of writing may be recovered, or mistakes corrected in any other action, when such recovery or correction would be essential to a complete remedy.

When the action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy and a speedy satisfaction of his judgment, although such other matters fall within some other one or more of the foregoing classes. Where several causes of action are united, belonging to any of the foregoing classes, the court may order separate trials for the furtherance of justice." Rev. Stat. 1888 (My-

ers & Co.), §§ 278, 280 (106-108) (70-72).

Iowa.—Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same party, and against the same party in the same rights, and if suit on all may be brought and tried in that county, may be joined in the same petition; but the court, to prevent confusion therein, may direct all or any portion of the issues joined therein to be tried separately, and may determine the order thereof. Rev. Codes of Iowa, 1888 (Miller), § 2630, p. 912.

In an action to recover specific personal property, damages for the detention may also be claimed, "but there shall be no joinder of any cause of action, not of the same kind, nor shall there be allowed any counter claim." *Ibid*, §§ 3225, 3226, pp. 1093, 1095.

In an action to recover real property, damages for the withholding may be recovered, as well as rents and profits, but there shall be no joinder and no counter claim therein, except of like proceedings, and as provided in this chapter. *Ibid*, §§ 3245, 3250, pp. 1099, 1100.

The action for partition shall be by equitable proceedings, and no joinder or counter claim of any other kind shall be allowed therein, except as provided by this chapter." *Ibid*, § 3277, p. 1104.

Kansas.—Same as Dakota, omitting the words in (5) "or for waste committed thereon," and concluding, "But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens. Comp. Laws, 1885 (Dassler), § (3882) 83, p. 616.

Kentucky.—Substantially the same as Arkansas, omitting the seventh clause. Kentucky Codes, 1888 (Carroll), § 83 (111), p. 57.

Minnesota.—Same as Dakota, omitting in (5) the words "or for waste committed thereon," and in the conclusion, the words "except in actions for the foreclosure of mortgages. Stat. 1878, § 118 (98), p. 723.

Missouri.—An early code allowed the plaintiff to join as many causes as he may have. See *Childs v. Bank of Mo.*, 17 Mo. 213. The present code is substantially the same as Dakota, omitting the provisions as to waste in (5), and as to foreclosure of mortgages in the conclusion, and changing clause 7 so as to

read "claims by or against a party in some representative or fiduciary capacity, by virtue of a contract, or by operation of law." Rev. Stat. 1879, vol. 1, § 3512, p. 601.

Montana.—Same as California, except that the words "and for an injunction to stay waste or injury thereto" are added to clause 2. Comp. Stat., 1887, § 86, p. 80.

Nebraska.—Substantially the same as Dakota, omitting the provision as to waste in (5) and as to foreclosure of mortgages in the conclusion. Comp. Laws, 1885, § 87, p. 640.

Nevada.—Same as California. Gen. Stat. 1885, § 3086, p. 767.

New York.—The original code adopted in 1848 was like the Dakota code, omitting the provision as to waste in (5) and as to the foreclosure of mortgages in the conclusion. Rev. Stat. 1852, vol. 2, p. 509, § 167. The present code adopted in 1877 is as follows:

The plaintiff may unite in the same complaint two or more causes of action whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries, except libel, slander, criminal conversation, or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property, in ejectment, with or without damages for the withholding thereof.
6. For injuries to personal property.
7. Chattels, with or without damages for the taking or detention thereof.
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transactions, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

But it must appear, upon the face of the complaint, that all the causes of action so united, belong to one of the foregoing subdivisions of this section, that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint that they do not require different places of trial. Co. Proc., § 167; N. Y. Ann. Code, 1889, § 484.

North Carolina.—Same as Dakota,

have been repealed.¹ While the provisions of these codes vary,² yet they are substantially the same, and provide for joinder of causes of action when they all arise out of (1) contract express or implied, (2) claims to recover real property with mesne profits and damages, (3) claims to recover personal property with damages, (4) injuries to person, (5) injuries to property, (6) injuries to char-

omitting the words "or for waste committed thereon" in clause 5. Code of 1883, § 267, p. 101.

Ohio.—Same as Dakota, omitting the words "or for waste committed thereon," and substituting the words "and the partition thereof," in clause 5, and concluding, "The causes of action so united must not require different places of trial, and, except as otherwise provided, must affect all the parties to the actions. Rev. Stat. 1890, §§ 5019, 5020, pp. 1262, 1263.

Oregon.—Substantially the same as California, omitting the provision as to waste, and rents and profits in clause 2, and the reference to actions for malicious arrest and prosecutions at the end. Gen. Laws, 1872, p. 124, § 91.

South Carolina.—Same as Dakota, with the omission of the provision as to waste in clause 5. Code, 1888, § 188, p. 128.

Texas.—In *Texas* the Common Law of England was adopted in 1840. See Sayle's *Texas Civil Stat.*, vol. 2, p. 86, art. 3128. But the congress expressly enacted that "the adoption of the common law shall not be construed to adopt the common law system of pleading; but the proceeding in all civil suits shall as heretofore be conducted by petition and answer." *Fowler v. Poor*, Dallam (Tex.), 401, 403-4; Sayle's *Texas Civil Stat.*, vol. 1, p. 399, art. 1185.

It was very early decided that as the common law forms of pleading were not recognized in Texas, all civil actions there are in a strict but not in a technical sense special actions on the case; actions in which the party asserts his right according to the particular facts and circumstances of his case without regard to technical forms. *Carter v. Wallace*, 2 Tex. 206.

"Our laws and the decisions of our courts favor the joinder of all causes of action arising between the same parties in the same right and growing out of the same transaction." *Lyles v. Murphy*, 38 Tex. 75, 79. See *Blair v. Gay*, 33 Tex. 157.

But the Texas system of pleading

does not require nor sanction the blending of various and contradictory rights and causes of action in the same suit. *Herrington v. Williams*, 31 Tex. 448. And the general rule is that a cause of action *ex contractu* and a cause of action *ex delicto* cannot be joined. *Stewart v. Gordon*, 65 Tex. 344.

"In *Texas*, the system, as followed, comes so near that of the Code States, that I have been strongly tempted to embrace it among them." Bliss' Code, Pleading, Pref. to 2nd ed., p. xiv.

Utah.—Same as California laws, 1884, p. 204, § 287.

Washington.—Substantially same as California, omitting the provisions as to waste and rents and profits in clause (2), the phrase "must all belong to one only of these classes" and the provision as to malicious arrest and prosecution in the conclusion. Code, 1881, p. 51, § 102.

Wisconsin.—Same as Dakota, omitting the provision as to waste in clause (5), and the words "except in actions for the foreclosure of mortgages" in the conclusion. Ann. Stat. (S. & B. 1889), p. 1531, § 2647.

Wyoming.—Same as Ohio. Rev. Stat. 1887, p. 562, §§ 2408-9.

1. **Repealed Codes—District of Columbia.**—A code was adopted in 1857, similar to that of Dakota, omitting the words "except in actions for the foreclosure of mortgages. Rev. Code, 1857, ch. 82, §§ 40, 41, p. 348. The writer has been unable to gain access to vol. 18, part 2, of the Rev. Stat. U. S., which contains the Rev. Stat. of the District of Columbia, but he believes this code has been repealed.

Florida, Maryland and Mississippi also adopted code provisions which have been since repealed. See *supra*, note 26, "Distinctions between forms of actions."

2. It must not be forgotten, therefore, that the general principles stated in this article may be inapplicable under the special provisions of the code of a particular State. They are in the main applicable, and in the main the authorities adduced will apply equally

acter, (7) claims against a trustee by virtue of a contract or by operation of law, (8) claims arising out of the same transaction, or transactions connected with the same subject of action, (9) claims to foreclose a lien on real property and recover a personal judgment for any deficiency in the proceeds of the sale, (10) the exercise of the right of eminent domain.¹ As to the first eight of these classes it is uniformly required that "the causes of action so united must all belong to one of these classes, must affect all the parties to the action, and not require different places of trial, and must be separately stated." A number of the States, in which the provisions as to joinder have not assumed the code form or been sufficiently numerous to justify including them within the code States, have authorized by statute joinder in one or more of the above classes. These statutory provisions will be set forth in the discussion of the respective classes.

(b) CAUSES OF ACTION IN SAME CLASS—(1) *Contracts*.—The causes of action to be joined must belong to only one of the above classes, under the express provisions of the various codes,² but all causes of action belonging to the same class may be joined, provided they comply with the code requirement as to affecting all the parties to the action, and are consistent.³ Thus all actions on contracts express or implied, and how-

in all the code States. Care has been taken to note the exceptions, both judicial and statutory, but the provisions of the codes are frequently changed, and the practitioner in every State must not fail to take note of these changes.

1. The code and statutory provisions as to clauses 9 and 10, are stated under their respective sub-headings.

2. *Joinder of Causes in Same Class*.—See the code provisions *ut supra*. The causes of action must belong to only one of the classes. *McCarty v. Fremont*, 23 Cal. 196; *Reynolds v. Lincoln*, 71 Cal. 183; *Keller v. Boatman*, 49 Ind. 104; *Dragoo v. Levi*, 2 Duv. (Ky.) 520; *Townsend v. Coon*, 7 N. Y. Civ. Proc. 56; *N. C. Land Co. v. Beatty*, 69 N. Car. 329; *Williams v. Miller*, 1 Wash. Ter. 88.

When, however, causes of action apparently belonging to different classes arise "out of the same transaction," they come, in some of the States only, under that special code provision. See *Harris v. Avery*, 5 Kan. 146; *Holmes v. Sheridan*, 1 Dill. (U. S. D. C.) 351; *Polly v. Wilkisson*, 5 N. Y. Civ. Proc. 135; *Watts v. Hilton*, 3 Hun (N. Y.) 606; *Carter v. DeCamp*, 40 Hun (N. Y.) 258. See also the opinion of WILLARD, C. J., in *Suber v. Allen*, 13 S. Car. 317, 324-5

The fact that a contract affects the same real estate for injuries to which plaintiff asks damages will not authorize him to join his cause of action for breach of said contract. *Thomas v. Utica & B. R. R. Co.*, 97 N. Y. 245; *Booth v. F. & M. Nat. Bank*, 1 N. Y. S. C. (T. & C.) 45. *Compuré Thompson v. White*, 8 How. Pr. (N. Y.) 520.

3. *The Causes of Action Must be Consistent*.—A cause based on the affirmation of a contract cannot be joined with one seeking to set aside and rescind it. *Neal v. Reynolds*, 38 Iowa 432; *Owens v. Hickman*, 2 Dis. (Ohio) 471.

A cause for share of rents and profits against a cotenant, and a cause averring the relation of landlord and tenant during same period and asking rent, are inconsistent and plaintiff would be compelled to elect. *House v. House*, 29 Minn. 252; *Owens v. Hickman*, 2 Dis. (Ohio) 471. So where plaintiff claims an absolute title to land, and asks damages for obstructing him in the use of it, and particularly in the enjoyment of a private right of way. *Smith v. Hallock*, 8 How. Pr. (N. Y.) 73.

When a contract for sale of stocks provided that the seller might demand return of the stocks on repayment of the price, and that if the buyer should pay more than he paid this seller for the same kind of stocks, he would pay

ever evidenced may be joined, all being included in class one.¹

(2) *Recovery of Real Property; Mesne Profits; Damages; Partition; Taxes; Eminent Domain.*—In an action to recover real property, a count for mesne profits may be joined, not only in all the code States, but by statutory provisions, such joinder is authorized in many of the other States.² The damages recoverable in addition to mesne profits is strictly limited to the damages for

the seller the difference in price, this seller could not sue for a return of the stock, and the payment of such a difference, the two claims being inconsistent. *Stewart v. Huntington*, 2 N. Y. Sup. 205.

A proceeding by *mandamus* cannot be joined with other actions. *Barada v. Inhabitants of Carondelet*, 16 Mo. 323.

A plaintiff cannot unite a cause of action to annul her marriage with defendant on account of a previous marriage to one who is still alive with a cause of action to quiet her title to her separate property in which the defendant claims an interest. *Uhl v. Uhl*, 52 Cal. 250. Compare *Dunbar v. Dunbar*, 1 Cleve. L. Rep. 148.

An action for a divorce on the ground of adultery and for a limited divorce on the ground of cruel treatment cannot be joined. *McIntosh v. McIntosh*, 12 How. Pr. (N. Y.) 289.

Though in *Tennessee* counts in tort and contract may in certain cases be joined in an action on the facts of the case, yet a count in trespass for personal injuries, and a count on a contract in settlement thereof are repugnant and cannot be joined. *Henderson v. Boyd*, 85 Tenn. 21.

When counts are inconsistent, the remedy is by motion to elect. *Keens v. Gaslin*, 24 Neb. 310; *Young v. Edwards*, 11 How. Pr. (N. Y.) 20.

1. Joinder of Causes in Same Class—Contracts.—When each cause of action rests upon a promise to pay, whether implied or not, they are similar in nature and may be joined. *Brown v. Carbonate Bank*, 34 Fed. Rep. 776; *Keller v. Hicks*, 22 Cal. 457; *Buford v. Funk*, 4 G. Gr. (Iowa) 493; *Stewart v. Balderston*, 10 Kan. 130, 143; *Gridley v. Gridley*, 24 N. Y. 130; *Freer v. Denton*, 61 N. Y. 492; *DeWitt v. McDonald*, 58 How. Pr. (N. Y.) 411; *Sutton v. McMillan*, 72 N. Car. 102; *Bowman v. Holladay*, 3 Oreg. 182; *Cureton v. Stokes*, 20 S. Car. 582.

Breaches of the covenants in two deeds of different lands from defendant to plaintiff, may be united in the same

action. *Nichol v. Alexander*, 28 Wis. 118.

A judgment for the payment of money only is a "contract" within the meaning of the codes, and an action thereon may be joined with an action on an express contract. *Childs v. Harris Mfg. Co.*, 68 Wis. 231; s. c., 32 N. W. Rep. 43.

When a contract contains a covenant for stipulated damages, and constitutes the parties partners, judgment for the liquidated damages, and for an account and dissolution of the partnership may be sought in the same action. *Stone v. Fouse*, 3 Cal. 292.

But causes of action accruing after suit brought may not be joined with causes accruing before, even by amendment. *Wurlitzer v. Suppe*, 38 Kan. 31; s. c., 15 Pac. Rep. 863; *Taylor v. Moran*, 4 Met. (Ky.) 127. See *Union R. R. & Trans. Co. v. Traube*, 59 Mo. 355; *Weinland v. Cochran*, 9 Neb. 480.

2. Recovery of Real Property, Mesne Profits and Damages.—In addition to the provisions upon this subject in the codes set forth in note 28, *supra*, there are special provisions in a number of the States allowing a count for mesne profits to be joined in an action of ejectment. Code of Georgia, 1882, § 3356, (3280), (3269), (*contra* prior to the adoption of the code. *Austell v. Swann*, 74 Ga. 278, 284); *Howell's Anno. Stat. Michigan* 1882, § 7829, p. 1957; *Rev. Code Mississippi* 1880, § 2512, p. 681; *Rev. Stat. Missouri*, 1879, vol. 1, § 2252, p. 376; *Comp. Laws New Mexico* 1884, § 2265; *New York Anno. Code* 1889, § 1496-7, pp. 541-2. *Lyles v. Murphy*, 38 Tex. 75; *Rev. Laws Vermont* 1880, p. 285, § 1251; *Code of Virginia*, p. 662, § 2751; *Code of West Virginia*, p. 685, § 30; *Anno. Stat. Wisconsin* (S. & B. 1889), p. 1766, § 3082; *Stat. 1 George IV*, ch. 87, § 2; *Rev. Stat. Maine* 1883, p. 817, § 11.

In *Maine*, the mesne profits up to the date of the writ of entry must be claimed in that action. They cannot be sued for in any subsequent action of any form. But mesne profits accrued

withholding the property, except in so far as a joinder of a claim for waste is allowed under the codes or statutes.¹ It would seem that a specific piece of real property, with mesne profits and damages, may be claimed in one count, as constituting one cause of action.² A claim for mesne profits may not be joined in an action unless authorized by statute, but such joinder is permissive simply and not compulsory.³ Real property may be recovered

subsequent to that date may be recovered in a separate action of trespass therefor. *Larrabee v. Lambert*, 34 Me. 79; *Larrabee v. Lambert*, 36 Me. 440. Pub. Gen. Laws Maryland 1888, vol. 2, p. 1128, § 69, allows recovery of mesne profits up to the time of the determination of the case. Plaintiff may recover mesne profits from the time his title accrued, and damages for waste. Pub. Stat. Massachusetts 1882, p. 1019, § 12. See also the article EJECTMENT, subtitle 4, 30; DAMAGES and MESNE PROFITS, Am. and Eng. Encyc. of Law, vol. 6, p. 217.

In *Illinois*, mesne profits are recovered by filing a suggestion of claim after recovering judgment in ejectment. Anno Stat. (Starr & Curtis), vol. 1, p. 992, par. 43. This procedure abolishes the action of trespass for mesne profits. *Harding v. Larkin*, 41 Ill. 413, 424. But this suggestion is substantially a new suit, and not a continuation of the action of ejectment. New service, pleadings, trial and judgment are required. *Ringhouse v. Keener*, 63 Ill. 230.

In *Pennsylvania*, mesne profits may be recovered in ejectment by ancient practice. *Boyd v. Cowan*, 4 Dall. (Pa.) 138; *Battin v. Bigelow*, Peters (U. S. C. C. Pa.) 452; *Damson v. McGill*, 4 Whart. (Pa.) 230; *Cook v. Nicholas*, 2 W. & S. (Pa.) 27; *Bayard v. Inglis*, 5 W. & S. (Pa.) 465.

Distinct parcels of land, if covered by one title, may be included in one complaint, and claims for the rents and profits and damages may also be united. *Beard v. Federy*, 3 Wall. (U. S.) 478. See also the cases cited *infra*, under II, 4 C, note 6, RECOVERY OF REAL PROPERTY, JOINDER OF DEFENDANT.

1 **Damages—Waste.**—Recovery of the possession of land and damages for a forcible eviction therefrom cannot be joined. *Mayo v. Madden*, 4 Cal. 27.

A claim for the recovery of real estate sold under a decree in equity cannot be joined in the same action with a claim against the clerk and master for the purchase money. *Brown v.*

Coble, 76 N. Car. 391; *Compare Heggie v. Hill*, 95 N. Car. 303.

Recovery of possession of land cannot be united with a claim for rents and profits not connected with the withholding of such possession. *Tompkins v. White*, 8 How. Pr. (N. Y.) 520. Nor a claim for consequential damages arising from a change of a road. *Bowles v. Sacramento T. & P. R. Co.*, 5 Cal. 224.

Damages for waste are not recoverable in the same action unless by statute. *Bottomf v. Wise*, 53 Ind. 32; *Woodruff v. Garner*, 27 Ind. 4. See *Simpson v. Greely*, 8 Kan. 586; *Hillman v. Baumback*, 21 Tex. 203.

2 **One Count Sufficient.**—Ejectment, mesne profits and damages were recovered in one action, perhaps in one count. *Beard v. Federy*, 3 Wall. (U. S.) 478; *Sullivan v. Davis*, 4 Cal. 291; *Spahr v. Nicklaus*, 51 Ind. 221; *Burrows v. Holderman*, 31 Ind. 412; *Black v. Drake*, 281 Kan. 482; *Armstrong v. Hinds*, 8 Minn. 254; *Merrill v. Dearing*, 22 Minn. 376; *Lord v. Dearing*, 24 Minn. 110; *Winona & St. Peter R. Co. v. St. Paul & Sioux City R. Co.*, 26 Minn. 179; *Garner v. Jones*, 34 Miss. 505. But see *Larned v. Hudson*, 57 N. Y. 151.

3 **Mesne Profits.**—Mesne profits cannot be recovered in a proceeding at law for assignment of dower unless authorized by statute. *Austell v. Swann*, 74 Ga. 278. Allowed in Michigan. *Howell's Anno. Stat. Michigan* 1882, § 7829, p. 1957; §§ 5756, 5757, p. 1496. And under the code provisions as to the recovery of real property. *Van Name v. Van Name*, 23 How. Pr. (N. Y.) 247.

Mesne profits may be recovered in a separate action. *Nash v. Sullivan*, 32 Mich. 189; s. c., 20 N. W. Rep. 144; *Rev. Code Mississippi* 1880, § 2512, p. 681. *Winings v. Wood*, 53 Ind. 187; *Walker v. Mitchell*, 18 B. Mon. (Ky.) 541; *McGrew v. Woodrow*, 1 Bush (Ky.) 602; *Vandervoort v. Gould*, 36 N. Y. 639. *Livingstone v. Tanner*, 12 Barb. (N. Y.) 481. Not when determined in the ejectment proceeding. *Rev. Stat.*

and a partition made thereof in one action under several of the codes; a separate action is necessary where there is no such provision.¹ The right to join a claim for a personal judgment or lien in an action of partition is disputed, but mesne profits have been held recoverable, a specific performance obtained, and real and personal property partitioned in the same proceeding.² Different claims for taxes on land have been held to be properly joined,³ and by statute in a number of States, in proceedings by a corporation to condemn land under its charter right of eminent domain, all lands in the county may be joined.⁴

Ohio 1890, § 5792; Rev Stat. Wyoming 1887, § 2998, p. 660. And the common law action is held to be superseded in *Massachusetts*. *Raymond v. Andrews*, 6 Cush. (Mass.) 265; and in *Maine* see cases cited *supra*.

1. **Partition** may be sought in an action of ejectment, the two constituting only one enlarged cause of action. *Scarborough v. Smith*, 18 Kan. 399, relying on the doctrine laid down in *Tabler v. Wiseman* 2 Ohio St. 207, that "a right of entry will entitle a party to the proceeding in partition, without the actual seisin required in some other States. Such joinder is allowed by the code of Ohio.

Such a joinder was held improper in *Gott v. Powell*, 41 Mo. 416; *Moreau v. Detchemendy*, 41 Mo. 431; *Lambert v. Blumenthal*, 26 Mo. 471; *Simpson v. Wallace*, 83 N. C. 477.

2. **Partition**.—In a proceeding for a partition of real estate, the complaint may not also include the enforcement of a lien against the residue not awarded to the petitioner. *Rennick v. Chandler*, 59 Cal. 354. *Contra*, *Bogardus v. Parker*, 7 How. Pr. (N. Y.) 305.

In a suit for division of a certain estate, which requires that all the heirs should be made parties, a plaintiff cannot join a claim against one of the heirs for services and another claim for the value of certain property converted by two of the other heirs. Such claims are inconsistent with the demand for partition of the community estate among the heirs. *Oliver v. Robertson*, 41 Tex. 422.

Partition and an accounting of rents and profit may be joined. *Finch v. Baskerville*, 85 N. Car. 205.

Partition of real estate in which a decedent had a life estate and an account and distribution of said decedent's estate may not be joined. *Shanks v. Mills*, 25 S. Car. 358. It seems this would have been allowed had decedent had a fee in said realty.

Partition may be asked though the title of one of the parties is but an inchoate right of dower. *Diehl v. Lambert*, 9 N. Y. Civ. Proc. 267.

Partition and a specific performance may be sought in the same action. *Hall v. Hall*, 38 How. Pr. (N. Y.) 97.

Real and personal property may be partitioned in the same action. *Prentice v. Janssen*, 7 Hun (N. Y.) 86.

3. **Taxes**.—If several tracts of land belonging to the same owner be separately assessed, but under one assessment, the taxes assessed on the several tracts may be recovered in one action. *People v. Hagar*, 52 Cal. 171.

Two taxes assessed on the same land at different times may be recovered in the same action. *Land Dist. v. Feck*, 60 Cal. 403. But two causes of action for enforcing liens for two street assessments on the same lot at different times and on different contracts, and for improving the same street, cannot be joined in the same suit. *Dyer v. Barstow*, 50 Cal. 652.

Under the provisions of the Iowa code, but one suit need be instituted against all the owners of lots against which a municipal assessment had been made. *Des Moines v. Stephenson*, 19 Iowa 507.

4. **Eminent Domain**.—In proceedings to condemn land under the right of eminent domain, when such right is exercised under corporate charters, there is a provision in some of the States to the effect that "All panels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them, to suit the convenience of parties." Code & Stat. California, vol. 3 (Deering), § 1244, p. 482; Rev. Stat. Idaho 1887, § 5216, p. 577; compare Rev. Code Iowa, 1888 (Miller), § 1245, p. 432; Stat. Minnesota 1878, § 14, p. 371; Rev. Stat. Missouri

(3) *Recovery of Personality; Damages; Injuries; Trusts.*—In like manner claims included in classes (3), recovery of personal property and damages, (4) injuries to person, (5) injuries to property, (6) injuries to character, and (7) claims against a trustee, may severally be joined.¹

1879, vol. 1, § 892, p. 160; Comp. Stat. Montana, 1887, § 604, p. 216; Comp. Laws 1884, New Mexico, § 2713, Rev. Stat. Ohio 1890, § 6416, p. 1586; § 2236, p. 503; Code Utah (Laws 1884), § 1111, p. 350; Rev. Laws Vermont 1880, p. 644, § 3359, *et seq.*; Code of Virginia, 1887, § 1085, p. 310, Code of West Virginia 1887, p. 310, § 4, p. 486, § 7; Anno. Stat. Wisconsin (S. & B. 1889), § 1846, p. 1106; Rev. Stat. Wyoming 1887, § 548, p. 204.

Separate appeals taken from awards made by the commissioners appointed to appraise the value of the land so taken may be consolidated into one action. *Washburn v. Milwaukee & L. W. R. R. Co.*, 59 Wis. 364. *Contra*, without the above statute, *Ortman v. Union Pac. Ry. Co.*, 32 Kan. 419. A right of way is a parcel of land within the meaning of the above statute, and therefore a right of way across a right of way previously acquired by another railroad, and over lands owned in fee may be united in one suit. *California South. R. R. Co. v. South. Pac. R. R. Co.*, 67 Cal. 59.

Damages for other injuries may not be asked by a landowner in his suit against a corporation for damages for lands taken. See *Allen v. Wilmington & Weldon R. R. Co.*, 102 N. Car. 381, *Blesch v. Chicago & N. W. Ry. Co.*, 44 Wis. 593. See the article EMINENT DOMAIN, subtitle XIV (3), JOINDER OF CLAIMS, Am. & Eng. Encyc. of Law, vol. 6, p. 611.

1. *Recovery of personal property and damages for the conversion thereof allowed in one suit.* *Baals v. Stewart*, 109 Ind. 371; *Pharis v. Carver*, 13 B. Mon. (Ky.) 236.

Injuries to Person.—All actions for personal injuries can be joined in the same complaint, as for malicious prosecution and false imprisonment. *Carl v. Ayers*, 53 N. Y. 14; *Dusenbury v. Keiley*, 85 N. Y. 383, 389; *Bradner v. Faulkner*, 93 N. Y. 515; *Marks v. Townsend*, 97 N. Y. 590; *Barr v. Shaw*, 10 Hun 580, *Haight v. Webster*, 18 N. Y. W. D. 108; *Doyle v. Russell*, 30 Barb. (N. Y.) 300. These cases clearly overrule *Nebenzahl v. Townsend*, 61 How. Pr. (N. Y.) 353.

Injuries to Property.—See *Freeman v. Webb*, 21 Neb. 160. *Jensen v. Union Pac. R. Co. (Utah)*, 4 Law Rep. Anno. 724; s. c., 21 Pac. Rep. 994.

Fraudulently inducing one to sign a bond and mortgage is an injury to personal property and may be joined with an action for a fraudulent conversion of personality. *Cleveland v. Barrows*, 59 Barb. 374; *DeSilver v. Holden*, 6 N. Y. Civ. Proc. 121; s. c., 50 N. Y. Super. Ct. (18 J. & S.) 236.

When the gist of an action is negligence, both the direct and consequential damages thereby occasioned may be recovered in the same action. *Fraler v. Sears Union Water Co.*, 12 Cal. 555.

Trespasses.—Different and distinct injuries to one and the same property, or to different properties, whether the same be personal or real, or both, may be joined in the same action. *More v. Massini*, 32 Cal. 590; *Strohburg v. Jones*, 78 Cal. 381; *Brickner v. Woolen Mills Co. v. Henry*, 73 Wis. 229.

Some of the codes place injuries both to property and person in one class, in which case all such injuries could be joined, since they belong to the same class. In *New York*, however, injuries to real property, to personal property and to the person, now constitute separate classes, and therefore may not be joined. See *Whatling v. Nash*, 41 Hun (N. Y.) 579; *Durkee v. Saratoga & Washington R. R. Co.*, 4 How. Pr. (N. Y.) 226.

Injuries to Character.—See *White v. Cox*, 46 Cal. 169.

An entire conversation or libellous publication constitutes but one cause of action. *Cracraft v. Cochran*, 16 Iowa 301. But separate conversations or publications constitute different causes of actions which may be joined, but should be separately stated. *Swinney v. Nave*, 22 Ind. 178; *Fleischmann v. Bennett*, 87 N. Y. 231; *Alpin v. Mor-ton*, 21 Ohio St. 536.

Slander and malicious prosecution for the offence charged in the slander were held properly joined, both being injuries to character. *Martin v. Mat-tison*, 8 Abb. Pr. (N. Y.) 3; *Hull v. Vreeland*, 42 Barb. (N. Y.) 543; s. c., 18

(4) *Same Transaction, or Transactions Connected with the Same Subject of Action.*—This provision of the code is difficult to discuss. The cases decided give but little aid in its interpretation. There are various general phrases used, but their application greatly varies.¹ It seems that the proceedings connected with a contract for the sale of land and other contracts all constitute one transaction.² So where there is but one subject of action,

Abb. Pr. (N. Y.) 182. *Shore v. Smith*, 15 Ohio St. 173. Slander and libel may be joined. *Martin v. Mattison*, 8 Abb. Pr. (N. Y.) 3. *Noonan v. Orton*, 32 Wis. 106.

Trusts.—A claim for a resulting trust for money wrongfully withheld may be joined with a similar claim for money wrongfully exacted. *Kraemer v. Deustermann*, 37 Minn. 469; s. c., 35 N. W. 276.

So for shares of stock held under a parol trust and fraudulently obtained. *Williams v. Lowe*, 4 Neb. 382.

Various breaches of the same trust may be joined. *Price v. Brown*, 60 How. Pr. (N. Y.) 511.

An action relating to different separate trusts created by the same will cannot be joined, when the beneficiaries are different and have no common interest. *Weeks v. Cornwall*, 39 Hun (N. Y.) 643.

A claim to enforce an express or implied trust may be joined with a claim to enforce a vendor's lien. *Burt v. Wilson*, 28 Cal. 632.

1. Same Transaction or Subject of Action.—Mr. Pomeroy says that "little aid can be derived from judicial decisions" in construing the clause as to joinder of actions arising out of the same transaction or transactions connected with the same subject of action. Having referred to the judicial interpretation of these words in *N. Y. & N. H. R. R. v. Schuyler*, 17 N. Y. 592, 604; *Sweet v. Ingerson*, 12 How. Pr. (N. Y.) 331; *Anderson v. Hill*, 53 Barb. (N. Y.) 238; *Ogdensburgh etc. R. R. v. Vermont etc. R. R.*, 63 N. Y. 176; *Adams v. Bissell*, 28 Barb. (N. Y.) 382; *Palen v. Bushnell*, 46 Barb. (N. Y.) 24; *Jones v. Steamboat Co.*, 17 Cal. 487, 497, and other cases, he then proceeds to analyze the subject most thoroughly, showing that unity of time does not make two events one transaction, and that the term "subject of action" was employed "as synonymous with, or rather in the place of, subject matter of the action." See his elaborate and thorough discussion of the question in

Remedies and Remedial Rights (2nd ed.), pp. 505, 521. See also *Bliss on Code Pleading* (2nd ed.), § 125, p. 207.

The language of this clause has been said to be "well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice." *COMSTOCK, J.*, in *New York & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592, 604. The word "transactions" probably means whatever may be done by one person which affects another's rights, and out of which a cause of action may arise. *Scarborough v. Smith*, 18 Kan. 399, 406.

When the causes of action constitute a series of transactions connected together and forming one course of dealing, all tending to one end, they are properly joined. *King v. Farmer*, 88 N. Car. 22; *Board etc. of Douglas Co. v. Wallridge*, 38 Wis. 179.

2. A vendor of land who had given a note secured by a mortgage on other land, to protect the vendee against an encumbrance on the land sold, may in the same suit recover balance of purchase money due him, the remainder of the note, and the discharge of the mortgage, the encumbrance having been removed, and all matters held to constitute one transaction. *Montgomery v. McEwen*, 7 Minn. 351. To same effect *Connor v. Board of Education of St. Anthony*, 10 Minn. 439.

When the subject is the recovery of certain land, or the amount of the purchase money therefor, under a contract to convey, several causes of action against parties with distinct and separate interests may be joined, because a general right is claimed arising out of a series of transactions tending to one end. *Young v. Young*, 81 N. Car. 91. *Compare Heggie v. Hill*, 95 N. Car. 303.

In a transaction for sale of land, a change subsequently made in the mode of payment and security required does not change the character of the trans-

the circumstances connected with it may all be joined.¹ But unity of time will not make two events one transaction, and the transactions must really be the same;² and even when they are the same a local cause of action cannot be blended with a transitory cause.³

(5) *Foreclosure of Liens and Personal Judgment.*—Several proceedings to foreclose a mortgage may be joined if on the same

action, or divide it into several transactions. *Montgomery v. McEwen*, 7 Minn. 351.

It is not error to join in the same suit claims for property converted, and for damages proximately resulting from a breach of contract, when the matters relied on for a recovery are connected with and grew out of the same cause of action and subject matter in dispute. *Milliken & Co. v. Callahan Co.*, 69 Tex. 205; *Houston & Texas Cent. R. Co. v. Graves*, 50 Tex. 181.

In a proceeding to cancel fraudulent certificates of stock having a common origin and ground of invalidity, all the holders thereof may be joined, however different their rights and their mode of acquiring said stock may be. *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592.

1. When the subject of the action is the disherison of the plaintiff, a cause arising from duress over the ancestor in making the will, and a cause arising from false representations inducing plaintiff to waive objections to the probate of the will may be joined. *Hay v. Hay*, 13 Hun (N. Y.) 315.

When the subject is a breach of trust, various breaches may be joined. *Price v. Brown*, 60 How. Pr. (N. Y.) 511.

When the subject was a breach of trust by A and B, executors of M, and by A alone, administrator of N, sole degatee of M, a joint action against A and B was allowed, it being impossible to determine A's liability as administrator without settling the accounts of A and B as executors. *McLachlan v. Staples*, 13 Wis. 448.

When a sheriff wrongfully detains property levied on, and injures it, the two causes of action arise out of the same transaction. *Smith v. Orser*, 43 Barb. (N. Y.) 187.

Causes of action for (1) harboring and maintaining plaintiff's wife; (2) conversion of personal property belonging to plaintiff, *jure mariti*; (3) inducing wife, while harbored, to convey land to defendant; (4) conversion of certain personality included in a mar-

riage settlement may be joined as being transactions connected with the same subject of action. *Hamlin v. Tucker*, 72 N. Car. 502.

When two sales are made for taxes, one by the treasurer and another by his deputy, they are "transactions connected with the same subject of action," and causes of action thereon may be joined. *Freeman v. Webb*, 21 Neb. 160.

Where plaintiff had done some work for A on certain logs, and at another time he had done some work for B on the same logs, he may join A and B in one suit, praying judgment for a lien upon the logs for the entire sum, and a personal judgment against A and B respectively for the sum for which they were personally liable. *Collins v. Cowan*, 52 Wis. 634.

2. Where a slander and an assault and battery occurred at the same period of time it by no means follows that each cause of action arose out of the same transaction. There are two transactions, physical force and the utterance of defamatory words. As injuries to person and character cannot be united, these two cannot be joined. *Anderson v. Hill*, 53 Barb. (N. Y.) 238, overruling *Brewer v. Temple*, 15 How. Pr. (N. Y.) 286, *Dragoo v. Levi*, 2 Duv. (Ky.) 520.

When A was induced by the fraudulent representations of Y to sell stock to X and accept X's notes, which were worthless, and when he received notes from X on a sale to X of Y's stock in the same corporation, A acting therein as Y's agent, and unqualifiedly endorsing these latter notes, the cause of action for damages for the fraudulent representations and the cause of action to be relieved from his endorsement of the second notes do not arise out of the same transaction, and are improperly joined. *Leidersdorf v. Second Ward Savings Bank*, 50 Wis. 406.

3. A local cause of action cannot be blended with a transitory cause, although arising out of the same transaction. *Neal v. Reynolds*, 38 Kan. 432. See also the cases cited, *infra*, under subdivision II, 4 (d) of this article, wherein "cause of action" is defined.

property, and the parties are the same.¹ A proceeding to establish a mechanics' lien may not be united with any other proceeding,² except that by statute, and in some States even without a statute, a personal judgment for the demand for which plaintiff claims a lien may be sought in the same proceeding wherein the establishment of the lien is sought.³ A mortgage cannot be foreclosed and a judgment for the deficit, if any, entered against the mortgagor, if such a joinder is not expressly authorized,⁴ unless such a joinder would be permissible as arising out of the same transaction or transactions connected with the same subject

1. Foreclosure of Mortgages.—Several mortgages on same property to whom the parties are the same may be foreclosed in one action. *Morrissey v. Leddy*, 11 N. Y. Civ. Proc. 438. See also *Bartlett v. Boyd*, 34 Vt. 256.

Several mortgages on different properties, when the parties liable on the debts secured are the same, were allowed to be foreclosed in one action in *Dial v. Gary*, 24 S. Car. 572.

2. Liens.—The action for mechanics' lien shall be prosecuted by equitable proceedings, and therewith shall no other cause of action be joined. Rev. Codes Iowa 1888 (Miller), § 2510, p. 862. Compare *Allen v. Ham*, 63 Me. 532, from which it seems that such counts can be joined, but on recovery of judgment for both the lien is forfeited. In Iowa, however, such other cause of action may be joined by consent, though several parties had united in the procedure to enforce the lien. *Hines v. Whitebreast C. & M. Co.*, 48 Iowa 296. It cannot be joined without such consent. *Sweetzer v. Harwick*, 67 Iowa 488.

3. Liens on Realty and Personal Liability—Mechanics' Liens.—It is not a misjoinder of counts to unite both the contractor and owner in the complaint of a material man to enforce his lien. *Trammell v. Hudmon*, 78 Ala. 222; *Trammell v. Hudmon*, 86 Ala. 472. And the plaintiff may have a personal judgment, though he fails to establish his lien. *Bedsole v. Peters*, 79 Ala. 133; *Brugman v. McGuire*, 32 Ark. 734; *Wilkerson v. Rust*, 57 Ind. 172; *Flynn v. Des Moines & St. L. R. Co.*, 63 Iowa 490; *Collins v. Cowan*, 52 Wis. 634.

The right to join these two counts was doubted in *Cox v. West Pac. R. Co.*, 47 Cal. 87; *Charbonneau v. Heuni*, 24 Wis. 250; and it was expressly denied in *Lewis v. Williams*, 3 Minn. 151; *Davis v. Schmidt*, 22 S. Car. 128.

Under the New York code it has been held that the personal judgment can only be had in case the lien is established. *Bouroughs v. Tostevan*, 75 N. Y. 567.

In a number of States this joinder is now authorized by statute as follows: "In an action on a mortgage or lien the judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally." Dig. of Stat. Arkansas, § 5170, p. 1002. To same effect are Comp. Laws Kansas 1885 (Dassler), § (4210), 399, p. 653; Kentucky Codes 1888 (Carroll), § 376 (406), p. 189; Howell's Anno. Stat. Michigan 1882, §§ 6702, 8386, pp. 1732, 2065; Rev. Stat. Missouri 1879, vol. 1, §§ 3185, 3306, pp. 536, 564; Comp. Laws New Mexico 1884, § 1531; New York Anno. Code 1889, §§ 1627, 1739, pp. 581, 619; Rev. Stat. Ohio 1890, § 5021, p. 1263; Sayles' Texas Civil Stat., vol. 1, art. 1340, p. 447. See *Delespine v. Campbell*, 52 Tex. 4; Rev. Stat. Wyoming 1887, p. 562, § 2410.

In *Connecticut*, in an action on a lien, judgment for any deficiency after the sale may be rendered "against any party liable to pay the same who is a party to the cause and has been duly served with process or appeared therein, and all such persons may be made parties." Gen. Stat. 1888, § 3028, p. 666. See Anno. Stat. Wisconsin (S. & D. 1889), § 3324, p. 1851; *Huse v. Washburn*, 59 Wis. 414; *Edleman v. Kidd*, 65 Wis. 18.

4. Mortgage Foreclosures. Personal Judgment.

A mortgage could not be foreclosed and personal liability determined in same action unless allowed by statute. *McKee v. Pope*, 18 B. Mon. (Ky.) 548; *Doan v. Holly*, 25 Mo 357; s. c., 26 Mo. 186.

Previously in proceedings in equity to foreclose a mortgage, the court could order an execution for the deficiency, if

of action.¹ Such a judgment is, however, expressly authorized by the statutes and codes of most of the States against the mortgagor,² and in many States the person or persons, parties to the action and duly served with process, who are liable for the debt secured by the mortgage;³ such a judgment may also, in

any, but could not enter a judgment therefor which would be a lien. *Hamilton v. Jefferson*, 13 Ohio 427; *Myers v. Hewitt*, 16 Ohio 449.

1. In *Wisconsin*, the practice of uniting the legal cause of action for the debt with the equitable remedy of foreclosure was introduced and prevailed in the territory before the adoption of the State constitution. *Jaine, J.*, in *Gamble v. Loop*, 14 Wis. 461, 465; citing statutes of 1839, p. 292, § 82.

The Rev. Stat. of Wis. 1849, ch. 84, § 77, expressly provided for the entry of judgment for the deficiency against the mortgagor. This provision was omitted from the revision of 1858. Notwithstanding that omission, where the mortgagor is the sole defendant, a judgment for the deficiency could be entered against him, because the two causes of action arise out of the same transaction, and affect all the parties to the controversy. *Sauer v. Steinbauer*, 14 Wis. 70. But the two causes of action were not allowed to be joined unless they affected all the parties. *Jesup v. City Bank of Racine*, 14 Wis. 331; as where there were different parties to the original debt and all are made defendants. *Cory v. Wheeler*, 14 Wis. 281; *Stilwell v. Kellogg*, 14 Wis. 461; *Farsi v. Goetz*, 15 Wis. 231.

The omission in the revision of 1858 was supplied by the act of 1862, ch. 243, P. L. 143, allowing entry of judgment against the defendant or defendants who executed the note, bond, or other evidence of debt, accompanying the mortgage. See *Connecticut Mut. Life Ins. Co. v. Cross*, 18 Wis. 109.

2. **Statutory Provisions.**—The California code having provided for the action to foreclose a mortgage and for the sale of the mortgaged property, continues: "And if it appear from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt." Code of Civil Proc., § 726; *Deering's Anno. Code and Stat.*, vol. 3, p. 328; Similar provisions in Rev. Code Dist. of Columbia, 1857,

ch. 101, § 3, p. 408; Rev. Stat. Idaho, 1887, § 4520, p. 503; Rev. Codes Iowa 1888 (Miller), §§ 3321, 3322, pp. 1111, 1112; Stat. Minnesota 1878, § 33 (30), p. 846 (in 1861 the law of Minnesota was the same as in Indiana, *Nichols v. Randall*, 5 Minn. 304); Comp. Stat. Montana 1887, § 358, p. 158; Comp. Stat. Nebraska 1885, § 847, p. 726; Gen. Stat. Nevada 1885, § 3270, p. 810; See *Weil v. Howard*, 4 Nev. 384; Rev. Stat. Ohio, 1890, § 5021, p. 1263; Laws Utah 1884, p. 268, § 606.

3. In several of the States it is expressly provided that judgment for the deficiency may be entered against the mortgagor and his surety or any person liable to pay the debt secured by the mortgage. *Dakota Code* (1 Levisce), §§ 136, 617, 619, pp. 41, 164-5; *North Carolina Code* 1883, § 267, p. 101; *South Carolina Code* 1888, p. 128, § 188; *Indiana Rev. Stat.* 1888 (*Myers & Co.*), § 1097 (714) (633); *Michigan How. Anno. Stat.* 1882, §§ 6702-4, pp. 1732-3; *New Jersey Rev.* 1877, p. 118, § 76; *New York Anno. Code* 1889, § 1627, p. 581; *Wisconsin Anno. Stat.* (S. & B. 1889), p. 179, § 3156; *Anno Stat. Illinois* (*Starr & Curtis*), vol. 2, p. 1642, par. 16.

The parties to a note or bond may be joined in a suit thereon, and a mortgage given by one to secure said note or bond may be foreclosed in the same suit. *Eastman v. Turman*, 24 Cal. 379; *Thorne v. Newby*, 59 How. Pr. (N.Y.) 120; *King v. Safford*, 19 Ohio St. 587; *Potter v. Hussey*, 1 Utah 249.

So the maker of a note, and a mortgage given by him and a third party. *Ball v. Nash*, 55 Ind. 9.

The guarantor of a note may not be joined unless the statute authorizes such joinder. *Borden v. Gilbert*, 13 Wis. 670.

If a mortgage is assigned as a pledge for the payment of the debt of the mortgagee, the assignee may unite in the same action his claim against the mortgagor and mortgagee, and persons having liens on the mortgaged premises. *Farwell v. Jackson*, 28 Cal. 105.

In an action for breach of contract, to secure the performance of which the

some States, be entered against subsequent purchasers from the mortgagor who have assumed the payment of the mortgage debt.¹ Similar joinders have been allowed in proceedings on a vendor's lien, for a legacy charged on land, and for the foreclosure of a lien

obligor had executed a mortgage, it is not a misjoinder to ask a foreclosure of the mortgage. *Stapleton v. King*, 40 Iowa 278.

In *Michigan, Oregon and Washington*, the mortgagor, surety etc., must have made an agreement to pay to support a personal judgment, and such agreement will not be implied. *Howell's Anno. Stat.* 1882, § 5656, p. 1458. *Howe v. Lemon*, 37 Mich. 164; *Gen. Laws Oreg.* 1872, p. 196, § 410, p. 516, § 7; *Code of Washington*, 1881, pp. 135-6, §§ 610, 611, 619.

The provisions as to a personal judgment against the mortgagee do not apply to cases where the mortgagors were not personally liable for the debt, as where mortgages were executed by others than the debtor, as collateral security, etc. *Chittenden v. Gossage*, 18 Iowa 157; *Corry v. Gaynor*, 21 Ohio St. 277; *Fleming v. Kerkendall*, 31 Ohio St. 568. Nor where the mortgagor was not served with process. *Wood v. Stanberry*, 21 Ohio St. 142. Nor to an action by the trustees for the foreclosure of railway mortgage bonds. *Welsh v. First Div. St. P. & Pac. R. Co.*, 25 Minn. 314.

The defendant must have been personally served. *Booth v. Connecticut Mut. Life Ins. Co.*, 43 Mich. 299; *Innes v. Stewart*, 36 Mich. 285. See *Embury v. Bergamini*, 9 C. E. Gr. (24 N. J. Eq.) 227.

The defendant may be personally served in another county. *Maholm v. Marshall*, 29 Ohio St. 611.

Such personal decree will not be given, if an action at law for the debt would be barred by the statute of limitations. *Michigan Ins. Co. v. Brown*, 11 Mich. 265.

The proceedings against a guarantor are new and supplementary to, and not a continuation of, the foreclosure proceedings. The mortgaged premises and the mortgagor's other property must be exhausted before a personal judgment may be had against the guarantor. *Johnson v. Shepard*, 35 Mich. 115.

Sureties, not for the payment of a mortgage, but for the provision of a sinking fund, are not liable to the per-

sonal judgment. *Joy v. Jackson*, etc. *Plank Road Co.*, 11 Mich. 155.

In foreclosing a mortgage against the heir of the mortgagor it is error to render a personal decree against him for the debt. *Harbison v. Vaughan*, 42 Ark. 539.

As to entering judgment for a deficiency against a deceased mortgagor's heirs, *qua* the assets of the estate in their hands. See *Collins' Case*, 17 Hun (N. Y.) 289; s. c., 6 Abb. N. C. (N. Y.) 227; *United States Life Ins. Co. v. Jordan*, 21 Abb. N. C. (N. Y.) 330; *Trapier v. Waldo*, 16 S. Car. 276;

1. The judgment may not be entered against subsequent purchasers from the mortgagor. *Rourke v. Coulton*, 4 Brad. (Ill. App.) 257; *Carleton v. Byington*, 24 Iowa 172; *Stone v. Becker*, 2 Clev. L. Rep. (Ohio) 346. It may in some of the States, if the purchaser has assumed the payment of the mortgage. *Bowen v. Kurtz*, 37 Iowa 239; *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Taylor v. Whitmore*, 35 Mich. 97; *Carley v. Fox*, 38 Mich. 387; *Klapworth v. Dressler*, 2 Beas. (13 N. J. Eq.) 62; *Cashman v. Henry*, 75 N. Y. 103; *Comstock v. Drohan*, 71 N. Y. 9; aff'g s. c., 8 Hun (N. Y.) 373; *Thayer v. Marsh*, 11 Hun (N. Y.) 501; *Haile v. Nichols*, 16 Hun (N. Y.) 37; *Munson v. Dyett*, 56 How. Pr. (N. Y.) 333. But such liability cannot be enforced by a separate action. *Hicks v. McGarry*, 38 Mich. 667.

The grantee of the mortgagor is not liable if the mortgagor was not. *Vrooman v. Turner*, 69 N. Y. 280; rev. 8 Hun (N. Y.) 78; *Fairchild v. Lynch*, 46 N. Y. Super. Ct. (14 J. & S.) 1.

A personal decree for this deficiency may be entered against a mortgagee who assigns the mortgage and guarantees its payment. *Jarman v. Wiswall*, 9 C. E. G. (24 N. J. Eq.) 267; *Bristol v. Morgan*, 3 Edw. Ch. (N. Y.) 142; *Leonard v. Morris*, 9 Paige (N. Y.) 90.

See this subject discussed more at length in the article on FORECLOSURE OF MORTGAGES, Am. & Eng. Encyc. of Law, vol. 8, p. 264, *et seq.* subtitle XII. Judgment for Deficiency.

on personal property.¹ The judgment is the same as a judgment at law.² These code provisions as to joinder are permissive, however, and not compulsory.³

(c) CAUSES OF ACTION BY AND AGAINST DIFFERENT PARTIES (see PARTIES).—Under the provisions of the codes several plaintiffs may not join their causes of action against the same defendant or defendants,⁴ though the same plaintiff

1. Where a vendor of land takes the vendee's notes in payment, and sues thereon, he should unite his equitable claim for a foreclosure of his vendor's lien. *Walker v. Sedgwick*, 8 Cal. 398; *Stephens v. Magor*, 25 Wis. 533. *Compare Turner v. Pierce*, 34 Wis. 658.

Proceedings to have a legacy declared a lien upon lands of testator in the hands of his devisee, and to enforce such lien by sale of the land may be joined. *Powers v. Powers*, 28 Wis. 659.

A plaintiff may join an action for judgment on a note with a prayer for the foreclosure of a lien on certain stocks pledged to secure the note. *F. & M. Nat. Bank v. Rogers*, 1 N. Y. Sup. 757.

2. The lien of such a judgment is the same as a judgment at law. *Germania Turn-Verein*, 74 Ill. 54.

3. These code provisions do not prohibit a separate action at law for this balance. *Palmer v. Harris*, 100 Ill. 276. See *Hayden v. Snow*, 9 Bissell (U. S. C. C.) 511; *Spruce v. Ins. Co.*, 40 Ohio St. 517. In *Michigan*, leave of court is, however, required. *Innes v. Stewart*, 36 Mich. 285.

4. **Different Plaintiffs.**—Joinder of Actions by.—Two or more parties having distinct causes of action against the same defendant cannot join in one suit to enforce their rights. *Bertrand v. Byrd*, 5 Ark. 651; *Sutherland v. Underwriter's Agency*, 53 Ga. 442; *Germania Fire Ins. Co. v. Hawks*, 55 Ga. 674; *Gray v. Rothschild*, 48 Hun (N. Y.) 596; *Powell v. Dayton*, 13 Oreg. 446; *N. & W. R. Co. v. Smoot*, 81 Va. 495; *Hinkle v. Davenport*, 38 Iowa 355; *Grant v. McCarty*, 38 Iowa 468; *Schultz v. Winter*, 7 Nev. 130.

An action by a legatee to follow a fund which the personal representative failed to collect on account of alleged fraud cannot be joined with an action brought by such personal representative to collect the assets of the estate. *Paxton v. Wood*, 77 N. Car. 11.

A joint action by several claiming

separate and distinct portions of a league of land brought to recover their respective parts or to recover meane profits is a misjoinder. *Allen v. Read*, 66 Tex. 13; *Wood v. McGuire's Children*, 17 Ga. 303.

So also where they claim the whole land by separate and hostile titles. *Hubbell v. Lerch*, 58 N. Y. 237.

It is a misjoinder when the action is brought to recover damages to their respective lands, though against one defendant and caused by the same act. *Barham v. Hostetter*, 67 Cal. 272.

But a joint action by several owners of distinct portions of land for one injury to them all, and claiming damages *in solido*, was allowed in *Hellams v. Switzer*, 24 S. Car. 39.

Distributees or *cestuis que trust* cannot sue jointly and recover a joint judgment against the administrator or trustee for an alleged balance of their several shares of the amount found due to them by settlement, or as to matters relating to the different trusts. *Pelly v. Bowyer*, 7 Bush (Ky.) 513; *Weeks v. Cornwall*, 39 Hun (N. Y.) 643.

Where A is liable to B, and B to C, B and C can unite in an action against A. *Carney v. Walden*, 16 B. Mon. (Ky.) 388.

When two mortgages on the same property, one in favor of the husband and one in favor of his wife, were joined in the same petition for foreclosure, the objection of misjoinder not being taken by plea, answer or demurrer, must be considered as waived. *Bartlett v. Boyd*, 34 Vt. 256.

Where several persons have been injured by the same libel, each has a separate cause of action and must sue alone. *Robinett v. McDonald*, 65 Cal. 611.

So in the English practice, a vendor of goods and the endorers of a bill given in payment therefor may not join in one suit on the claims, on the bill and on the note. *Smith v. Richardson*, L. R., 4 C. P. Div. 112; s. c., 27 W. R. 230; 48 L. J., C. P. 140; 40 L. T. N. S. 256.

may declare upon a contract between himself and defendant, and upon a contract between defendant and a third person which has been assigned to him,¹ and a number of the States have specially provided for the joinder of plaintiff's claiming mechanics' liens upon the same premises.²

In like manner the same plaintiff may not join distinct causes of action against different defendants,³ except in proceedings to

1. Individual and Assigned Causes.—But since a plaintiff may unite several causes of action in the same complaint, where they all arise out of contracts, express or implied, a claim for work done by the plaintiff for the defendant might be united with a claim of third persons for work done by them for the defendant and by them assigned to the plaintiff. *Frazer v. Oakdale Lumber & Water Co.*, 73 Cal. 187; s. c., 14 Pac. Rep. 829; *Pierce v. Bicknell*, 11 Kan. 262; *Myers v. Miller*, 2 West. L. Monthly (O.) 420. See *Keller v. Roesler*, 1 C. P. Rep. (Pa.) 124; s. c., 2 Luz., L. T., N. S. (Pa.) 7.

A count on a writing obligatory executed by defendant to plaintiff may be joined with a count on a promissory note made by defendant to a third party who endorsed it to the plaintiff, said plaintiff being entitled under the statute to sue on said note in his own name. *Barclay v. Moore*, 17 Ala. 634.

But the notes must have been endorsed or assigned to the plaintiff. *Norris v. Pollard*, 75 Ga. 359.

A claim for damages for a tort as well as a claim arising ex-contractu, if it may be assigned, may be joined by the assignee thereof with a claim due him in his individual capacity, provided the two claims are properly joined under the codes. *More v. Massini*, 32 Cal. 590; *Hall v. Cincinnati, Hamilton & Dayton R. R.*, 1 Dis. (O.) 58.

2. Mechanics' Liens.—"Any number of persons claiming liens may join in the same action, and when separate actions are commenced the court may consolidate them." Code of California, § 1195, approved March 18th, 1885. *Deering's Ann. C. & S.*, vol. 3, p. 469; *Dakota Code* (1 Levissee), § 667, p. 175; *Rev. Code Dist. of Columbia* 1857, ch. 105, § 9, p. 418; *Rev. Stat. Idaho* 1887, § 5137, p. 571; *Rev. Stat. Indiana*, vol. 2 (*Myers & Co.*), § 5289; *Comp. Laws Kansas* 1885, (Dassler), §§ (4451, 4452), 634, 635; *Rev. Code Mississippi* 1880, § 1385, p. 395; *Comp. Laws New Mexico* 1884, § 1532; *Gen. Laws Oregon* 1872, p.

654, § 9. (This law was repealed by the act of October 28th, 1874, P. L. p. 104, which was in turn in part repealed by the act of February 11th, 1885, P. L. 13, neither of which two acts contain the provision of the old law upon this subject). *Code of Tennessee* 1884, p. 819, § 4287; *Laws Utah* 1884, p. 343, § 1069; *Code Washington* 1881, p. 335, § 1968; *Ann. Stat. Wisconsin* (S. & B. 1889), p. 1851, § 3324; *Allis v. Meadow Spring Distilling Company*, 67 Wis. 16.

Proceedings to foreclose mechanics' liens could not be consolidated prior to the statutes therefor. *Harsh v. Morgan*, 1 Kan. 293.

In *Pennsylvania*, it is provided that in proceedings by writ of *scire facias* on a mechanics' lien, "Upon the return of such writ it shall be lawful for any other person having filed a claim as aforesaid, to cause to be entered on the record of the same suit a suggestion setting forth the amount and nature of his demand, and thereupon he may have a rule upon the defendant to appear and plead thereto, as in other actions." Act of June 16, 1836, § 19. P. L. 699, Br. *Purd. Dig.*, tit. *Mechanics' Liens*.

3. Same Plaintiff—Distinct Causes of Action—Different Defendants.—Distinct causes of action in favor of the same plaintiff or plaintiffs, but against different defendants, may not be joined. *Ferguson v. Terry*, 1 B. Mon. (Ky.) 96; *Robinson v. Rice*, 20 Mo. 229; *Phillips v. Flynn*, 71 Mo. 424; *Burns v. Williams*, 88 N. Car. 159. See *Lowry v. Jackson*, 27 S. Car. 318; s. c., 3 S. E. Rep. 473.

Not even if, by the same writing, where causes arising out of the same transaction cannot be joined. *Harris v. Campbell*, 4 Dana (Ky.) 586.

Plaintiff cannot recover damages occasioned by an attachment issued by A, and by a foreclosure by B in the same action, though by one contract B had agreed to release the mortgage, and A to give a credit on the claim under which he had issued the attachment. *Buell v. Dodge*, 79 Cal. 208.

recover the possession of real property,¹ and proceedings under special statutes against makers of an obligation, and the endorsers,

The rule is the same under the English practice. *Burstall v. Beyfuss*, 53 L. J., Ch. 565; s. c., 26 L. R., Ch. Div. 35; 32 W. R. 418; 50 L. T., N. S. 542.

Separate and distinct promises to pay made at different times will not support a joint action against the separate promisors, although they may impose a separate liability on each of the defendants. *Jones v. Engelhardt*, 78 Ala. 505; *Jackson v. Bush*, 82 Ala. 396; s. c., 1 So. Rep. 175; *Burhaus v. Corey*, 17 Mich. 282.

A cause of action against A for goods sold and delivered may not be joined with a cause of action against B on a promise to A to pay for said debts. *Sanders v. Clason*, 13 Minn. 379.

Where A has a claim to an account of income from certain property against B down to a certain date, and from that date against C, the grantee of B, he cannot join B and C as codefendants in the same suit. *Patterson v. Kellogg*, 53 Conn. 38.

A plaintiff may not obtain a transfer of certain shares of stock in a corporation which a defendant had acquired from him by fraud, and certain other shares in same corporation sold to B, defendant, under an assessment fraudulently levied by the corporation. *Johnson v. Kirby*, 65 Cal. 483.

A proceeding to invalidate a fraudulent mortgage to one person and to enforce a valid mortgage of other property to another may not be joined. *Higgins v. Crichton*, 63 How. Pr. (N. Y.) 354.

A joint action cannot be brought against several defendants for slander. *Anderson v. Pack*, 2 Clev. L. Rep. (Ohio) 260.

Where A has a claim against B, and C, by fraudulent representations induces A to assign to him the claim at a discount, A cannot in one action set aside the assignment to C and recover judgment against B. *Nichols v. Drew*, 94 N. Y. 22; aff. s. c., 19 Hun 490. Compare *Powell v. Dayton*, S. & G. R. R. Co., 13 Oreg. 446.

A plaintiff cannot join in the same complaint a cause of action in contract against A and a cause of action in tort against A and B. *N. C. Land Co. v. Beatty*, 69 N. Car. 329.

Where dogs belonging to different owners unite in depredations upon a flock of sheep, the owner of the sheep

cannot maintain a joint action against the owners of the dogs for the damage done, but must sue each separately for the damage done by his own dog. *Dyer v. Hutchins*, 87 Tenn. 198.

A joint action for trespass and damage by stock cannot be maintained against the several owners of the stock. *Cogswell v. Murphy*, 46 Iowa 44.

Where A commits a trespass and erects a brick stack on B's land, B cannot sue A for the trespass and C, the successor of A, for the removal of the stack, in the same action. *Equitable Life Ass. Soc. v. Schermerhorn*, 60 How. Pr. (N. Y.) 477. Or maintain a joint action against A and C for damages. *Hines v. Jarrett*, 26 S. Car. 480. Compare *Lochmiller v. Indian Ford W. P. Co.*, 51 Wis. 683.

A claim for injuries caused by accumulations of ice and snow, and in consequence of a cellar being open, cannot constitute a joint action against the property owner and the city. *Kelly v. Newman*, 6 How. Pr. (N. Y.) 156.

Where plaintiff, injured by an excavation in a lot, has an action against owner and municipality, he cannot join the two actions. *Trowbridge v. Forepaugh*, 14 Minn. 133.

A claim for equitable relief against a corporation cannot be joined with a claim for damages against individual defendants. *House v. Cooper*, 16 How. Pr. (N. Y.) 292.

A joint action against several persons licenced to sell liquor, and their several sureties on their several bonds, cannot be maintained. *Baker v. McCoy*, 58 Ind. 215.

An action against an administrator and his sureties for a *devastavit* cannot be united with an action against a probate judge for taking insufficient sureties. *Mitchell v. Mitchell*, 96 N. Car. 14; s. c., 1 S. E. Rep. 648.

A joint action against several successive county treasurers for mismanagement of funds in their hands will not lie. *Firth v. Roe*, 60 How. Pr. (N. Y.) 432.

1. Recovery of Real Property—Joinder of Defendant.—One plaintiff may sue one or more defendants claiming different portions of the premises sued for. *Beard v. Federy*, 3 Wallace (U. S.) 478; *Central Pac. R. Co. v. Dyer*, 1 Sawy. (U. S. C. C.) 641; *Winans v.*

guarantors or sureties.¹

Christy, 4 Cal. 70; Boles v. Cohen, 15 Cal. 150; Patterson v. Ely, 19 Cal. 28; Wilson v. Castro, 31 Cal. 420; Byington v. Woods, 13 Iowa 17; Bowers v. Keesecher, 9 Iowa 422; Woolfolk v. Ashby, 2 Met. (Ky.) 288; Sale v. Crutchfield, 8 Bush (Ky.) 636; Winona & St. Peter R. Co. v. St. Paul & Sioux City R. Co., 26 Minn. 179; Rank v. Levinns, 5 N. Y. Civ. Proc. 368; s. c., 50 N. Y. Super. Ct. (18 J. & S.) 159.

A party may institute a petitory action for one tract of land, and in the same petition may sue the defendant for slander of title of another and distinct tract. *Williams v. Close*, 12 La. An. 873. Compare *Dodge v. Colby*, 108 N. Y. 445.

Recovery of possession of one lot and damages for withholding it and damages for withholding another lot, may not be joined in one action, at least when plaintiff's title to the two lots accrued at different dates. *Holmes v. Williams*, 16 Minn. 164. *Furlong v. Cooney*, 72 Cal. 322.

The holder of three tax deeds to different tracks of land may not join proceedings to quiet title to all the tracts when their former owners were different. *Turner v. Duchman*, 23 Wis. 500.

The plaintiff may not join counts alleging two distinct seisms, as they are distinct causes of actions. *Overseers of the Poor of Boston v. Otis*, 20 Pick. (37 Mass.) 38.

But see *Howell's An. Stat.* 1882, Michigan, § 7798, p. 1950; *DeMill v. Moffat*, 49 Mich. 125; *Crittenden v. Crittenden*, 1 Hill (N. Y.) 359.

1. **Makers, Endorsers, Guarantors and Sureties — Joinder of.** — By § 2, ch. 1, of the rules under the Practice act in Connecticut it is provided that "persons severally and immediately liable on the same obligation or instrument, including parties to bills of exchange and promissory notes, and endorsers, guarantors and sureties, whether on the same or by a separate instrument, may all or any of them be joined as defendants, and a joint judgment may be rendered against them so joined."

To the same effect are the laws of California Code (Deering) 1885, § 383; Michigan *Howell's Anno. Stat.* 1882, p. 1857, § 7345; Kansas Comp. Laws (Dassler) 1885, p. 609, § (3832), 39; Nevada Gen. Stat. 1885, § 3037; North Carolina Code 1883, vol. 1, p. 70, § 186.

It seems that this rule would not authorize the joining as defendants of the maker of a note which had been merged in a judgment and a guarantor of the note. *Lemmon v. Strong*, 55 Conn. 443; *Lindle v. Crowley*, 26 Kan. 47; *Wooten v. Maultsby*, 69 N. Car. 462.

In *Massachusetts*, it is provided that persons severally liable upon contracts in writing, including all parties to bills of exchange and promissory notes, may all or any of them be joined in the same action. Pub. Stat. 1882, p. 965, § 4.

To the same effect are the codes of Colorado, § 14; Indiana, Rev. Stat. 1888 (Myers & Co.), § 270; *Mix v. State Bank*, 13 Ind. 521; Kentucky, *Carroll's Code*, 1888, § 26; *Arkansas Dig.* 1884, § 4943; *Iowa Rev. Code* (Miller's) 1888, p. 882, § 2550; *Minnesota Stat.* 1878, p. 711, § 36 (35); *Missouri Rev. Stat.* 1879, § 3467; *Nebraska Comp. Stat.* 1885, p. 633, § 44; *New York Anno. Code* 1889, § 454 (Civ. Proc., § 120); *Ohio Rev. Stat.* 1890, § 5009; *Oregon Code Civ. Proc.*, § 14; *Gen. Laws* 1872, p. 111, § 36; *South Carolina Code* 1888, p. 97, § 141.

Only guarantors on the same instrument may be joined. *Hammel v. Beardsley*, 31 Minn. 314; s. c., 17 N. W. Rep. 858; *Lucy v. Wilkins*, 33 Minn. 21; s. c., 21 N. W. Rep. 849; *Harris v. Eldridge*, 5 Abb. N. C. (N. Y.) 278.

Where one has entered into a covenant for the performance of certain duties, and another, by a separate writing, has become his surety to the performance of said covenants; they cannot be joined in the same action to recover for a breach. *Childress v. McCullough*, 5 Port. (Ala.) 54; *Preston v. Davis*, 8 Ark. 167; *Hurlburt et al. v. W. & W. Mfg. Co.*, 38 Ark. 594; *Marshall v. Peck*, 1 Dana (Ky.) 609; *Krauss v. McGlone*, 3 Weekly Notes (Pa.) 272.

A entered into a written contract; A, B and C entered into an undertaking conditioned on the performance of A. A defaulted in the contract. Plaintiff was entitled to join a count on the contract, with a count on the undertaking. *Houston v. Delahay*, 14 Kan. 125.

Where one maker of a promissory note separately agrees to pay a larger rate of interest than the note calls for, the holder may sue all the makers on the note, and join in the same action his claim against the one on his sepa-

All joinders by or against different persons are prohibited in Georgia.¹

(d) ACTIONS EX CONTRACTU AND EX DELICTO.—The weight of authority is to the effect that the code provisions have not abolished the distinction between causes of action *ex contractu* and *ex delicto*, even when they arise out of the same transaction,² though there are decisions to the contrary;³ and in Iowa the decisions are uniform that the distinction is abolished, and such causes of action may be joined if they are between the same parties in the same right and with the same venue.⁴

rate contract. *Knapp v. Mills*, 20 Tex. 123.

An action upon a promissory note against the maker and endorser cannot be joined with an action on account against the endorser only. *Thorpe v. Dickey*, 51 Iowa 676.

A surety sued his cosurety for contribution and asked judgment against his principal in one action, there being no demurrer. *Rankin v. Collins*, 50 Ind. 158.

At common law a joint action cannot be maintained against the maker and endorser of a promissory note. *Fawcett v. Fell*, 77 Pa. St. 308.

1. Georgia.—“Distinct and separate claims of or against different persons cannot be united in the same action.” Code of Georgia 1882, p. 819, § 3256, (3191), (3180). See also the article on PARTIES, in the Am. and Eng. Encyc. of Law; Pomeroy on Remedies and Remedial Rights (2nd ed.), §§ 479-501, pp. 521-539; Bliss on Code Pleading (2nd ed.), §§ 94-5, pp. 147-150.

2. Tort and Contract.—Under the original code of New York a plaintiff was not allowed to state his cause of action in two counts, one sounding in tort and the other in contract. *Cahoon v. Bank of Utica*, 4 How. Pr. (N. Y.) 422; *Maxwell v. Farnam*, 7 How. Pr. (N. Y.) 236; *Furniss v. Brown*, 8 How. Pr. (N. Y.) 59; *Colwell v. N. Y. & Erie R. Co.*, 9 How. Pr. (N. Y.) 311; *Waller v. Raskan*, 12 How. Pr. (N. Y.) 28; *Sweet v. Ingerson*, 12 How. Pr. (N. Y.) 331; *Hunter v. Powell*, 15 How. Pr. (N. Y.) 221; *Booth v. F. & M. Nat. Bank*, 65 Barb. (N. Y.) 457; *Keep v. Kaufman*, 56 N. Y. 332. (These cases would seem clearly to overrule *Robinson v. Flint*, 16 How. Pr. (N. Y.) 24, and *Adams v. Bissell*, 28 Barb. (N. Y.) 382, where joinder was held proper if the causes of action arose out of the same

transaction.) The provisions of the code adopted in 1877 are construed in the same way. *McDonald v. Kountze*, 58 How. Pr. (N. Y.) 152; *Thompson v. St. Nicholas Nat. Bank*, 61 How. Pr. (N. Y.) 163; *Teall v. Syracuse*, 32 Hun (N. Y.) 332; *Compton v. Hughes*, 38 Hun (N. Y.) 380; *Dodge v. Glendenning*, 10 N. Y. St. Rep. 8; *Nichols v. Drew*, 94 N. Y. 22; *Seymour v. Lorillard*, 8 N. Y. Civ. Proc. 90; *Week v. Keteltas*, 10 N. Y. Civ. Proc. 43.

The same conclusion has been reached in the following cases decided in the other code States. *Lawrence v. Montgomery*, 37 Cal. 183; *Clark v. Lineberger*, 44 Ind. 223; *Jones v. Johnson*, 86 Ky. 530; *Jameson v. Copher*, 35 Mo. 483; *Ederlin v. Judge*, 36 Mo. 359; *Phillips v. Flynn*, 71 Mo. 424; *Logan v. Wallis*, 76 N. Car. 416; *Doughty v. Atlantic & N. Car. R. Co.*, 78 N. Car. 22; *Lane v. Cameron*, 38 Wis. 603.

3. A cause of action in tort may be united with a cause of action on contract, if the two causes of action arise out of the same transaction. *Berry v. Carter*, 19 Kan. 135; *Gertler v. Linscott*, 1 N. W. Rep. 579; s. c., 26 Minn. 82; *Humphrey v. Merriam*, 37 Minn. 502; s. c., 35 N. W. 365 (see an early case *contra*, *Reynolds v. La Crosse & Minn. P. Co.*, 10 Minn. 178); *Patterson v. Kirkland*, 34 Miss. 423.

4. Iowa.—Causes of action *ex contractu* and *ex delicto* may be joined, if between the same parties, in the same right, and with the same venue. *Turner v. First Nat. Bank*, 26 Iowa 562; *Jack v. D. M. & Ft. D. R. Co.*, 49 Iowa 627; *Foster v. Hinson*, 76 Iowa 714.

In an early case in California the court inclined to the view that the two causes of action could be joined when they arose out of the same transaction. *Jones v. Cortes*, 17 Cal. 487. See also *Ghiraldelli v. Bourland*, 32 Cal. 585. These cases would seem, however,

(e) ACTIONS AT LAW AND IN EQUITY.—Under the provisions of the codes, the principles both of law and equity are preserved, but prayers for both species of relief may in many cases be joined in one action.¹ Thus an instrument in writing may be reformed and enforced in the same proceedings.² And in like manner instruments in writing may be annulled or cancelled and a recovery of money or possession of land had in the same action.³ So in many States a fraudulent

clearly to be overruled by *Lawrence v. Montgomery*, 37 Cal. 183, and *Loup v. California Southern R. Co.*, 63 Cal. 97, 99.

1. Law and Equity.—Principles Preserved.—The courts under the code system give relief not merely to the extent and in the cases where it was heretofore given by the courts of law, but also to the extent and in the cases where it was heretofore given by courts of equity; thus preserving the principles of both systems, the only change being that the principles are applied and acted on in one court and by one mode of procedure. *Lee v. Pearce*, 68 N. Car. 76; *Zeile v. Moritz*, 1 Utah 283; *Thompson v. Caton*, 3 Wash. 31.

2. Instruments Reformed and Enforced.—"Actions brought to reform instruments in writing, such as policies of insurance and other contracts, mortgages, deeds of conveyance and the like, and to enforce the same as reformed by judgments for the recovery of the money due on the contracts, or for the foreclosure of the mortgages, or for the recovery of possession of the land conveyed by the deed, fall within the same general principle. One cause of action only is stated in such cases, however various may be the reliefs demanded and granted." *Pomeroy on Remedies*, § 459; *Hutchinson v. Ainsworth*, 63 Cal. 286; *Hutchinson v. Ainsworth*, 73 Cal. 452; *Hunter v. McCoy*, 14 Ind. 528; *Rigsbee v. Trees*, 21 Ind. 227; *Sanders v. Farrell*, 83 Ind. 28; *Smith v. Kyler*, 74 Ind. 575; *Walkup v. Zehring*, 13 Iowa 306; *Guerney v. American Ins. Co.*, 17 Minn. 104; *McClurg v. Phillips*, 49 Mo. 315; *Burnside v. Wayman*, 49 Mo. 356; *Henderson v. Dickey*, 50 Mo. 161; *Stewart v. Carter*, 4 Neb. 564; *Ruhling v. Hackett*, 1 Nev. 360; *Gooding v. McAlister*, 9 How. Pr. (N. Y.) 123; *New York Ice Co. v. North Western Ins. Co.*, 23 N. Y. 357; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *Meyer v. Van Collem*, 7 Abb. Prac. 222; *McConn v. Sims*, 69 N. Car.

159; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Yates v. Yates*, 21 Wis. 473; *Harrison v. Juneau Bank*, 17 Wis. 340; *Moon v. McKnight*, 54 Wis. 551.

But after a foreclosure and sale the mortgage cannot be reformed and the whole proceeding amended so as to pass the title to the vendee. *Rogers v. Abbott*, 37 Ind. 138; *Laub v. Buckmiller*, 17 N. Y. 620; *Miller v. Kolb*, 47 Ind. 220; *Angle v. Speer*, 66 Ind. 488.

But a decree of foreclosure and sale is no bar to a correction of the mortgage and a reforeclosure. *Conyers v. Mericles*, 75 Ind. 443; *Jones v. Sweet*, 77 Ind. 187; *McCasland v. Ætna Life Ins. Co.*, 108 Ind. 130; *Burkam v. Burk*, 96 Ind. 270.

In a proceeding for partition, a mortgagee defendant may by counterclaim procure the reformation of his mortgage and a foreclosure. *Conyers v. Mericles*, 75 Ind. 443.

In *Pennsylvania* in an action at law parol evidence is admissible, to reform writings in case of fraud, accident and mistake, and under this rule, an instrument in writing may be reformed and executed in the same action. *Moliere v. Penna. Fire Ins. Co.*, 5 Rawle (Pa.) 342; *Spring Garden Ins. Co. v. Scott*, 27 Leg. Int. (Pa.) 76; *Noel v. Pymatuning Ins. Co.*, 25 Weekly Notes (Pa.) 233. *Compare Cooper v. Ins. Co.*, 50 Pa. St. 299; *Rowand v. Finney*, 96 Pa. St. 192; *Ahlborn v. Wolff*, 118 Pa. St. 242.

3. Instruments Cancelled.—A complaint was *held* good which asked (1) to impeach and set aside a decree; (2) to annul deeds executed in pursuance thereof; (3) to recover the land with mesne profits and an injunction against waste. *England v. Garner*, 86 N. Car. 366.

Causes of action to cancel a bond on which A was surety, and to recover the sum paid A for acting as surety, may be joined. *Zimmerman v. Kinkle*, 108 N. Y. 282.

In like manner an action to cancel a

conveyance may be set aside by a simple contract creditor, his debt reduced to judgment and made a lien on the property fraudulently conveyed, in one action.¹ Deeds may be

release of damages for fraud, etc., and an action to recover the damages so released, may be joined. *Blair v. Chicago & Alton R. Co.*, 89 Mo. 383.

In a proceeding to quiet title the plaintiff may ask the cancellation of a deed or the vacation of another's title and the possession of the premises. *Keens v. Gaslin*, 24 Neb. 310; *Phillips v. Gorham*, 17 N. Y. 270; *Lattin v. McCarty*, 41 N. Y. 107; rev. s. c., 17 How. Pr. (N. Y.) 239; *Palmer v. Searing*, 12 N. Y. St. Rep. 559.

Also a claim for mesne profits and damages. *Bruce v. Kelly*, 5 Hun (N. Y.) 229.

Such a joinder was *held* improper in *Lee v. Simpson*, 29 Wis. 333; and also in *Curd v. Lackland*, 43 Mo. 139; *Gray v. Paine*, 43 Mo. 203; *Wynn v. Cory*, 43 Mo. 301. These decisions in Missouri seem, however, to have held the joinder in one count improper, and the subsequent Missouri cases cited in the preceding note would seem to have overruled them.

1. Reconveyance Enforced and Debt Proved.—A plaintiff may in the same action join a cause of action for which he seeks a personal judgment against the defendant with a cause of action to set aside fraudulent conveyances of defendant's property, although made at different times and to different persons, and subject the same to his lien. *Pomeroy on Remedies and Remedial Rights* (2nd ed.), § 459, p. 501; *Macondray v. Simmons*, 1 Cal. 393; *Frank v. Kessler*, 30 Ind. 8; *Hamilton v. Barricklow*, 96 Ind. 398; *Chamberlin v. Jones*, 13 West. Rep. (Ind.) 786; *Anderson v. Anderson*, 80 Ky. 638; *North v. Bradway*, 9 Minn. 183; *Dawson Bank v. Harris*, 84 N. Car. 206; *Mebane v. Layton*, 86 N. Car. 571.

In like manner trust property which has been conveyed in fraud of heirs or *cestuis que trusts*, may be ordered to be reconveyed and the liability of the trustee determined in the same suit. *Howse v. Moody*, 14 Fla. 59; *Reed v. Howe*, 28 Iowa 250; *Gafford v. Dickinson*, 37 Kan. 287; s. c., 15 Pac. Rep. 175; *Silsbree v. Smith*, 41 How. Pr. (N. Y.) 418; *Stronach v. Stronach*, 20 Wis. 129. *Compare Bowers v. Keesecher*, 9 Iowa 422; *Richtinyer v. Richtinyer*, 56 Barb. (N. Y.) 55; *Bassett v. Warner*, 23 Wis. 673.

Fraudulent conveyances of an execution debtor may be set aside by an execution vendee and the possession of the property recovered in the same action. *Pfister v. Dascey*, 65 Cal. 403; *Burch v. Brantley*, 20 S. Car. 503.

In like manner title papers and notes may be recovered, conveyances set aside and judgment entered for the notes in one action, when said title papers and notes had been procured by a conspiracy. *Sheppard v. Stephens*, 2 Southwest. Rep. (Ky.) 548.

A conveyance in fraud of the rights of a mortgagor may be set aside and the mortgage foreclosed in the same action. *Greither v. Alexander*, 15 Iowa 470; *Moon v. McKnight*, 54 Wis. 551.

But a trust deed under which the mortgagor claims cannot be set aside and the mortgage foreclosed in the same action. *Helck v. Reinheimer*, 23 N. Y. W. D. 473.

A suit to set aside a conveyance by a debtor of land not included in an assignment by him for the benefit of creditors may not be joined with a suit for an accounting under the assignment. *Hatcher v. Winters*, 71 Mo. 30.

But in a proceeding to marshal a decedent's assets, disputed titles to land in another county, as well as to lands in the county of the suit, were *held* to be no misjoinder, and both titles were adjudicated upon. *Barrett v. Watts*, 13 S. Car. 441.

In a suit by heirs it is a misjoinder to sue (1) for damages against an administrator illegally granted administration; (2) to try title to lands situate in other counties and sold by him to residents of other counties; (3) for a partition of the estate, and (4) to recover the property in the hands of said administrator. *Frost v. Frost*, 45 Tex. 324.

A judgment creditor may not sue the executors of his debtor for an account and also ask an adjudication against a claim of title to certain real estate belonging to said estate, which title is claimed by a third party, and not through said executors. *Suber v. Allen*, 13 S. Car. 317.

In some of the States, however, a simple contract creditor cannot maintain an action against the debtor and his fraudulent assignee, asking judgment against his debtor, and also to have the assignment declared void and

ordered to be re-executed, and premises recovered in one action,¹ claims for a specific performance and damages may be joined;² and perhaps a claim for the surrender of deeds, etc., with a money demand.³ Ejectment and a foreclosure of a mortgage or assignment of dower, may be joined.⁴ An injunction to restrain future trespasses or wrongs, with damages for those in the past, and a recovery of property, both real and personal, may be joined in one action.⁵ Joinder of claims at law and in equity are not compul-

the debt paid out of the proceeds of the assigned property. *Stevens v. Chance*, 47 Iowa 602; *Young v. Wells*, 33 Mo. 106; *Schwitzer v. Cohen*, 7 Hun (N. Y.) 665. *Compare* *Alger v. Scoville*, 6 How. Pr. (N. Y.) 131; *Marion Deposit Bank v. McWilliams*, 1 West. L. Monthly (Ohio) 571; *Thompson v. Caton*, 3 Wash. Ter. 31; *Blake v. Van Tilborg*, 21 Wis. 672; *Charboneau v. Heuni*, 24 Wis. 250.

In these States, however, judgment creditors can still file a creditor's bill. *Ogden v. Wood*, 51 How. Pr. 375. *Compare* *Mahler v. Schmidt*, 43 Hun (N. Y.) 512; *Fellows v. Fellows*, 4 Cow. (N. Y.) 682; *Bank of British N. A. v. Suydam*, 6 How. Pr. (N. Y.) 379; *Royer Wheel Co. v. Fielding*, 31 Hun (N. Y.) 274; *Oakley v. Lugwell*, 33 Hun (N. Y.) 357; *Bradner v. Holland*, 33 Hun (N. Y.) 288; *Gates v. Boomer*, 17 Wis. 455.

A lien creditor can do so. *Kalm v. Salmon*, 10 Sawy. (U. S. C. C.) 183.

So can simple contract creditors. *Mebane v. Layton*, 86 N. Car. 571.

1. **Re-execution of Deeds.**—The re-execution of a deed by the sheriff to replace one, that is lost, and the recovery of the premises included in the deed may be joined in one action. *McMillan v. Edwards*, 75 N. Car. 81. So as to a deed executed by the defendant himself and lost. *Jennings v. Reeves*, 101 N. Car. 447.

2. **Specific Performance**—A specific performance and a claim for rents and profits may be united. *Duvall v. Tinsley*, 54 Mo. 93; *Spier v. Robinson*, 9 How. Pr. (N. Y.) 325.

A specific performance and an action to recover money upon an alleged agreement may not be joined. *Ferguson v. Burt*, 2 Utah 388.

Contra, when both arise out of the same transaction and are founded upon the same written instrument. *Gray v. Dougherty*, 25 Cal. 266.

A specific performance of a contract and damages for its breach may be

joined. *Steinberger v. McGovern*, 56 N. Y. 12. *Compare* *Beck v. Allison*, 56 N. Y. 366; *Barlow v. Scott*, 24 N. Y. 40.

A specific performance and a partition may be sought in the same action. *Hall v. Hall*, 38 How. Pr. (N. Y.) 97.

It is improper to unite an action for specific performance against one party and an action of ejectment against another in the same suit. *Fagan v. Barnes*, 14 Fla. 53.

3. **Surrender of Deeds.**—An equitable suit to compel the surrender of various deeds executed by an agent in violation of his authority may not be joined. *Lexington & B. S. R. R. Co. v. Goodman*, 15 How. Pr. (N. Y.) 85. Nor can a suit to compel such a surrender and a suit for damages against the agent be joined. *Gardner v. Ogden*, 22 N. Y. 327.

A plaintiff may join a cause of action for the surplus on a foreclosure of a mortgage with a demand for the surrender of the notes secured by the mortgage. *Cahoon v. Bank of Utica*, 7 N. Y. 486; s. c., 7 How. Pr. (N. Y.) 401; rev. s. c., 6 How. Pr. (N. Y.) 134.

The recovery of the land itself on the ground that the mortgage had been paid before the sale, or else the surplus arising from the sale. *Heggie v. Hill*, 95 N. Car. 303.

4. **Ejectment.**—Ejectment and a foreclosure of a mortgage on the same land were allowed to be joined in *Herron v. Herron*, 91 Cal. 278; *Martin v. McNeely*, 101 N. Car. 634. *Contra*, as to different lands. *Edgerton v. Powell*, 72 N. Car. 64.

An action for the admeasurement of dower may be joined with an action of ejectment for the recovery of dower. *Brown v. Brown*, 4 Robt. (N. Y.) 688; s. c., 31 How. Pr. (N. Y.) 481.

5. **Injunctions.**—A plaintiff may ask to have his right to a certain water course determined, damages given him for diversion of the water, etc., by defendant, and an injunction against future

sory,¹ but where joined these claims must usually be separately stated.² Joinder of actions at law and in equity are not allowed in the United States courts, even when sitting in code States.³

diversions, etc., in the same action. *Marius v. Bicknell*, 10 Cal. 217; *Weaver v. Conger*, 10 Cal. 233; *Jungerman v. Bover*, 19 Cal. 354. So as to obstructions on a road and damages. *Converse v. Hawkins*, 31 Ohio St. 209.

Damages for overflow caused by dam and injunction to restrain its maintenance. *Akin v. Davis*, 11 Kan. 580. To same effect *Getty v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 269.

A husband and wife may in the same proceeding seek an injunction to restrain the levy and sale of certain property on execution against the husband, and a decree that the property is that of the wife. *Clegg v. Varnell*, 18 Tex. 294.

Ejectment, damages for a trespass, and injunction against further trespasses, may be joined, if the relief, both equitable and legal, relate to all the matters at issue. *Gates v. Kieff*, 7 Cal. 124; *Bigelow v. Gove*, 7 Cal. 133, as explained in *Weaver v. Conger*, 10 Cal. 233; *Natoma Water & M. Co. v. Clarkin*, 14 Cal. 545; *More v. Massini*, 32 Cal. 590; *Little v. Willford*, 31 Minn. 173; *Ware v. Johnson*, 55 Mo. 500. See *England v. Garner*, 86 N. Car. 366; *Hathaway v. Springfield, Mt. V. & P. R. R.*, 2 West. L. Monthly (Ohio) 481; *Gillett v. Treganza*, 13 Wis. 472; *Riemer v. Johnke*, 37 Wis. 258. So an injunction to restrain collection of taxes and an action to recover back those paid. *Turner v. Althaus*, 6 Neb. 54.

An injunction to restrain the infringement of a trade mark may be joined with a claim for an accounting of the profits and damages. *Leidersdorff v. Flint*, 50 Wis. 401.

An injunction should not be granted to restrain the doing of acts in relation to property in respect to which property no final judgment is prayed, as an injunction to restrain proceedings at law, when the final judgment prayed is damages for a trespass in levying and continuing an execution. *Kahn v. Kahn*, 15 Fla. 400.

The abatement of a nuisance and the recovery of damages therefor are not distinct causes of action which cannot be united in the same complaint, but merely different kinds of relief to which the plaintiff may be entitled where a nuisance is the cause of action. *Yolo*

Co. v. Sacramento, 36 Cal. 193; *Grandona v. Lovdal*, 70 Cal. 161; *Bailey v. Dale*, 71 Cal. 34; *Emory v. Hazard Powder Co.*, 22 S. Car. 476; *Lochmiller v. Indian Ford Water Power Co.*, 51 Wis. 683; *Brickner Woolen Mills Co. v. Henry*, 73 Wis. 229.

1. When a person may join his legal and equitable cause of action, he is not compelled to do so. He may proceed separately. *Bruce v. Kelly*, 5 Hun (N. Y.) 229.

2. The causes of action at law and in equity must be separately stated. *Peyton v. Rose*, 41 Mo. 257; *Jones v. Moore*, 42 Mo. 213; *Curd v. Lackland*, 43 Mo. 139; *Keens v. Gaslin*, 24 Neb. 310; *Hathaway v. Springfield, Mt. V. & P. R. R. Co.*, 2 West L. Monthly (Ohio) 481; *Harrison v. Juneau Bank*, 17 Wis. 341.

The grounds of equity jurisdiction should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 544.

Where the complaint asks legal and equitable relief, if the law and equity are inseparably mixed together, it would be demurrable; but it is not necessary that there should be express words showing where the declaration at law leaves off and the bill in equity begins. *Gates v. Kieff*, 7 Cal. 124.

An injunction to restrain future acts and damages for past, state but one cause of action. *Shepard v. Manhattan R. Co.*, 5 N. Y. Sup. 189; *Leidersdorff v. Flint*, 50 Wis. 401.

The reformation of a contract and its enforcement, when reformed constitute but one cause of action. *Gooding v. McAlister*, 9 How. Pr. (N. Y.) 123.

A nuisance is the cause of the action, and therefore the abatement thereof and damages therefor do not constitute separate causes of action, but merely different kinds of relief. They therefore need not be separately stated. *Yolo Co. v. Sacramento*, 36 Cal. 193; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480.

3. **United States Courts.**—In the United States courts the union of legal and equitable causes of action in one suit is forbidden by § 2 of the Process act of May 8th, 1792, substantially re-enacted in Rev. Stat., § 913;

(f) **SEPARATE STATEMENT; CAUSE OF ACTION DEFINED.**—At common law distinct causes of action should not be joined in the same count,¹ and the codes expressly require that causes of action when united “must be separately stated.”² But different items in an account, notes and breaches of contract may, as a rule, be united in one count.³ The relief asked must not be confounded with the cause of action, and there-

and therefore when an action is brought in a State court where such a union is permitted, and the suit is removed to the United States courts, the plaintiff will be required to amend his petition so as to set forth only legal or equitable causes of action. *Bennett v. Butterworth*, 11 How. (U. S.) 669; *Thompson v. Railroad Cos.*, 6 Wall. (U. S.) 134; *Hurt v. Hollingsworth*, 100 U. S. 100; *Montejo v. Owen*, 14 Blatchf. (U. S. C. C.) 324. The plaintiff should divide his suit into two actions. *Fisk v. Union Pac. R. Co.*, 8 Blatchf. (U. S. C. C.) 299; *La Mothe Mfg. Co. v. National Tube Works*, 15 Blatchf. (U. S. C. C.) 432; s. c., 7 Rep. 138.

1. Distinct Counts.—Common Law.—Distinct causes of action should not be joined in the same count. *Portage Lake M. & M. Ben. Soc. v. Phillips*, 36 Mich. 22; *Potts v. Clarke*, Spenc. (20 N. J. L.) 536; *Handy v. Chatfield*, 23 Wend. (N. Y.) 35; *Waggoner v. White*, 11 Heisk. (Tenn.) 741.

The common counts could be joined in one count in assumpsit. *Webber v. Tirill*, 2 Saund. (6th ed.) 122a, note 2; *Bailey v. Freeman*, 4 Johns. (N. Y.) 280; *Nelson v. Swan*, 13 Johns. (N. Y.) 483.

The common counts cannot all be united in one count as one cause of action, without any specification of the causes due upon each several cause. *Buckingham v. Waters*, 14 Cal. 146.

2. Causes Must be Stated Separately Under the Codes.—See the various code provisions and *Pike v. Van Wormer*, 5 How. Pr. (N. Y.) 171; *McCarty v. Fremont*, 23 Cal. 196; *Watson v. San Francisco & H. B. R. R. Co.*, 41 Cal. 17; *White v. Cox*, 46 Cal. 169; *Sands v. Wood*, 1 Iowa 263; *Childs v. Bank of Mo.*, 17 Mo. 13; *Mooney v. Kennett*, 19 Mo. 551; *Supervisors of Kewaunee Co. v. Decker*, 30 Wis. 624.

As to the separate statement of actions at law and in equity, see *supra*, II, 4, e, note 3.

3. Different items of an account having no connection with each other may be joined in one paragraph, and a bal-

ance due thereon constitutes but one cause of action. *Gaff v. Hutchinson*, 38 Ind. 341; *Tootle v. Wells*, 39 Iowa 452; s. c., 18 Pac. Rep. 692; *Kansas City Hotel Co. v. Sigmement*, 53 Mo. 176; *Wright v. Baldwin*, 51 Mo. 269; *Roehring v. Huebschmann*, 34 Wis. 185.

When property is sold to be paid for in instalments and notes are given for each instalment, when they are all due, the plaintiff may claim the entire sum in one count. *Morse v. Frost*, 54 Conn. 84.

Several promissory notes may be joined in one paragraph. *Firestone v. Klick*, 67 Ind. 309; *Stadler v. Parmlee*, 10 Iowa 23; *Merritt v. Nihart*, 11 Iowa 57; *Holland v. Kemp*, 27 S. Car. 623; s. c., 3 S. E. Rep. 83.

But the actions against the maker and guarantor of a note are distinct and must be separately stated. *Tucker v. Shiner*, 24 Iowa 334.

Various breaches of a contract or bond constitute but one cause of action. *De Haven v. Davis*, 35 Mo. 406; *Haynes v. Webster*, 53 Mo. 135; *Fisk v. Tank*, 12 Wis. 276; *Nichol v. Alexander*, 28 Wis. 118.

Unless their investigation involves separate and independent enquiries and findings. *Boyce v. Christy*, 47 Mo. 70.

A complaint averring a contract and breach and claiming to recover the money paid thereon, and damages for the breach, alleges but one cause of action. *Reedy v. Smith*, 42 Cal. 245.

A breach of a number of distinct promises made in connection with a contract of marriage, may be alleged in one paragraph, as the breach of the marriage contract constitutes the sole cause of action. *Dalton v. Barchand*, 2 Clev. L. Rep. (Ohio) 57.

A balance of an account and a note therefor constitute but one cause of action. *Claire v. Claire*, 18 Neb. 54.

“Balance per settlement” and an open account constitute two causes of action. *Eisenhower v. Stein*, 37 Kan. 281; s. c., 15 Pac. Rep. 167.

A claim belonging to plaintiff and one assigned to him constitute two

fore one general right may entitle a plaintiff to several reliefs.¹ So various injuries, all resulting from one act, which is the grava-

causes of action. *Pierce v. Bicknell*, 11 Kan. 262.

1. Different Reliefs, but One General Right.—Mr. Pomeroy, in his discussion of the meaning of the phrase "cause of action," says: "The cause of action is very often confounded with the remedy. . . . It was shown in the opening paragraphs of the introductory chapter that every remedial right arises out of an antecedent primary right and corresponding duty, and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant, a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. . . . The cause of action will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong." See Mr. Pomeroy's admirable work on Remedies and Remedial Rights (2nd ed.), §§ 452-462, pp. 494-504.

The reformation and enforcement of an instrument may be demanded in one count. See cases cited *supra*, II, 4, e, note 3.

The cause of action of a stockholder is that he entrusted money to the corporation and its officers, and therefore a dissolution, receiver, accounting, etc., may all be asked in one complaint. *Mitchell v. Bank of St. Paul*, 7 Minn. 252.

So causes based on the director's misfeasance and negligence. *Smith v. Rathbun*, 22 Hun (N. Y.) 150.

A proceeding to settle affairs of a partnership is but one cause of action, and plaintiff may ask in one paragraph an accounting, a receiver, an injunction against the sale of partnership property, the annulling of such a sale, and a specific lien in complainant on said property. *Palmer v. Tyler*, 15 Minn. 106. *Compare Skidmore v. Collier*, 8 Hun (N. Y.) 50.

An action to foreclose a mortgage given by A to secure a note and for judgment against A and other parties to the note, are separate actions. *Sands v. Wood*, 1 Iowa 263; *Roberts v. Glenn*, 1 Clev. L. Rep. (Ohio) 46; *Giddings v. Barney*, 31 Ohio St. 80. But *contra* when the personal judgment, and a sale of the land under the vendors or a mechanics' lien is asked. *Davenport v. Murray*, 68 Mo. 198; *Hardy v. Miller*, 11 Neb. 395.

An injunction to restrain the satisfaction, etc., of a judgment, and the substitution of any but plaintiff's attorney in that action, is but one cause of action. *Standart v. Burtis*, 46 Hun (N. Y.) 82.

When two separate patents on one article owned by plaintiff are each infringed by defendant in manufacturing that article, a bill to restrain such infringements may include the infringement of both patents. *Gillespie v. Cummings*, 3 Sawy. (U. S. C. C.) 259.

In a petition to vacate judgments, each judgment constitutes a separate cause of action. *Elizabeth v. Morrison*, 1 Clev. L. Rep. (Ohio) 195.

An application for alimony is an incident to a proceeding in divorce and not a separate cause of action. *Damon v. Damon*, 28 Wis. 510.

A complaint which states that plaintiff is entitled to recover on two different legal grounds, viz.: a contract of guaranty and a mistake, states but one cause of action arising from the facts of the case. *Mills v. Barney*, 22 Cal. 240; *Bonney v. Reardin*, 6 Bush (Ky.) 34.

Fraudulent disposition of his property by a judgment debtor, though by separate conveyances to different parties, constitutes but one cause of action, and a complaint to set them all aside need contain only one count. *Strong v. Taylor School Twp.*, 79 Ind. 208; *Donovan v. Dunning*, 69 Mo. 436; *Marx v. Tailer*, 12 N. Y. Civ. Proc. 226; *Tisdale v. Moore*, 8 Hun (N. Y.) 19.

So all the facts connected with an illegal alienation of corporate property. *Beecher v. Schieffelin*, 4 N. Y. Civ. Proc. 230; or the fraudulent acts inducing plaintiff to convey his property. *Palmer v. Searing*, 12 N. Y. St. Rep. 559.

men of plaintiff's action, may be joined in one count.¹ Each count must contain all the facts necessary to constitute a cause of action.²

1. One Gravamen of the Action.—When a complaint in one count states a malicious prosecution and an undertaking filed therein, it was *held* that the *gravamen* of the complaint was the malicious prosecution, and the action therefor was barred by the statute of limitations, and that the allegations with regard to the undertaking could not be construed as constituting a separate cause of action which was not barred by the statute. *Sharp v. Miller*, 54 Cal. 329. *Compare Schenck v. Butsch*, 32 Ind. 338.

It was doubted whether a slander and a malicious prosecution arising from the same transaction constituted more than one cause of action in *Harris v. Avery*, 5 Kan. 146.

An entire conversation, though containing several distinct charges, either of which is actionable, constitutes but one cause of action, and can properly be made the basis of but one count in a petition. *Cracraft v. Cochran*, 16 Iowa 301.

In an action to recover for injuries to plaintiff's wife, house and furniture, caused by a single explosion of gunpowder, it is not proper pleading to set forth the injury to each as a separate cause of action, in a distinct or separate count. "The complaint is of injury resulting from an explosion of powder. The fact that a part of those injuries consisted in the wounding of the wife, a part in the destruction of furniture, and a part in injury to a house, cannot be regarded as a proper reason for setting forth each specific injury in a separate count or paragraph as an independent cause of action." *Hazard Powder Co. v. Volger*, 18 Pac. Rep. (Wyo.) 636; *Howe v. Peckham*, 6 How. Pr. (N. Y.) 229; s. c., 10 Barb. (N. Y.) 656.

When the *gravamen* of an action is a certain act, the fact that it may be accomplished by different means is not enough to require separate counts. Whether negligence arose from want of care in construction or operation of a dam is not sufficiently material to require separate counts. *Hoffman v. Tuolumne Co. Water Co.*, 10 Cal. 413; *Gale v. Tuolumne Water Co.*, 14 Cal. 25.

Tenders by different persons, acting as agents of plaintiffs at different times

and places, of separate lots of grain for transportation, all making the quantity refused to be transported constitute but one cause of action for the refusal to transport the whole quantity. *Cobb v. I. C. R. Co.*, 38 Iowa 601.

The recovery of real property, mesne profits and damages may all be asked in one count. *Sullivan v. Davis*, 4 Cal. 291. See the cases cited *supra*, II, 4, b. (2). *Contra*, *Harrall v. Gray*, 12 Neb. 543.

Recovery of personalty and damages for withholding may be claimed in one count. *Pharis v. Carver*, 13 B. Mon. (Ky.) 236.

The value of personal property destroyed and damages for its destruction may be demanded in one count. *Tendesen v. Marshall*, 3 Cal. 440. See *Angell v. Hopkins*, 79 Cal. 181.

Where trespass is charged, the allegation of injuries to personal property are not statements of separate causes of action, but mere averments in aggravation of the wrongful entry, and all may be included, therefore, in one count. *Gilbert v. Pritchard*, 41 Hun (N. Y.) 46; *Whatling v. Nash*, 41 Hun (N. Y.) 579.

But when damages are claimed for a trespass upon a dam, canal, etc., and for the diversion of the water therein, there are two distinct causes of action which must be separately stated. *Nevada Co. & S. Canal Co. v. Kidd*, 37 Cal. 282; *Nevada Co. & S. Canal Co. v. Kidd*, 43 Cal. 180.

In an action to recover moneys fraudulently obtained, though by divers frauds at different times, constitutes but one cause of action. *People v. Tweed*, 63 N. Y. 194; s. c., 50 How. Pr. (N. Y.) 38, affg 5 Hun (N. Y.) 353.

Damages for fraudulent representations that sheep sold were sound, and for injuries caused to other sheep from contact with these, constitute but one cause of action. *Wilcox v. McCoy*, 21 Ohio St. 655.

Damages for nondelivery of cattle and putting them in a stock yard infected with disease constitute but one cause of action. *Baldwin v. L. S. & Mich. South. R. Co.*, 1 Clev. (Ohio) 178.

2. Sufficiency of Counts.—Each count must contain all the facts necessary to constitute a cause of action,

5. Joinder in Actions on Bonds and Recognizances.—In an action on a bond or recognizance only causes of action under the bond can be joined,¹ but different breaches of one and the same bond may be joined.² Actions on several bonds or recognizances may

and its defects cannot be supplied from statements in other counts unless *expressly* referred to; and not then, if the matters referred to constitute the *gravamen* of the action. *Haskell v. Haskell*, 54 Cal. 262; *Loup v. California South. R. Co.*, 63 Cal. 97, 100; *Murphy v. Estes*, 6 Bush (Ky.) 532; *Nat. Bank of Michigan v. Green*, 33 Iowa 140 (Rev. Code of Iowa, Miller, 1888, § 2646, par. 5, p. 916; each must be sufficient in itself); *Stewart v. Balderston*, 10 Kan. 131; *Gerther v. Linscott*, 26 Minn. 82; s. c., 1 N. W. Rep. 579.

An objection on this ground must be made in the trial court. *Conver v. Chicago M. & St. P. R. Co.*, 62 Iowa 460.

When, however, several causes of action arise out of the same transaction, if the plaintiff upon the facts stated is entitled to any portion of the relief prayed for, an objection that neither cause of action, taken separately, is sufficiently stated to entitle a recovery, is not a fatal defect, provided the complaint contains such facts as, taken together, showed the plaintiff entitled to both kinds of relief sought. *Montgomery v. McEwen*, 7 Minn. 351; *First Div. St. Paul & Pac. R. Co. v. Rice*, 25 Minn. 278.

If all the facts constitute one cause of action, they may be stated in one paragraph and different reliefs prayed. The fact that the plaintiff does not ask for the proper relief, or asks for inconsistent relief, is not ground of demurrer. *Connor v. Board of Education of St. Anthony*, 10 Minn. 439; *First Div. St. Paul & Pac. R. Co. v. Rice*, 25 Minn. 278; *McGlothlin v. Hewer*, 44 Mo. 550.

1. Bonds and Recognizances.—A cause of action against the sureties upon the bond of an administrator, arising from a breach of the condition of the bond, cannot be united in the same complaint with a cause of action against the administrator, arising from acts of the deceased intestate in fraudulently disposing of his property. *House v. Moody*, 14 Fla. 59.

In an action on a recognizance, the plaintiff may not join a count asking that securities given by the principal to indemnify the sureties in said bond should be applied to the payment of his

claim when recovered. *People v. Skidmore*, 17 Cal. 260.

In an action against a sheriff for an alleged trespass in making an unlawful levy, a count against the sureties on his official bond which does not allege that they participated in the trespass, or that the sheriff signed the bond, is a misjoinder. *Ghiradelli v. Bourland*, 32 Cal. 585; *Hoye v. Raymond*, 25 Kan. 665.

In an action against a sheriff for wrongful seizure of goods, a count cannot be joined upon the liability of the makers of an indemnity bond executed to the sheriff prior to the levy. *Longcope v. Bruce*, 44 Tex. 434.

A cause of action against a probate judge for taking insufficient sureties on an administration bond cannot be united with a cause of action against the administrator and said sureties for a devastavit. *Mitchell v. Mitchell*, 96 N. Car. 14; s. c., 1 S. E. Rep. 648.

2. Different Breaches.—Where one is guardian of several wards and gave but one bond, all the wards may unite in a proceeding for an accounting. *Slatings v. Barrett*, 26 S. Car. 474.

Several wards may join in a suit on their guardian's bond to recover for the conversion of their joint property. *Bond v. Dillard*, 50 Tex. 302.

Separate actions by each legatee, distributee, etc., should be brought against an executor and his surety on the executor's bond. *Durfee v. Abbott*, 50 Mich. 479; *Case v. Funk*, 10 West. L. Jour. (Ohio) 163.

Where, on obtaining an injunction to stay proceedings on three judgments in favor of three different parties, the defendant therein filed but one injunction bond, the said three judgment creditors were allowed to unite in one action, and recover a joint judgment for the total amount of their demand, although their claims were of different amounts and bore interest from different dates. *Peerce v. Athey*, 4 W. Va. 22.

Different breaches of one and the same official bond may be joined. *People v. Slocum*, 1 Idaho 62.

There is no improper joinder of actions and of parties in a suit for actual and punitive damages, against the

not be joined.¹ There is, however, a tendency to allow a joinder of action on several bonds given by one administrator, and on the successive bonds given by a public officer² as well as on several appeal or attachment bonds.³

6. Joinder of Statutory and Common Law Actions.—A proceeding distinctively statutory may not be joined with an action at common law,³ but when penalties are prescribed by a statute, several

principal and the surety on an injunction bond. *Cowery v. Coons*, 33 La. An. 372; *Riggs v. Bell*, 39 La. An. 1030.

1. Several Bonds.—Actions on several recognizances may not be joined. *Webb v. Bowman*, 3 J. J. Marsh. (Ky.) 70.

A cause of action on the bond of a court clerk and upon the bond of an administrator may not be joined, though a joint fraud between the clerk and the administrator is charged. *Street v. Tuck*, 84 N. Car. 605.

2. When an administrator, having given a bond with sureties, gives a new bond with other sureties, under a statute which provided that when such new bond was given and approved, the former sureties shall be discharged from all liability for the future acts of the administrator, in an action by heirs against said administrator, plaintiffs were allowed to join in one suit an action on each bond, with a prayer that the liabilities of each set of sureties should be ascertained therein as well as a judgment given against the second set of sureties for certain specific railroad bonds alleged to have been wrongfully transferred to said second set of sureties by the administrator. *Love v. Keowne*, 58 Tex. 191. Compare *Lane v. State*, 27 Ind. 108; *McLachlan v. Staples*, 13 Wis. 448.

But different suits would not be consolidated when the plaintiff is able to state and prove clearly when the misfeasance occurred. *Screwmen's Ben. Ass. v. Smith*, 73 W. Rep. (Tex.) 793.

When two official bonds were given for the same term a joint action thereon was allowed. *Holeran v. School Dist.*, 10 Neb. 406.

When, however, the bonds had been given by the same official for different terms the plaintiff was not allowed to join counts upon the several bonds and recover judgment in debt for the gross amount of the penalties against one who was a surety on all the bonds. *Cassady v. Board of Trustees*, 393 Ill. 394.

Such a joinder was allowed in *Syme v. Bunting*, 86 N. Car. 175. And see *Woods v. Hayward*, 13 Pick. (Mass.) 269; *Trustees of McMinn Academy v. Reneau*, 2 Swan (Tenn.) 94; *Screwmen's Ben. Ass. v. Smith*, 7 S. W. Rep. (Tex.) 793; *Finch v. State*, 9 S. W. Rep. (Tex.) 85.

In *Indiana*, there is now a statutory provision on this subject: "Whenever any public officer or other person is required by the laws of this State to give bond for the performance of his duties, and more than one bond is given by the same officer or person for the performance of such duties, either during the same period of time or for successive periods of time, any person entitled to sue upon either of said bonds may bring a joint suit upon all or any number of said bonds, and in such action the liability of all the respective sureties therein shall be determined by the court or jury." Act approved March 9th, 1889; *Indiana Stat.*, Elliott's Supplement, 1889, § 15, p. 21.

3. A consolidation of several appeals for money demands between the same parties will authorize the court to render a judgment for the entire amount against the sureties in the several appeal bonds, if the same persons are sureties in all the bonds. *Wetumpka etc. R. Co. v. Bingham*, 5 Ala. 657.

A plaintiff may proceed in one action for damages for breaches of two or more attachment bonds executed by the same obligors in his favor. *Gabel v. Hammerwell*, 44 Ala. 336; *Clendenin v. Schneider*, 35 Mo. 533.

In an action of debt on an appeal bond, plaintiff cannot join damages to himself and others, to himself alone individually and to himself alone in an official capacity. *Bardill v. Trustees of Schools*, 4 Bradw. (Ill. App.) 94.

4. Statutory and Common Law Actions.—A summary proceeding under the forcible entry and detainer act may not be joined with other causes of action, although arising out of the same transaction. *Ow v. Wickham*, 38 Kan. 225.

penalties may be recovered in one action,¹ and if a penalty or damages is made recoverable in a specific form of action, the weight of authority seems to be that counts therefor may be joined with counts for other causes of action in the same form, but not in a different form.²

III. JOINDER OF ACTIONS IN DIFFERENT RIGHTS.—1. Actions by Executors or Administrators.—In actions by executors or administrators, counts may be joined whenever the sum recovered would be assets.³ This rule was only established after a long controversy

A common law action for negligence cannot be joined with one for statutory negligence. *Kendrick v. Chicago & Alton R. Co.*, 81 Mo. 521.

When a statute provides that a trespasser in certain case should pay treble damages to the party injured, and be deemed guilty of a misdemeanor and subject to fine, a civil action for the damages cannot be joined with a criminal action for the fine. *Felter v. Manville*, 23 Kan. 191.

An action for a penalty cognizable in a justice's court and required by the statute to be sued for there, may not be joined with an action in a court of common pleas. *Denoon v. Burns*, 2 Clark (Pa.) 397.

1. Qui Tam Actions to Recover Statutory Penalties.—Several penalties for offences of a similar nature may be recovered in one action. *Holland v. Bothmar*, 4 Tenn. Rep. 228; *Kempton v. Sullivan Savings Institution*, 53 N. H. 581; *Purinton v. Ladd*, 58 N. H. 596; *Gibson v. Gault*, 33 Pa. St. 44; *Lancaster v. R. R. Co.*, 12 Lan. Bar (Pa.) 99; *Finley v. Hayes*, 81 N. Car. 368; *Cincinnati S. & C. R. Co. v. Cook*, 37 O. S. 265. *Contra*, *Brown v. Rice*, 51 Cal. 489.

The joining of several matters of fact together which show as many failures to perform a duty enjoined by law, and claiming to recover a penalty for each when the law itself only allows the recovery of one penalty for one and all of such violations, is not a joining of several distinct causes of action. *Loveland v. Garner*, 71 Cal. 541; s. c., 12 Pac. Rep. 616.

2. Counts for trespass, case, etc., at common law can be joined with a count in the same form under a statute giving punitive damages. *Prescott v. Tufts*, 4 Mass. 146; *Fairfield v. Burt*, 11 Pick. (Mass.) 244; *Heridia v. Ayres*, 12 Pick. (Mass.) 334; *Worster v. Proprietors of Canal Bridge*, 16 Pick. (Mass.) 541; *Hogsett v. Ellis*, 17 Mich. 351; *Swift v.*

Applebone, 23 Mich. 252; *Withington v. Young*, 4 Mo. 564; *U. S. v. Williams*, 6 Mont. 379.

Contra, *Whipple v. Fuller*, 11 Conn. 582; *Morrison v. Bedell*, 22 N. H. 234; *Keyes v. Prescott*, 32 Vt. 86.

When a statute provides for damages recoverable in case, and also for a penalty recoverable in the same action, a count in case for the damages may be joined with a count in debt for the penalty. *Smith v. Merwin*, 15 Wend. (N. Y.) 184. *Compare* *Pearkes v. Freer*, 9 Cal. 642.

Counts in debt for statute penalties may be joined with one for money had and received, where the entire recovery goes to the party aggrieved. *Spencer v. Thompson*, 11 Ala. 746; *Gruber v. First National Bank of Clarion*, 87 Pa. St. 465.

Contra, *People ex rel. Drew v. Circuit Court Judges*, 1 Doug. (Mich.) 434; *Scott v. Robards*, 67 Mo. 289; *Wiles v. Suydam*, 64 N. Y. 173, rev'g 3 Hun 604; s. c., 6 N. Y. Supr. Ct. (T. & C.) 292; *Sullivan v. N. Y., N. H. & H. R.*, 61 How. Pr. (N. Y.) 490.

Trover cannot be joined with an action on an act of assembly to recover double damages for an illegal distress and sale. *Smith v. Meanor*, 16 S. & R. (Pa.) 375.

Statutory liability of a corporation and its common law liability may be enforced in the same action. *Bottomley v. Port Huron & N. W. R. Co.* 44 Mich. 542; *Lamphier v. Worcester & Nashua R. Co.*, 33 N. H. 495; *Penn. R. v. Bock*, 93 Pa. St. 427. *Compare* *Kendrick v. Chicago & Alton R. R. Co.*, 81 Mo. 521.

3. Actions by Executors or Administrators.—"It is now a well settled rule in actions by a plaintiff who is an executor or administrator, that when the money, when recovered, would be assets, the executor may declare for it in his representative character, and that the best line to adopt in determin-

over the liability of executors and administrators for costs under the statute of 4 Jac. 1, c. 3.¹ A plaintiff may declare on prom-

ing whether counts may be joined is to consider whether the sum, when recovered, would be assets." Chitty on Pleadings, 16th Am. ed. 296, 7th Eng. ed. *225.

"The best rule of determining what demands may be joined is to consider whether the sum, when recovered, would be assets; if it would be so, it may be joined." Saunders on Pleading and Evidence (5th Am. ed.) *1119.

See an article on The Joinder of Actions in Different Rights, 10 Am. Jur. 310.

1. **History of Rule.**—The above well settled rule, that when the money recovered would be assets, executors or administrators may declare therefor in their representative capacities, was only settled after a long controversy. The early cases arose under the statute of 4 Jac. 1, ch. 3, which provided that "in every action where the verdict passeth for the defendant the plaintiff should pay costs." Under this statute it was decided in 7 Jac. 1, that when the executor sued on a bond given the testator, and failed to recover, he was not liable for costs under the statute because he sued in another's right. *Haywarth v. David*, Cro. Jac. 229. A few years later, in an action for ravishment *de gard*, brought by an executrix, the issue being upon the tenure, and found for defendant, the defendant claimed costs, because the plaintiff counts that she brings her action upon her own possession. Three judges held that the defendant should not have costs, and one judge *contra*. *Peacock v. Steese*, Cro. Car. 29 (1 Car. I.). In *Atkey v. Heard*, Cro. Car. 219 (7 Car. I.), it was decided that in trover by an administrator, if the conversion be in his own time, he shall pay costs under the statute. The leading case of *Bull v. Palmer* was decided in 27, 28 Car. II. It was an action of assumpsit, and the plaintiff declared that the defendant covenanted with him, being executor to J S, as executor, upon which account so much was due, and he promised to pay it. Plaintiff was nonsuited. Defendant asked for costs. Costs were refused by a majority of the judges, three against one, because "the action is in the right of his executorship, and the money recovered will be the assets." *Bull v. Palmer*, 2 Levinz 165; 1 Freem. 424.

This principle then laid down was not generally accepted. Upon the single question of actions of trover, when the conversion was done in the time of the executor or administrator, the above case of *Atkey v. Heard*, Cro. Car. 219 (7 Car. I.) was followed in *Hole v. King*, 1 Comyns 162 (8 Anne), and *Ballard v. Spencer*, 7 Tenn. 358 (37 Geo. III), while the court refused to follow that decision in *Mason v. Jackson*, 3 Levinz 60 (34 Car. II.); *Downes v. Shaft*, 1 Barnes 129 (13, 14 Geo. II), and *Cockerill v. Kynaston*, 4 Term 277 (31 Geo. III).

In a note to *Hole v. King* it is stated that "the rule in these cases is, that where it is necessary for a plaintiff, who is an executor, to name himself executor, and bring the action in the right of his testator, he is not liable to costs; but that where the cause of action arises in the time of the executor he is liable to costs, although he name himself executor, because he might have brought the action in his own right." See *Hole v. King*, 1 Comyns 162, note (2). To the same effect is the note (a) to the case of *Jenkins v. Plume*, 1 Salk. 207.

In a note to the case of *Coryton v. Lithebye*, 2 Saund. 117 f, the annotator goes so far as to say that "the old notion that the money recovered will be assets, and therefore the executor is not subject to costs, seems to be now exploded." The convenience of the rule was so very apparent, however, that LORD ELLENBOROUGH, C. J., in the case of *Cowell v. Watts*, decided in 1805 (45 Geo. III), referred to it as follows: "I wish that the rule which was long ago laid down in *Bull v. Palmer*, had been abided by, that where the money when recovered would be assets the executor may declare for it in his representative character." Then having decided the question of joinder raised in the case under that rule, he nevertheless concluded as follows: "Whether the plaintiffs might have sued in their own characters is another question, affecting the right to costs, which may arise hereafter, and upon which it is unnecessary to say anything at present." *Cowell v. Watts*, 6 East 405, 409, 411.

This much disputed question as to the liability for costs was finally put at rest by the statute of 3 and 4 W. IV, ch. 42, § 31, which put executors and adminis-

ises made to himself in his representative capacity, and on promises made to his decedent,¹ but causes of action accruing to the plaintiff in his representative capacity cannot be joined with causes of action that have accrued to him in his individual capacity.²

trators on the same footing as other plaintiffs as to their liability for costs, unless where the court sees that they have been misled by some misconduct on the part of the defendant, or unless some other very peculiar ground be laid for the interference of the court. See *Wilbraham v. Snow*, 2 Saund. 47 *u.* note (s).

Meanwhile the rule which had thus grown out of a much disputed controversy on the matter of costs, had become a well settled rule as determining the question of joinder of counts in actions by executors or administrators, and is so stated by all the text writers upon the subject, and is cited and relied upon in nearly all of the cases herein-after referred to under this heading. See the remainder of the above note to *Coryton v. Lithebye*, 2 Saund. 117 *f.*

1. Promises to Executor or Administrator and Decedent.—A count for money had and received by defendant to the use of the executor, as such, may be joined to a count for money had and received to the use of the testator. *Gallant v. Bouteflower*, 3 Doug. 34. This is stated to be "the constant practice" in 1790. *Petrie v. Hanway*, 3 Term 659; *Webster v. Spencer*, 3 B. & Ald. 366; *Clark v. Hougham*, 2 B. & C. 149; *Clarke v. Lamb*, 6 Pick. (Mass.) 512; *Brown v. Lewis*, 9 R. I. 497; *Sebring v. Keith*, 2 Bailey (S. Car.) 192; *Flowers v. Kent*, *Brayt.* (Vt.) 134. So also counts for goods sold, work done or money paid by the executor or administrator as such may be joined with counts on promises to the testator or intestate. *Ord v. Fenwick*, 3 East 104; *Cowell v. Watts*, 6 East 405; *Edwards v. Grace*, 2 M. & W. 190; *Werner v. Humphreys*, 3 Scott, N. R. 226; *Marshall v. Broadhurst*, 1 Cr. & J. 403; *Lowe v. Bowman*, 5 Blackf. (Ind.) 411; *Wilson v. Hunt*, 6 B. Mon. (Ky.) 379, 383; *Fry v. Evans*, 8 Wend. (N. Y.) 530; *Stevens v. Gregg*, 10 S. & R. (Pa.) 234; *Bank of Pennsylvania v. Halde-man*, 1 P. & W. (Pa.) 161; *Peries v. Aycinena*, 3 W. & S. (Pa.) 64.

Counts for goods sold or money paid by the testator may be joined with an account stated between the executor and the defendant. *Thompson v. Slent*, 1 Taunt. 322; *Powley v. Newton*, 2

Marsh. 147; s. c. 6 Taunt. 453; *Lancefield v. Allen*, 1 Bligh, N. S. 592. See *Werner v. Humphreys*, 2 Mann. & Gr. 833.

An executor may in the same declaration declare for rent due in his own time and for that which accrued in the testator's lifetime. *Taylor v. Holmes*, 1 Freem. 367. Compare *Armstrong v. Hall*, 17 How. Pr. (N. Y.) 76.

Counts on promises made to an intestate may be joined with counts on promissory notes given to the administrator as administrator, since the intestate's death. *Chitty's Pleadings*, (16 Am. ed.) *226; *Partridge v. Court*, 5 Price 412; aff'd in *Court v. Partridge*, 7 Price 591, overruling *Betts v. Mitchell*, 10 Mod. 315. Compare *Catherwood v. Chaband*, 1 B. & C. 150.

An executor may declare on a trover and conversion in the testator's lifetime and also on a trover and conversion after his death. *Cockerill v. Kynaston*, 4 Term. 277; *French v. Merrill*, 6 N. H. 465.

An executor may join in the same complaint a count for trespass *quare clausum fregit* during the testator's lifetime, with another for a like trespass after his death, to lands devised to the executor in trust for specific purposes. *Pittsburgh, Fort Wayne & Chicago R. v. Swinney*, 97 Ind. 586. Compare *Robbins v. Gillett*, 2 Pinney (Wis.) 439; s. c., 2 Chand. (Wis.) 96.

In assumpsit by an administrator *de bonis non*, a count alleging a promise to have been made to the first administrator may be joined with counts alleging promises to the intestate and to the administrator *de bonis non*. *Sullivan v. Holker*, 15 Mass. 374. Compare *Catherwood v. Chaband*, 1 B. & C. 150. See EXECUTORS AND ADMINISTRATORS, XVI, Remedies, 1 Actions at Law, (a) By executors and Administrators, 13; Joinder of Counts, Am. & Eng. Encyc. of Law, vol. 7, p. 367.

2. Causes Accruing in Individual and Representative Capacity.—"An executor cannot include counts on causes of action accruing to him in his private right and individual character, with counts on causes of action which are laid to have been vested in him in his representative character." *Chitty's*

2. Actions Against Executors or Administrators.—In actions against executors or administrators, only such counts may be joined as seek a judgment *de bonis decedentis*,¹ and therefore a count cannot

Pleadings (16th ed.), vol. 1, *227; *Rogers v. Cook*, 1 Salk. 10; s. c., Carth. 235, and Show. 366; note to *Coryton v. Lithebye*, 2 Saund. 117 *e*; note to *Foxwist v. Tremaine*, 2 Saund. 210 *a*; *Hooker v. Quilter*, 1 Wils. 171; s. c., 2 Strange 1271; *King v. Thom.* 1 Tenn. 487; *Cassels v. Vernon*, 5 Mason (U. S. C. C.) 332, 333; *Dias v. Phillips*, 59 Cal. 293; *Lyon v. Evans*, 1 Ark. 349; *Bulkley v. Andrews*, 39 Conn. 523; *Frink v. Taylor*, 4 G. Gr. (Iowa) 196; *Brown v. Webber*, 6 Cush. (Mass.) 560; *Yates v. Kimmel*, 5 Mo. 87; *Mertens v. Loewenberg*, 69 Mo. 208; *Hall v. Fisher*, 20 Barb. (N. Y.) 441; *Mason v. Norcross*, *Coxe* (N. J.) 242; *Thompson v. Bohannon*, 38 Tex. 241; *Robbins v. Gillett*, 2 Pinney (Wis.) 439; *Kline v. Guthart*, 2 P. & W. (Pa.) 494.

A husband cannot join a count for a cause of action in right of his wife with a cause of action vested in him as administrator of a third party. *Mertens v. Loewenberg*, 69 Mo. 208.

Where slaves were taken from the possession of an administrator, he may, in an action of trover, declare against the defendant for the conversion of them, first, as property belonging to him in his own right, and, second, as property belonging to him as administrator. This was *held* to be no misjoinder, because "the wrong done is to the possession and not to the title; and the action brought is not upon two distinct separate demands, the one in plaintiff's own right and the other *in auter droit*; for though, in the second count, he claims the property as bailee, yet it is not an action in right of the bailor, but in right of the bailee." *Lashlee v. Wily*, 8 Humph. (Tenn.) 659. Compare a similar decision in an action of detinue. *Boyle v. Townes*, 9 Leigh (Va.) 158.

And it has in one case been *held* under the New York code that a plaintiff could join her action *as devisee* for rent of a farm leased to the defendant by a testator which accrued after testator's death, with her action *as executrix* for breaches of covenants contained in that lease, because "both rights accrued under a contract made by the testator with the defendant, and growing out of the same matter." *Armstrong v. Hall*, 17 How. Pr. (N. Y.) 76.

A count on a bond given to the plaintiff as executor, and payable to the plaintiff, his "attorney, executors, administrators or assigns," may not be joined with a count on a bond given to the testator, because the executor by taking the bond extinguished the original debt, and a recovery on that bond would not be assets of his testator's estate. *Hosier v. Arundell*, 3 B. & P. 7.

An executrix cannot join in one action a count for damages for injuries occasioned the decedent by defendant's negligence, and a count for the damages occasioned to her, as his widow, due to the fact that decedent's death was caused by those injuries. *Frink v. Taylor*, 4 G. Greene (Iowa) 196.

In an action by A as executor of B, who had been executor of C, a count upon an account stated between A as executor and the defendant cannot be joined with counts on promises to C, because the account stated is not declared to have been made with A as executor of B in his right as executor of C. *Henshall v. Roberts*, 5 East 150.

A personal representative cannot sue in his right as an heir and in his representative capacity in one action. *Paxton v. Wood*, 77 N. Car. 11.

When one is administrator of two different persons who were killed by the same negligence, he cannot unite in one suit his two actions for damages on account of the death of his respective intestates. *Danaher v. City of Brooklyn*, 4 N. Y. Civ. Proc. R. 286.

1. Actions Against Executors and Administrators — Joinder Allowed.—"An account stated by the defendant as executor of moneys due *from the testator* may be supported, and may be joined with counts upon promises by the testator. . . . And a count upon an account stated by an executor as such, of moneys due and owing from *him* in that character, may be joined with counts on promises by the testator, as such account stated does not make the executor personally liable." Chitty's Pleadings (16th ed.) *227; *Powell v. Graham*, 7 Tamst. 580; s. c., 1 Moore 305; *Ellis v. Bowen*, *Forrest* 98; *Segar v. Atkinson*, 1 H. Bl. 102 (*compare* *Rose v. Bowler*, 1 H. Bl. 109); *McKinley v. Call*, 1 Mon. (Ky.) 54; *Carter v. Phelps*, 8

be joined which would charge him personally.¹ Therefore a count on promises by the testator may not be joined with a count on promises by his executor or administrator, because the estate is liable to complete the testator's contracts, but is not bound by the contracts of the executor or administrator.² A count for funeral expenses cannot be joined with counts on promises by the

Johns. (N. Y.) 440; Reynolds v. Reynolds, 3 Wend. (N. Y.) 244; Gillet v. Hutchinson, 24 Wend. (N. Y.) 184; Wilkings v. Murphey, 2 Hayw. (N. Car.) 282; Malin v. Bull, 13 S. & R. (Pa.) 441; Epes v. Dudley, 5 Rand. (Va.) 437; Dobbs v. Green, 2 Wis. 228; Dobbs v. Enearl, 4 Wis. 451.

A count for taxes due from the testator may be joined with a count for taxes due from the executor on the same property, while in his hands as executor pending the settlement of the estate. Bonaparte v. State, 63 Md. 465.

To a count in covenant charging a breach by the testator in his lifetime of a covenant binding himself, his executors and assigns may be joined a count charging a breach since said testator's decease. Wilson v. Wigg, 10 East 313.

But a count against executors on their own covenant in a deed executed by virtue of a power in a will, and in execution of an agreement made by the testator cannot be joined with one against them on the covenants of the testator. Strohecker v. Grant, 16 S. & R. (Pa.) 737.

It has been held in New York that a count on a promise by the testator to pay rent can be joined with counts upon promises by the executor to pay for use and occupation after testator's death. Pugsley v. Aikin, 1 Kern. (N. Y.) 494, rev'g Pugsley v. Aikin, 14 Barb. (N. Y.) 114. To the contrary is Wigley v. Ashton, 3 B. & Ald. 101.

A count for money paid by plaintiff since testator's death on a bond on which plaintiff was testator's surety may be joined with counts on promises made by testator in his lifetime. Reeve v. Cawley's Exr., 2 Harr. (N. J.) 415.

A count upon an indebtedness and promise by the administrator or executor as such may be joined with one upon an indebtedness and promise of the decedent, provided the consideration of the demand spring from or was connected with the estate. Howard's Admrs. v. Powers, 6 Ohio 92.

Where one was administrator of a decedent, and guardian of his children, an action in behalf of the children

against him and the sureties on his guardian bond to recover their distributive shares was allowed in Redfearn v. Austin, 88 N. Car. 413.

When one was a guardian, and after his ward's decease became also his administrator, and then died, the heirs of said ward may sue the executor of said decedent as guardian and as administrator, to recover the amount of said ward's estate. Alexander et ux. v. Wolfe et al., 83 N. Car. 272.

1. Actions Against Executors.—Joinder Inadmissible.—"So, in an action against an executor, a count cannot be introduced which would charge him personally, for the judgment in the one case would be *de bonis testatoris*, and in the other *de bonis propriis*." Chitty's Pleadings (16th ed.) *227.

A count on a cause of action against an executor as such cannot be joined with a count on a cause of action against him in his own personal capacity. Herrenden v. Palmer, Hobart 88a; Godbold v. Roberts, 20 Ala. 354; McMahon v. Allen, 3 Abbott Prac. (N. Y.) 89; Lord v. Vreeland et al., 24 How. Pr. (N. Y.) 316. Compare Parker v. Baylis, 2 Bos. & Pull. 73; Hencken v. Ludewig, 12 Rob. (La.) 188; Denegre v. Denegre, 33 La. An. 689; Epes v. Dudley, 5 Rand. (Va.) 437.

2. Thus a count on a promise by the testator to pay rent cannot be joined with counts upon promises by the executor to pay for use and occupation after testator's death. Wigley v. Ashton, 3 B. & Ald. 101. A contrary conclusion, however, was reached in Pugsley v. Aikin, 1 Kern. (N. Y.) 494, rev'g Pugsley v. Aikin, 14 Barb. (N. Y.) 114.

The principle is frequently stated to be that an executor may not bind the estate by an executory contract; that the estate is liable to complete the testator's contracts; but the executor's contracts do not bind the estate. Upon this ground the case of Pugsley v. Aikin, 1 Kern. (N. Y.) 494, was distinguished in Austin v. Munro, 47 N. Y. 360, 366. See also Hayward v. McDonald, 1 How. Pr. N. S. (N. Y.) 229.

decendent.¹ While a plaintiff may join a count on a several promise by the testator with a count on a joint promise, he may not sue the personal representative of the decedent in that capacity,

A count on a promise made by the defendant as administrator to pay money received by him in that capacity to the plaintiff's use cannot be joined with other counts on promises made by the intestate. Both the pleas and the judgment are different. *Rose v. Bowler*, 1 H. Bl. 109; *Jennings v. Newman*, 4 Term. 347; *Brigden v. Parkes*, 2 Bos. & Pull., 424; *Ashly v. Ashly*, 7 B. & C. 444 (compare *Churchill v. Bertrand*, 3 Ad. & Ell. N. S. 568); *Farmers' Bank v. Cullen*, 4 Harr. (Del.) 289; *Moody v. Ewing*, 8 B. Mon. (Ky.) 521, 522; *Gillet v. Hutchinson*, 24 Wend. (N. Y.) 184; *Seip v. Drach*, 14 Pa. St. 352.

Counts for goods sold, work done, money paid, etc., for the defendant, as executor, cannot be joined with a count on promises made by the testator or for money found to be due on an account stated with the defendant as executor. *Corner v. Shew*, 3 M. & W. 350; *Kennedy v. Stallworth*, 18 Ala. 263; *McDaniel v. Parks*, 19 Ark. 671; *Vaughn's Exr. v. Gardner*, 7 B. Mon. (Ky.) 326, 327; *Grahame et al. v. Harris et al.*, 5 Gill & J. (Md.) 489; *Benjamin v. Taylor*, 12 Barb. (N. Y.) 328; *Bogle's Exr. v. Kreitzer*, 46 Pa. St. 465. Compare *Eaton v. Whitaker*, 6 Pick. (Mass.) 465; *Smith v. Proctor*, 1 Sandf. (N. Y. Supr. Ct.) 72; *Ross v. Harden*, 44 N. Y. Supr. Ct., (12 J. & S.) 26; *Austin v. Munro*, 47 N. Y. 360, aff'g *Austin v. Monroe*, 4 Lans. (N. Y. Supr. Ct.) 67; *Reeve v. Cawley's Exr.*, 2 Harr. (N. J.) 415. See, however, *Tradesmen's National Bank v. McFeely*, 61 Barb. (N. Y.) 522. Or with a count on promissory notes given by testator in his lifetime to plaintiff. *Jeffords v. Ringgold*, 6 A. 2. 544.

A count against a defendant, as an administrator, based upon a rejected claim against the estate, cannot be joined with a count against such defendant personally with others to compel him and them to transfer to the estate property to which they had procured the legal title through fraud. *Mesmer v. Jenkins*, 61 Cal. 151.

1. **Funeral Expenses.**—A count stating defendant to be indebted as administrator on account of the funeral expenses of the intestate cannot be joined with counts on promises by the intestate.

Hayter v. Moat, 5 Dowl. 298; s. c., 2 M. & W. 56; *Myer v. Cole*, 12 Johns. (N. Y.) 349; *Demott v. Field*, 7 Cow. (N. Y.) 58; *Ferrin v. Myrick*, 41 N. Y. 315. To the contrary effect are *Hapgood v. Houghton*, 10 Pick. (Mass.) 155; *Gregory v. Hooker*, 1 Hawks. (N. Car.) 394; s. c., 9 Am. Dec. 646. Though it was held in the first of those cases that a count on a promissory note of the executor given in payment of the funeral expenses could not be joined. *Hapgood v. Houghton*, 10 Pick. (Mass.) 155. Compare *Laird v. Arnold*, 25 Hun (N. Y.) 4. See *Blood v. Kane*, 6 N. Y. Sup. 353.

And see EXECUTORS AND ADMINISTRATORS, § 15, 2, c, Funeral Expenses, Am. & Eng. Encyc. of Law, vol. 7, p. 340.

In *Ferrin v. Myrick*, HUNT, C. J., after a careful review of the authorities in New York, concludes as follows:

"The following principles are settled by these authorities:

"1. That for all causes of action arising upon a contract made by the testator in his lifetime, an action can be sustained against the executors as such, and the judgment would be *de bonis intestatoris*.

"2. That in all causes of action, where the same arises upon a contract made after the death of the testator, the claim is against the executor personally, not against the estate, and the judgment must be *de bonis propriis*.

"3. That these different causes of action cannot be united in the same complaint." *Ferrin v. Myrick*, 41 N. Y. 315, 322.

In trover it is a misjoinder to add a count for a conversion by the testator with a count for a conversion by his executors. The judgments are different. *Terhune v. Bray's Exrs.*, 1 Harr. (16 N. J. L.) 53.

A proceeding against an heir not *qua* heir, but as an executor *de son tort* cannot be regarded as an action against the heir. *Warren v. Raymond*, 17 S. Car. 163.

Under the Minnesota code allowing the joinder of several causes of action when they relate to the same transaction or transactions connected with the same subject of action, it has been held

and also in his individual capacity as the surviving obligor.¹ Unconnected demands against different estates cannot be joined, though the defendant is executor of both.²

3. Action, By and Against Husband and Wife.—A cause of action accruing to the husband alone, or in any representative capacity, cannot be joined with a cause of action to which the husband is entitled in right of the wife,³ and therefore a claim for damages for personal injuries to a wife or child may not be joined with a claim for damages for loss of service, etc.,⁴ except when such join-

that a plaintiff can sue a defendant trustee in his capacity as a trustee, and also as an individual under the peculiar circumstances of the case of *Fish v. Berkey*, 10 Minn. 199.

1. However, in an action against an executor or administrator a count upon a promise by the testator may be joined with a count upon a promise by the testator and another, though the surviving promisor be living. *Hamlet v. Bates Exrs.*, 10 B. Mon. (Ky.) 437.

A count averring a contract with plaintiff alone may be joined with a count averring the same contract to be with plaintiff, and another since deceased. *Reitzel v. Franklin*, 5 W. & S. (Pa.) 33.

A surviving obligor, who is also the executor or administrator of his deceased co-obligor may not be sued on said obligation in his individual and also in his representative capacity. *Landan v. Levy*, 1 Abb. Pr. (N. Y.) 376; *Watson v. Dickey et al.* Tappan (Ohio), 203. A contrary conclusion was, however, reached in the very recent case of *Little Grocer Co. v. Johnson*, 50 Ark. 62.

2. Unconnected demands against different estates cannot be joined, though the defendant is executor of both. *Daniel v. Morrison*, 6 Dana (Ky.) 182, 186.

Where M bequeathed his property to N, and appointed A and B his executors, and N died, and A was appointed administrator, the heirs of N were allowed to sue A and B jointly, alleging breaches of both trusts, it being impossible to determine with what amount A should be charged as such administrator, without a settlement of the accounts of A and B as executors. *McLachlan v. Staples*, 13 Wis. 448.

The representatives of two deceased co-obligors cannot be joined in the same action, although the undertaking of the testators might have been joint and several. *Grymes v. Pendleton*, 4

Call. (Va.) 130; *Watkins Exr. v. Tate*, 3 Call. (Va.) 521.

The Revised Statutes of the District of Columbia, § 827, authorizes the joinder in one action of the legal representatives of the maker and the legal representatives of the endorser of a promissory note. *Keyser v. Fendall*, 5 Mackey (S. C. D. C.) 47.

See also EXECUTORS AND ADMINISTRATORS, § 16, 1 b (8), Joinder of Counts, Am. & Eng. Encyc. of Law, vol. 1, p. 379.

3. Actions by Husband and Wife.—“When the wife is complainant in an action *ex contractu*, no cause of action can be included, unless it be founded on a contract with a *feme* before marriage, or she be the meritorious cause of action. . . . And in an action in form *ex delicto* for a personal injury, if the wife be joined, the declaration must proceed only for torts to her individually, and not for such wrongs as only affect the husband.” *Chitty's Pleadings* (16th ed.) *225.

A count on a cause of action accruing to the husband alone may not be joined with a count on a cause of action to which the husband is entitled in right of the wife. *Rose v. Bowler*, 1 H. Bl. 109. Compare *Smith v. Johnson*, 5 Harr. (Del.) 40; *Bartlett v. Boyd*, 34 Vt. 256; *Anderson v. Pack*, 2 Clev. L. Rep. (Ohio) 260.

Nor may a count on a cause of action vested in him as administrator of a third party be joined with a count in right of his wife. *Mertens v. Loewenberg*, 69 Mo. 208.

4. Thus, in an action to recover damages for personal injuries to a wife or child, a count to recover damages for the injuries themselves may not be joined with a count to recover the husband's or father's consequential injuries, loss of service, expenses, etc., thereby occasioned. Separate actions must be brought to recover these different dam-

der is authorized by statute.¹ In an action against husband and wife, a cause of action against the husband alone cannot be

ages. *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526; *Tell v. Gibson*, 66 Cal. 247; *Fuller et ux. v. Naugatuck R. Co.*, 21 Conn. 557; *Rogers v. Smith*, 17 Ind. 323; *Cincinnati, Hamilton & Dayton R. Co. v. Chester*, 57 Ind. 207; *Laughlin v. Eaton*, 54 Me. 156, 158; *Gardner v. Kellogg*, 23 Minn. 463; *Lucas v. New York Central R. Co.*, 21 Barb. (N. Y.) 245; *Kavanaugh v. City of Janesville*, 24 Wis. 618. *Contra*, *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9; *Whitaker v. Warren*, 60 N. H. 20. *Compare Smith v. Warden*, 86 Mo. 282; *Penna. R. Co. v. Bock*, 93 Pa. St. 427. So in case for slanderous words. *Dengate v. Gardiner*, 4 M. & W. 5; *Ebersoll v. Krug*, 3 Binney (Pa.) 555.

In *New York*, it has been held that though such a joinder would be bad on demurrer, it was good after verdict. *Lewis v. Babcock*, 18 Johns. (N. Y.) 443; *citing Russell v. Come*, 1 Salk. 119; *Todd v. Bedford*, 11 Mod. 264.

In like manner when a husband has brought suit for personal injuries and dies, and his wife is substituted as administratrix, she cannot add a count to recover damages for the injuries sustained by her on account of her husband's death. *Frink & Co. v. Taylor*, 4 G. Greene (Iowa) 196, c.

And a father cannot join the statutory action to recover damages for the death of his minor child, with an action to recover for personal injuries received by himself, though caused by the same negligence. *Cincinnati, Hamilton & Dayton R. Co. v. Chester*, 57 Ind. 207.

1. **Statutory Modifications.**— Since the enactment of ch. 99, L. 1881, giving a married woman the right to maintain an action, as if sole, for any injury to her person or character, such a cause of action cannot be joined with one in favor of the husband for the loss of her services and the expenses caused by such injury in an action by husband and wife. *Shanahan v. Madison*, 57 Wis. 276.

By the Revised Statutes of Iowa, section 2771, it is provided that "in an action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to join thereto claims in his own right." This provision has been held

to change the common law rule, and allow the joinder of a count to recover for the husband's loss of his wife's services. *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa 129; s. c., 96 Am. Dec. 115.

A similar provision was adopted in *Maryland* in 1856 (Laws 1856, p. 146, § 29), but it was omitted from the code adopted in 1860.

In *Louisiana*, the code provides that husbands "can proceed judicially and in their own name in whatever relates to the preservation of their dotal property, . . . as well as to the recovering of the debts due them." Rev. Codes, 1875 (Voorhies), art. 107, p. 56.

Under this article it has been held that the husband should sue in his own name to enforce any right of his wife, except where she exclusively administers her property, or a question of ownership of dotal property or a real right of hers is involved. *Cooper v. Cappel*, 29 La. An. 213.

And therefore a husband may join a claim for damages for his wife's personal injuries with a claim for money expended in consequence thereof. *Holzar v. New Orleans & Carrollton R. Co.*, 38 La. An. 185.

The 40th section of the English Common Law Procedure act, 1852, provides that, "in any action brought by a man and his wife for injury done to the wife, in respect of which she is necessarily joined as a plaintiff, it shall be lawful for the husband to add thereto claims in his own right." This section has been construed to be permissive only, not imperative. *Brockbank v. Whitehaven Junction R. Co.*, 7 Hurlst. & Nor. 834.

The wife not being liable on a mere personal contract made by husband and wife, a count against husband and wife on such a contract or on a contract by the husband alone cannot be joined with a count on a promise of the wife *dum sola*. *Edwards v. Davis*, 16 Johns. (N. Y.) 231. *Compare Scheier v. Tyrrell*, 23 Week. Dig. (N. Y.) 476; *Nutz v. Reutter*, 1 Watts (Pa.) 229. *Compare Morris v. Norfolk*, 1 Taunt. 212. *Compare Bonney v. Reardin*, 6 Bush (Ky.) 34.

An action against husband for words spoken by him and another against husband and wife for words spoken by

joined,¹ except in so far as such joinders are rendered proper by code provisions.²

4. Actions By and Against Partners, Guardians, Assignees, etc.—A surviving partner or co-obligee may join his claim on the joint debt with a claim due him individually,³ and it has been decided in Texas, that when the partners of two firms are the same, they may join causes of action in favor of one firm, with

wife cannot be consolidated. *Swithin v. Vincent*, 2 Wils. 227; *Anderson v. Pack*, 2 Clev. L. Rep. (Ohio) 260.

1. Actions Against Husband and Wife.

—In an action against husband and wife to charge the wife's statutory separate estate for necessities furnished the family, a count can be added alleging a cause of action against the husband alone. *Jordan & Son v. Smith*, 83 Ala. 299; *Esckridge v. Ditmars*, 51 Ala. 245; overruling *May v. Smith*, 48 Ala. 483; *Lippincott v. Hopkins*, 57 Pa. St. 328.

2. Under the Indiana code, an action may be brought to recover a judgment against a husband for the amount of the demand, and to charge certain land held by the wife under an implied trust for her husband with a mechanic's lien for the same demand. *Lindley v. Cross*, 31 Ind. 106.

So an action was allowed on a note signed by husband and wife, valid as to wife, in *Missouri*, and to charge the wife's separate real estate. *Lincoln v. Rowe*, 51 Mo. 571. See cases in preceding note.

A claim to set aside a conveyance of real estate from husband to wife for fraud against creditors, may be joined with a claim against the husband arising out of contract so as to charge the land with the lien of the judgment when recovered. *Frank v. Kessler*, 30 Ind. 8; *Hamilton v. Barricklow*, 96 Ind. 398.

In an action to foreclose a mortgage executed by husband and wife to secure a note made by the husband alone, the complaint may ask judgment against the husband for the amount of the note and interest, and a decree against husband and wife for the sale of the mortgaged premises. *Rollins v. Forbes*, 10 Cal. 299 (*compare* *Moffitt v. Roche*, 77 Ind. 48). Not allowed in Wisconsin under the Rev. Stat. 1858. *Cary v. Wheeler*, 14 Wis. 281. But that would certainly be allowed under the act of 1862. *Connecticut Mutual Life Ins. Co. v. Cross*, 18 Wis. 109. But not a personal judgment against the wife therefor. *Moffitt v. Roche*, 77 Ind. 48; *McGlaughlin v. O'Rourke*, 12 Iowa 459;

Howe v. Lemon, 37 Mich. 164; *Kitchell v. Mudgett*, 37 Mich. 81; *Carley v. Fox*, 38 Mich. 387; *Manhattan Life Ins. Co. v. Glover*, 14 Hun (N. Y.) 153. Unless the mortgage or the bond accompanying it expressly charges the wife's separate estate. *McKeon v. Hagan*, 18 Hun (N. Y.) 65; *Williamson v. Duffy*, 19 Hun (N. Y.) 312; *Jones v. Merritt*, 23 Hun (N. Y.) 184.

Nor against a minor on foreclosure of mortgage given by guardian. *Wood v. Truax*, 39 Mich. 628.

The right of joinder depends upon the general question whether the causes of action should be sued upon separately or jointly, upon which, see **HUSBAND AND WIFE**, II, §§ 14-23 in the *Am. & Eng. Encyc. of L.*, vol. 9., pp. 828-836; *Lawson, Rights, Remedies and Practice*, vol. 2, § 730, and *Pomeroy, Remedies and Remedial Rights* (2nd ed.), §§ 234-236, pp. 283-297.

3. Partners.—A surviving partner or co-obligee may sue in his own name and in his representative capacity for the amount due the firm, or on the obligation and is at liberty to unite with the joint debt a debt due to himself individually. *Chitty's Pleadings* (16th ed.) *225; *Smith v. Salomon*, 1 Col. 176; *Vandenhoevel v. Stores*, 3 Conn. 203, 207; *Quillen v. Arnold*, 12 Nev. 234; *Adams v. Hackett*, 27 N. H. 289; *Boyd v. Webster*, 58 N. H. 336; *Davis v. Church*, 1 W. & S. (Pa.) 240, 242; *McCartney v. Hubbell*, 52 Wis. 360.

A demand due to the plaintiff as surviving partner of one firm may be joined in the same action with a demand due to him as the surviving partner of another firm. *Stafford v. Gold*, 9 Pick. (Mass.) 533.

A plaintiff may include with an individual demand the claims of two separate firms of which he was a member, all of which demands had been assigned to him. *Keller v. Roesler*, 1 C. P. Rep. (Pa.) 124; s. c., 1 Luz. L. T., N. S. (Pa.) 6.

But in a joint action by several plaintiffs an independent cause of action

causes of action in favor of the other firm.¹ In like manner, a cause of action against one on a joint contract may be joined with a cause of action against him individually.² The same principles generally apply to actions brought by and against guardians,³ assignees,⁴

to each may not be joined. *Grant v. McCarty*, 38 Iowa 468.

1. Where the partners in two firms are the same they may join causes of action in favor of the one firm with causes of action in favor of the other firm in one action. *Messner v. Lewis*, 20 Texas 221. *Compare* *Ruth v. Lowrey*, 10 Neb. 260.

2. A cause of action against one on a joint contract may be joined with a cause of action against him individually. *Garr v. Redman*, 6 Cal. 574; *Logan v. Wallis*, 76 N. Car. 416; *Butler v. Kirby*, 53 Wis. 188; *Richards v. Heather*, 1 B. & Ald. 29; *Golding v. Vaughan*, 2 Chitty's Rep. 436; *Bertrand v. Byrd*, 4 Ark. 187; *Little v. Edwards*, 69 Md. 499; *Holmes v. Marden*, 12 Pick. (Mass.) 169; *Wheeler v. Thorn*, 2 N. H. 397; *Genesee Co. Bank v. Bank of Batavia*, 43 Hun (N. Y.) 295.

But not when all parties to the joint contract are made defendants. *Brown v. Lee*, 19 Fed. Rep. 630; *Miller v. Northern Bank of Miss.*, 34 Miss. 412; *Doan v. Holly*, 25 Mo. 357; 26 Mo. 186; *Moore v. Platte Co.*, 8 Mo. 467.

Counts upon a promise by the defendant and another, since become a bankrupt and certificated, may be joined in an action against the solvent partner alone, with counts on promises by the defendant solely since the other became a bankrupt. *Hawkins v. Ramsbottom*, 6 Taunt. 179.

3. **Guardians.**—While a plaintiff may not sue individually and as guardian (natural tutrix), yet advantage of the defect should be taken by exception. It is too late after judgment. *Ashbey v. Ashbey*, 38 La. An. 902.

While a father may sue in his own name for injuries to child, he cannot join therewith his claim for loss of service, etc. *Gardner v. Kellogg*, 23 Minn. 463. See the cases cited *supra*, note 8.

If a count against a party as guardian of a lunatic be joined with one against him in his own right, it is a misjoinder. *Rodgers v. Ellison*, Meigs (Tenn.) 88.

When one is guardian of two minors, a plaintiff may recover for board and goods furnished each minor at tenant's request in one action, because the

suit is properly brought against the guardian individually. *Young v. Smith*, 22 Tex. 345. *Contra*, *St. Joseph's Orphan Soc. v. Wolpert*, 80 Ky. 86.

A guardian of three minors for whom he had been appointed by one order under one bond brought one suit against a surety on the bond of the former guardian of said minors, who had been removed, and in whose hands the probate court had found a balance separately due each of the minors, and recovered judgment for the sum due each minor, and in error the court refused to decide there had been a misjoinder under the Arkansas Code. *Turner v. Alexander*, 41 Ark. 254.

As to actions against one who is both a guardian and an administrator, see *Redfearn v. Austin*, 88 N. Car. 413; *Alexander v. Wolfe*, 83 N. Car. 272.

4. **Assignees.**—The same parties being assignees of A, a bankrupt, and also of B, a bankrupt, under separate commissions, cannot recover in the same action a joint debt due from the defendant to both the bankrupts, and also separate debts due to each. *Hancock v. Haywood*, 3 Term Rep. 433.

They can, however, recover the joint demand due to all the bankrupts. *Streatfield et al. v. Halliday*, 3 Term Rep. 779. And assignees under a joint commission against two partners may recover in the same action debts due to the partners jointly and debts due to them separately. *Graham v. Mulcaster*, 4 Bing. 115.

Different assignees under separate commissions cannot sue jointly. *Ray v. Davies*, 8 Taunt. 134; s. c., 2 Moore 3.

Different assignees of different bankrupts, who had been partners, cannot unite in an action to recover the separate interest of one of said bankrupts. *Smith v. Goddard*, 3 Bos. & Pull. 465; *Hogg v. Bridges*, 8 Taunt. 200; s. c., 2 Moore 122.

Counts for money lent and for money paid by plaintiff as assignee of a bankrupt may be joined with counts for money had and received to plaintiff's use as assignee, and upon an account stated with him as assignee. *Richardson v. Griffin*, 5 Maule & Sel. 294; s. c., Chitty's Rep. 325. *Compare* *Will-*

public officers,¹ corporations, corporate officers and stockholders,² and all cases in which the same party claims or defends in several different rights.³

Iams v. Vines, 1 Dow. & Low. 710; s. c., 8 Jur. 270; 13 L. J., Q. B. 49.

An action against an assignee (syndic) as such cannot be joined with an action to hold him personally liable for misfeasance. *Blake v. His Creditors*, 6 Rob. (La.) 520. Compare *Berford v. Barnes*, 45 Hun (N. Y.) 253. *Rush v. Good*, 14 S. & R. (Pa.) 226.

A cause of action against the trustee of an insolvent bank for misfeasance cannot be joined with a cause of action on a bond given by him individually to assist in making up a deficiency in the bank's assets. *French v. Salter*, 17 Hun (N. Y.) 546.

As to joining actions on original and assigned claims, see *supra*, II, 4 c. and notes.

1. Public Officers.—A plaintiff cannot join a count upon an obligation taken by him in his individual capacity only, with a count on an obligation taken by him in an official capacity. *Patrick v. Rucker*, 19 Ill. 428; *Albin v. Talbott*, 46 Ill. 424; *Foltz v. Stevens*, 54 Ill. 180.

Nor can a count for damages sustained in an individual capacity be joined with a count for damages sustained in an official capacity. *Bardill v. Trustees of Schools*, 4 Brad. (Ill. App.) 54.

An action against a municipal corporation to recover damages for an injury to private property, resulting from the prosecution of a public improvement, cannot be joined with a cause of action under the municipal charter, against the municipal officers of the city in their individual capacity, for the same injury occasioned by their gross negligence and abuse of power. *Hancock v. Johnson*, 1 Met. (Ky.) 242.

In like manner claims in an individual or official capacity cannot be set off against each other. *McCracken v. Elder*, 34 Pa. St. 239; *Russell v. First Presby. Church*, 65 Pa. St. 9; *Tagg v. Bowman*, 99 Pa. St. 376.

2. Corporations, Corporate Officers and Stockholders.—It is an improper joinder of causes of action to join a claim for equitable relief against a corporation, with a claim for damages against individual defendants. *House v. Cooper*, 16 How. Pr. (N. Y.) 292.

In actions for labor debts against stockholders or directors and corporation, both liabilities may be enforced in

one action. *Milroy v. Spurr Mt. Iron Mining Co.*, 43 Mich. 231; *Sullivan v. Sullivan Mfg. Co.*, 14 S. Car. 494.

A proceeding to enforce an agreement as to the purchase of a railroad company at a foreclosure and a reorganization thereof and damages for a breach thereof, cannot be joined with a claim for the removal of the officers of the reorganized company. *Stanton v. Mo. Pac. R. Co.*, 2 N. Y. Sup. 298.

The statutory liability of stockholders and their liability for unpaid subscriptions may be enforced in the same suit. *Morris v. Collamer & St. Clair St. R. Co.*, 2 Clev. L. Rep. (Ohio) 347; *Warner v. Callender*, 20 Ohio St. 190.

As to whether the liability of any number of stockholders may be joined in one action, see *Faymonville v. McCullough*, 59 Cal. 285; also the article on PARTIES.

In an action upon a debt due from an insolvent corporation, the complaint alleged that defendant was liable as a stockholder to the extent of his stock, by reason of the nonfiling of a certificate as to payment of capital stock required by statute; and also liable as a trustee by reason of failure to publish report as also required by statute. *Held*, the causes of action were not properly joined. *Wiles v. Suydam*, 64 N. Y. 173; rev. 3 Hun (N. Y.) 604; s. c., 6 N. Y. S. C. (Thompson & Cook) 292. Compare *Durant v. Gardner*, 19 How. Pr. (N. Y.) 94; s. c., 10 Abb. Prac. (N. Y.) 445; *Jones v. Johnson*, 86 Ky. 530; rev. *Jones v. Johnson*, 10 Bush 649.

In an action by a member of an unincorporated association against the association officers in their official capacity for an accounting, etc., a cause of action against the defendants on a contract made by them in their individual capacity cannot be joined. *Warth v. Radde*, 18 Abb. Prac. (N. Y.) 396; s. c., 28 How. Pr. (N. Y.) 230; *Poulsen v. Van Steenbergh*, 65 How. Pr. 342. Or against the officers for misfeasance. *Jones v. Johnson*, 86 Ky. 530.

A stockholder may ask for a dissolution, removal of one assignee and appointment of another, and an accounting and injunction against the officers. *Mitchell v. Bank of St. Paul*, 7 Minn. 252.

3. Several Different Rights.—The rights

5. Effect of Code Provisions.—While except in Iowa there seems to be no express code provision that the causes of actions joined should be by or against the same parties in the same right, yet the decisions have been almost uniform in holding that the codes have made no change of the common law in this respect,¹ except in those cases where an express enactment has authorized such joinders.²

of parties as heirs at law to assert their title to real estate descended, and as distributees to have an accounting of the administration of the personal estate, are distinct and present separate causes of action. *Rush v. Warren*, 26 S. Car. 72.

A plaintiff cannot unite a right of action for breach of trust against a surviving trustee, and the representative of his deceased cotrustee, with a claim for interest of trust funds, recoverable against the surviving trustee as surviving executor of the estate from which the trust funds have been set apart. *Sortore v. Scott*, 6 Lans. (N. Y.) 271.

Where a plaintiff in an action of detinue claimed in one count on a right of *property in himself*, and in a second count on a right of *possession in himself as a bailee*, there was held to be no misjoinder, as the claim in each case was in plaintiff's right and neither count set forth a claim in *autre droit*. *Boyle v. Townes*, 9 Leigh (Va.) 158. Compare a similar decision in an action of trover. *Lashlee v. Wily*, 8 Humph. (Tenn.) 659.

In an action to enjoin a city from selling certain lots held by the city in trust for the benefit of the common schools, on the ground that the lots had been previously offered at public auction, and purchased by the plaintiffs, it is error to join a count alleging that the plaintiffs are citizens and tax payers of the school district to be benefited by the sale of the lots, and that the sale, as newly advertised, is without authority of law, and will be to the great injury of the school district, because the first count is to redress a private, the second to redress a public grievance. *Fort Smith v. Brogan*, 49 Ark. 306. See generally the cases cited in the preceding notes to this division of this article, JOINDER OF ACTIONS IN DIFFERENT RIGHTS.

1. Effect of Code Provisions.—Pomeroy on Remedies and Remedial Rights (2nd ed.), § 502, p. 539; Bliss on Code Pleading (2nd ed.), § 117, p. 193.

Mr. Pomeroy, while admitting the

rule, criticises it as follows: "Another particular rule, which is but an application of the same doctrine, requires that the several causes of action against or for a given person should all affect him in the same capacity. In other words, a demand for or against a party in his personal character cannot be united with another demand for or against him in a representative character as trustee, executor, administrator, receiver, and the like. The reason usually given for this rule when applied to the defendant is that the judgment upon one cause of action would be against the defendant personally, to be made *de bonis propriis*, while the judgment upon the other cause of action would be against him in his representative or official capacity, and not perhaps to be made out of his own property; as, for example, it might be made *de bonis testatoris*. This reasoning, borrowed from the old law, is a mere formula of words, for there is nothing in the nature of things which prevents such a double judgment. It is just as easy for such a judgment to be rendered in one action as it is for two distinct judgments to be granted in separate suits. The argument, however, like so much of so-called legal reasoning, still has convincing force with most of the courts, even while administering the reformed system." Pomeroy on Remedies and Remedial Rights (2nd ed.), § 502, p. 539.

2. By section 1815 of the Code of Civil Procedure of New York, adopted in 1880, it is provided as follows:

"An action may be brought against an executor or administrator personally, and also in his representative capacity in either of the following cases:

"1st. Where the complaint sets forth a cause of action against him in both capacities, or states facts which render it uncertain, in which capacity the cause of action exists against him.

"2nd. Where the complaint sets forth two or more causes of action against the defendant in different capacities, all of which grow out of the same trans-

IV. JOINDER, WHEN PERMITTED; WHEN COMPULSORY; CONSOLIDATION OF ACTIONS.—A cause of action which could have been joined when suit was brought may be joined by amendment.¹ Such an amendment, however, will not be allowed on an appeal from an award of arbitrators or the judgment of a justice of the peace.² Joinders that are permitted under the code are not compulsory.³ The

action, or transactions connected with the same subject of action, do not require different places or modes of trial, and are not inconsistent with each other. In a case specified in this section a judgment for the plaintiff for a sum of money must distinctly show whether it is awarded against the defendant personally, or in his representative capacity."

The writer has not found any construction of this section of the code; but in Mr. Throop's Annotated Code there is the following note: "The first subdivision is chiefly designed to provide for some cases in which the last section may bear hardly upon a plaintiff. It sometimes happens that the plaintiff may be able to charge the defendant in both capacities, especially in equity, for instance, if a surviving partner of the decedent is one of his executors, a creditor may require him to account, if necessary, in both capacities. Again, it may be uncertain in which capacity a defendant is liable, as where the plaintiff's agent dies without having accounted, and his executor takes possession of all the effects found in his possession, some of which are the plaintiff's, but the plaintiff is unable to distinguish his own from the decedent's. The second subdivision is designed to extend the same principle to cases where the causes of action are distinct, in accordance with § 484, *ante*, subd. 9 and the concluding sentence. See *Ross v. Harden*, 44 Supr. Ct. (J. & S.) 26."

By the English Rules of Court, Order XVII, Rule 5, it is provided that "claims by an executor as such may be joined with claims by him personally, but the claims are to be with reference to the same estate." This has, however, been construed to refer to cases where the executor sues in his individual capacity upon a claim which he has against the assets, *quo assets*, and not to allow an executrix, who was also a life tenant of realty, to join actions for waste committed in decedent's lifetime and after his death. *Johnson v. Burges*, 47 L. J., Ch. Div. 552.

The cases in the code States and the special provisions, except those above stated, are given under the respective subdivisions of this division of the article.

1. Joinder by Amendment.—A cause of action which accrues after suit is brought may not be joined by amendment. See cases cited in note to division II, 4, (b), (1), *CONTRACTS*. All causes of action that may properly be joined may be joined by an amendment. *Freeman v. Webb*, 21 Neb. 160; *Getty v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 269. See *Sullivan v. Sullivan*, 24 S. Car. 474.

A complaint on a contract may be amended to a suit on a tort. *Hord v. Chandler*, 13 B. Mon. (Ky.) 403.

2. A joinder that might have been proper originally may be improper on an appeal from an award of arbitrators. *Reitzel v. Franklin*, 5 W. & S. 33; *Tryon v. Miller*, 1 Whart. (Pa.) 11; *Winder v. Northampton Bank*, 2 Pa. St. 446. Or the judgment of a justice of the peace. *Miller v. Lockwood*, 17 Pa. St. 248; *Hendricks v. Cameron*, 3 Ct. of Ap. C. C. (Tex.), § 261; *Laing v. St. Louis Type Foundry Co.*, 3 Ct. of Ap. C. C. (Tex.), § 463; *City of North Lawrence v. Hoysradt*, 6 Kan. 170. Compare *Boyle v. Grant*, 18 Pa. St. 162.

3. Joinder Not Compulsory.—Mesne profits may be recovered in a separate action, though a claim therefor could have been joined in the action to recover the land. *Nash v. Sullivan*, 32 Mich. 189; s. c., 20 N. W. Rep. 144; *Rev. Code Mississippi 1880*, § 2512, p. 681. *Winings v. Wood*, 53 Ind. 187; *Walker v. Mitchell*, 18 B. Mon. (Ky.) 541; *McGrew v. Woodrow*, 1 Bush (Ky.) 602; *Vandervoort v. Gould*, 36 N. Y. 630. Not when they were determined in the proceeding for recovery of the land. *Rev. Stat. Ohio, 1890*, § 5792; *Rev. Stat. Wyoming 1887*, § 2997, p. 660. See also the cases cited in notes to II, 4, (b), (3) of this article.

The code provisions authorizing a personal judgment for an deficit in

court determines the manner of trial of cases properly joined.¹ At common law, an entire demand could not be divided, but a separate suit could be brought on each distinct demand.² Such separate suits, if they could have been joined, might, even at common law, been consolidated by the order of the court,³ and such consolidation is now expressly authorized by statute in most of the

the foreclosure of a mortgage does not prohibit a separate action at law therefor. *Palmer v. Harris*, 100 Ill. 276. See *Hayden v. Snow*, 9 Bissell (U. S. C. C.) 511, *Spencer Ins. Co.*, 40 Ohio St. 517.

In *Michigan*, leave of court is however, required. *Innes v. Stewart*, 36 Mich. 285.

The codes do not compel the joinder of legal and equitable causes of action. *Bruce v. Kelly*, 5 Hun (N. Y.) 229.

In *Illinois*, in suits before a justice of the peace, the plaintiff is required to consolidate all his demands, existing at the time suit is commenced, which are of such a nature as to be consolidated and which united would not exceed the justice's jurisdiction. Anno. Stat. (Starr & Curtis), vol. 2, p. 1448, par. 49. This statute has been construed in *Lucas v. LeCompte*, 42 Ill. 303; *Meeks v. Sims*, 84 Ill. 422. This statute has no application or bearing on suits brought in courts of record. *McDole v. McDole*, 106 Ill. 452.

1. Trial.—Where in one suit there are several distinct causes of action properly joined, it is proper to direct the jury to find the issues separately and to assess the damages for each matter separately. *Ward v. Ward*, 2 Zab. (22 N. J. L.) 699.

When both legal and equitable relief is asked, the correct practice is to try the equitable cause first and afterwards the legal. *Harrison v. Juneau Bank*, 17 Wis. 340.

Whether the issues presented by a complaint shall be tried by a jury, when the demand for it is made before the trial commences, is to be determined upon the complaint itself, and the character of the case subsequently made by the evidence cannot affect the decision upon the demand. *Greenleaf v. Egan*, 30 Minn. 316.

2. Separate Suits.—At common law, while a plaintiff could not divide an entire demand or cause of action and maintain several suits thereon, there was no rule which required him to consolidate several distinct demands in one suit. *Nickerson v. Rockwell*, 90 Ill.

460; *McDole v. McDole*, 106 Ill. 452.

As to the division of entire demands, see Am. & Eng. Encyc. of Law, title ACTIONS, div. 11, Splitting of Actions, vol. 1, p. 184 c.

3. Consolidation at Common Law.—

"Where the plaintiff has two causes of action which may be joined in one action, he ought to bring one action only; and if he commence two actions, he may be compelled to consolidate them, and to pay the costs of the application." Chitty's Pleadings (16th ed.), § 221; Gould's Pleadings (5th ed.), § 103, p. 207; Hollingsworth v. Collinson, 4 Ad. & Ell. 646 (31 E. C. L.), *Lewis v. Barks*, 4 C. B. N. S. 330 (93 E. C. L.), *Beck v. Duveraux*, 9 Neb. 109; *Clason v. Church*, 1 Johns. Cas. (N. Y.) 29; *Powell v. Weiler*, 11 B. Mon. (Ky.) 186. *Merrihen v. Taylor*, 1 Bro. App. (Pa.) lxvii; *Rumsey v. Wynkoop*, 1 Yeates (Pa.) 5; *Prior v. Kelly*, 4 Yeates 128, *Boyle v. Grant*, 18 Pa. St. 162; *City v. Tyson*, 9 Weekly Notes (Pa.) 367; *Lancaster v. R. R. Co.*, 12 Lan. Bar (Pa.) 99; *Kemp v. Kemp*, 1 Woodward (Pa.) 189.

"Several suits, laid in different counties, for the publication in one number of a newspaper circulated in all those counties, of the *same libel*, have, in the New York supreme court, been consolidated into one by GOULD, J., and the practice was generally approved. Sixty suits (one in each county of the State) were plainly vexatious and oppressive." Gould's Pleadings (5th ed.), p. 508, note 22.

Consolidation by Referees.—Where distinct actions are depending, and it is intended to refer them all, there must be separate rules and separate reports, or the actions must be first united and then referred, or in one of them a rule must be entered, submitting all matters in dispute between the parties. A consolidation effected by the arbitrators of their own sole action will invalidate their finding. *Morse on Arbitration and Award*, p. 72; *Craig v. Craig*, 4 Halst. (9 N. J. L.) 198. *Hart v. James*, 1 Dall. (Pa.) 380; *Groff v. Musser*, 3 S. & R. (Pa.) 262. These cases

United States.¹ Causes of action which could have been joined will generally be consolidated,² but distinct causes of action will

overrule the contrary case of *Brown v. Scott*, 1 Dall. (Pa.) 156.

Under the New York Code a referee has power to amend pleadings, but this power seems to be restricted to the curing of immaterial variances. *Edwards on Referees*, p. 33. At any rate a referee cannot allow a new cause of action to be inserted in the complaint by way of amendment. *Union Bank v. Mott*, 10 Abb. Pr. (N. Y.) 372.

It seems that cases that could not be joined may, by consent, be consolidated and referred to the same referee. See *Bemus v. Quiggle*, 7 Watts. (Pa.) 362; *Paist v. Caldwell*, 75 Pa. St. 161.

See the cases cited under title ACTIONS, subtitle 9, Consolidation, Am. & Eng. Encyc. of Law, vol. 1, p. 184a.

1. **Consolidation Under Statutes.**—Separate actions brought on counts that might be joined may be consolidated by order of court. *Cooper v. Maddan*, 6 Ala. 431; *Berry v. Ferguson*, 58 Ala. 314; Code of Alabama 1886, § 2742; Rev. Statutes of Arizona 1887, § 918; Dig. Stat. Arkansas, § 5018, p. 983; Code of California, §§ 1048, 1195; *Deering's Anno. C. & S.*, vol. 3, pp. 424, 469; *Hinsdale v. Eels*, 3 Conn. 377; *Dakota Codes* (1 Levissee), §§ 528, 667, pp. 145, 175; *Hatcher v. Nat. Bank of Chambersburg*, 79 Ga. 542; s. c., 5 S. Co. 109; *Logan v. Mechanics' Bank*, 13 Ga. 201; Rev. Stat. Idaho 1887, §§ 4926, 5137, 5216, pp. 551, 571, 577; Rev. Code Iowa 1888 (Miller), § 2734, p. 945; Comp. Laws Kansas 1885 (Dassler), §§ (3944) 145, (4452) 635, pp. 622, 686; Rev. Code Louisiana (Voorhies) 1875, §§ 422, 423, p. 123; *Howell's Anno. Stat. Michigan* 1882, § 7375 (4186, 5806), p. 1865; Stat. Minnesota 1878, § 128, (109), p. 725; Comp. Stat. Nebraska 1885, § 150, p. 647; Gen. Stat. Nevada 1885, § 3524, p. 853; Revision New Jersey 1887, p. 867, § 121; New York Anno. Code 1889, §§ 817-19, p. 287; § 1989, p. 705; Rev. Stat. Ohio 1890, § 5120, p. 1288; Gen. Laws Oregon 1872, § 505, p. 213; *Philips v. Delane*, 2 B. Rev. (S. Car.) 429; Code of Tennessee 1884, p. 819, § 4289; *Sayle's Texas Civil Stat.* vol. 1, art. 1450, p. 471; Laws Utah 1884, p. 320, § 929; Anno. Stat. Wisconsin (S. & B. 1889), p. 1612, § 2792; Rev. Stat. Wyoming 1887, p. 577, § 2507.

In Missouri consolidation will only be ordered when the suits are "founded alone upon liquidated demands." Rev. Stat. 1879, vol. 1, § 3656, p. 623. See *Genestelle v. Waugh*, 11 Mo. 367.

2. Separate appeals taken from awards made by commissions in proceedings to condemn land under the right of eminent domain may be joined. *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364.

The court will order a consolidation of several actions of ejectment where there is the same question and defense in all the cases. *Smith v. Kimble*, 4 Halst. (9 N. J. L.) 335; *Hendrickson v. Hendrickson*, 3 Gr. (N. J. L.) 102.

An action by plaintiff as surviving partner, and another in his individual name, when against the same defendant, may be consolidated. *McCartney v. Hubbell*, 52 Wis. 360.

Where a policy of insurance was executed by four companies, stipulating that each acted for itself, and would only be liable for one fourth of the whole amount insured in case of loss, a loss occurred, and the insured brought four separate actions against each company. On motion by plaintiff these actions were consolidated, and that action sustained, on appeal, by a divided court. *Viele v. Germania Ins. Co.*, 26 Iowa 9.

Pending an action for partition, one of the parties brought an action against the other parties to enforce a declaration of trust as to the same land. *Held*, as both causes of action related to the partition and were not distinct, the actions were properly consolidated. *Bixby v. Bent*, 59 Cal. 522.

It seems that proceedings for the foreclosure of different mortgages given by a railroad company may be joined. In a very recent case, decided December 23rd, 1889, JUDGE BREWER (now of the Supreme Court of the United States) said:

"Another matter is this:—There is a motion to consolidate the three cases pending in this court for foreclosures of different mortgages given by the railway company. Nothing can be gained by consolidation for the purposes of hearing. Whether consolidation could be had for purposes of decree and sale is a matter not necessary now for deter-

not be consolidated,¹ nor causes which accrued subsequent to the bringing of the earlier suits,² nor when such consolidation would oust the jurisdiction of the court.³ Causes of action which cannot be joined may not be ordered to be tried by the same jury at the same time, if the parties thereto object.⁴

V. REMEDY FOR MISJOINDER.—1. At Common Law.—In the case of a misjoinder, the declaration will be bad on a general demurrer or in arrest of judgment, or upon error.⁵ A demurrer, however,

mination. That the court has power to consolidate cases situated as these are, I have no doubt, and if all were now ripe for decree, my impression is that equity would require a consolidation; but the cases are not ripe for decree, and there is no certainty as to when either one will be. If one be delayed, while another is speeded, it may be that consolidation will never be proper. For the mortgagee who is prompt ought not to suffer for the delay of one who is a laggard. The motion to consolidate will therefore be denied, with leave to renew the same when either case is ripe for decree." *Mercantile Trust Co. v. Miss., Kan. & Texas Ry. Co.* (U. S. C. C.) Kansas, 7 Ry. and Corp. Law Journal, No. 2, January 11th, 1890, p. 30.

1. Distinct causes of action will not be consolidated. *Wallace v. Eldredge*, 27 Cal. 408; *Stanley v. Garrigues*, 1 Weekly Notes (Pa.) 28; *Uhler v. Selfridge*, 1 Weekly Notes (Pa.) 61; *Blesch v. Chicago & N. W. Ry. Co.*, 44 Wis. 593. Nor where the two causes of action were regarded by the parties as separate and distinct accounts, although they might have been joined. *Johnson v. Pirtle*, 1 Swan (Tenn.) 262.

An action against husband for words spoken by him and another against husband and wife for words spoken by wife cannot be consolidated. *Swithin v. Vincent*, 2 Wils. 227; *Anderson v. Pack*, 2 Clev. L. Rep. (Ohio) 260.

Actions on successive official bonds, with different sureties, will not be consolidated. *Screwmen's Ben. Assoc. v. Smith*, 7 S. W. Rep. (Tex.) 793.

Two several writs of *scire facias* to revive two several executions by the same plaintiff against the same defendant cannot be consolidated. *Mickle v. Brewer*, 3 Halst. (8 N. J. L.) 85. Except by agreement. See *Reed's Appeal*, 7 Pa. St. 65; *Yeager's Appeal*, 18 Atl. Rep. (Aug. 28th, 1889) 137. *Compare Bank v. Hunsicker*, 2 Weekly Notes (Pa.) 381.

Actions to foreclose mortgages of even date by same mortgagee to same

mortgagor, but on different adjoining properties cannot be consolidated. *Bech v. Ruggles*, 6 Abb. N. C. (N. Y.) 69; *Kipp v. Delamater*, 58 How. Pr. (N. Y.) 183; *Lockwood v. Fox*, 8 Daly (N. Y.) 127. They may be consolidated if on the same property, though to different mortgagees. *Eleventh Ward Savings Bank v. Hay*, 55 How. Pr. (N. Y.) 438; *Morrissey v. Leddy*, 11 N. Y. Civ. Proc. 438.

2. A consolidation will not be ordered when the rights of action accrued at different dates, and the separate suits were brought at the respective accretion of the rights of action. *Gaulden v. Shehee*, 24 Ga. 438; *Worley v. Glentworth*, 5 Halst. (10 N. J. L.) 241. *Compare Ft. Wayne, M. & Cin. R. R. Co. v. Clark*, 59 Ind. 191.

3. Nor when such consolidation would oust the jurisdiction of the court. *Manufacturer's Bank of Macon v. Goolsby*, 35 Ga. 82; *Buckner v. Thompson*, 11 Ill. 563; *Mallock v. Krome*, 78 Ill. 110; *Nickerson v. Rockwell*, 90 Ill. 460; *Powell v. Weiler*, 11 B. Mon. (Ky.) 186; *Mohrhardt v. S. P. & T. N. Ry. Co.*, 2 Ct. of App. C. C. (Tex.), § 322. See *Cariaga v. Dryden*, 29 Cal. 307; *Powell v. Weiler*, 11 B. Mon. (Ky.) 186.

4. Where cases cannot be consolidated, the court has no authority, as a matter of convenience and economy, to require several cases upon the same general subject to be considered and determined by the same jury at the same time, if the parties thereto object. *Ortman v. Union Pac. Ry. Co.*, 32 Kan. 419.

That may be done, if the causes of action could have been joined. *Holmes v. Sheridan*, 1 Dill. (U. S. D. C.) 351.

An erroneous order consolidating certain actions is not ground for reversal, if not excepted to, at least when it appears that upon the findings appellant was not entitled to any judgment in his favor. *Bangs v. Dunn*, 66 Cal. 72; s. c., 4 West. Coast Rep. 352.

5. *Chitty's Pleadings* (16th ed.) *228.

must be general, and not to one count.¹ Before the entry of a demurrer, the plaintiff may cure the misjoinder by a *nolle prosequi*, but after demurrer he can only do so by amendment.² While a misjoinder was at common law fatal in error or arrest of judgment,³ yet if the misjoined count was not relied on in any way, or a verdict thereon found for defendant, the verdict for plaintiff on the other counts will be allowed to stand,⁴ and in many of

1. **Demurrer.**—A misjoinder of counts may be taken advantage of by a general demurrer. *Bridgen v. Parkes*, 2 Pros. & Pul. 424; *Jefford's Admr. v. Ringgold & Co.*, 6 Ala. 544; *Godbold v. Roberts*, 20 Ala. 354; *Copeland v. Flowlers*, 21 Ala. 472; *Whilden v. Merchants' etc. Nat. Bank*, 64 Ala. 1; Code of Georgia 1882, § 4192 (4133) (4102); Pub. Stat. Massachusetts 1882, p. 966, § 12; *Barlow v. Leavitt*, 12 Cush. (Mass.) 483; *Green v. Morris & Essex R. R. Co.*, 4 Zab. (24 N. J. L.) 486. But not by a demurrer to one count only. *Ragsdale v. Bowles*, 16 Ala. 62; *Fletcher v. Piatt*, 7 Blackf. (Ind.) 522; *Fernald v. Garvin*, 55 Me. 414; *Toff v. West Shore & Ontario Tr. Co.*, 17 Vr. (46 N. J. L.) 34; *Smith v. Merwin*, 15 Wend. (N. Y.) 184; *Henderson v. Boyd*, 85 Tenn. 21; *Templeton v. Clogston*, 59 Vt. 628; s. c., 10 Atl. Rep. 594; *Creel v. Brown*, 1 Rob. (Va.) 265; *Louisville & Portland Canal Co. v. Rowan*, 4 Dana (Ky.) 606.

If the only counts that are good may be properly joined, the misjoinder of a defective count is fatal on demurrer. *Kent v. Long*, 8 Ala. 44.

A misjoinder of counts in an original and amended complaint cannot be reached by a demurrer to the amended complaint. *Shotwell & Co. v. Gilkey's Adms.*, 31 Ala. 724.

The improper joinder of two causes of action in a complaint under the forcible entry and detainer act is not a ground of demurrer, but should be reached by a motion requiring plaintiff to amend. *Liddon v. Hodnett*, 22 Fla. 271.

A misjoinder in the declaration is no ground for nonsuiting the plaintiff at the trial. *Lamb v. Newbiggin*, 1 Car. & Kir. (47 E. C. L.) 549.

2. Before demurrer has been entered, plaintiff may enter a *nolle prosequi* as to any misjoined count. This cannot be done after demurrer. *Chitty's Pleadings* (16th ed.) *228; *Gould's Pleadings* (5th ed.), § 101, p. 206; *Drummond v. Dorant*, 4 Term Rep. 360.

After general demurrer for mis-

joinder, an amendment correcting the misjoinder may be allowed. *Wilkinson v. Moseley*, 30 Ala. 562; *Masterson v. Matthews*, 60 Ala. 260; *Jennings v. Newman*, 4 Term Rep. 347; *Drummond v. Dorant*, 4 Term Rep. 360.

3. **Error.**—A misjoinder of actions is available in error or arrest of judgment. *Denison v. Ralphson*, 1 Siderf. 244; 1 Keble 852, 870; *Dalston v. Janson*, 5 Mod. 91; 1 Salk. 10; *Corbitt v. Packington*, 3 Barn. & Cress. 268; *Comee v. Shaw* 1 Horn. & Hurl. 65; 3 Mees. & Welsby 350; *Hooker v. Quilter*, 1 Wils. 171; *Lyon v. Evans*, 1 Ark. 349; *Phelps v. Hurd*, 31 Conn. 444; *Moore v. Hicks*, 12 Ga. 189; *Carstarphen v. Graves*, 1 A. K. Marsh. (Ky.) 435; *Selby v. Hutchinson*, 4 Gilm. (Ill.) 319; *Cruikshank v. Brown*, 5 Gilm. (Ill.) 75; *McGinnity v. Laguerenne*, 5 Gilm. (10 Ill.) 101; *Dalston v. Bradberry*, 50 Ill. 82; *Bodley v. Roop*, 6 Blackf. (Ind.) 158; *Canton Nat. Bld. Assoc. v. Weber*, 34 Md. 669; *Swem v. Sharrett*, 48 Md. 408; *Fairfield v. Burt*, 11 Pick. (Mass.) 244; *Hopkins v. Atlantic & St. L. R. R.*, 36 N. H. 9, 12; *Peabody v. Kinsley*, 40 N. H. 416; *Nimocks v. Inks*, 17 Ohio 566; *Brumbaugh v. Keith*, 31 Pa. St. 327; *Gruber v. First Nat. Bank of Clarion*, 8 Weekly Notes (Pa.) 113; *Holland v. Pack, Peck* (Tenn.) 151.

A misjoined count will be stricken off, on a rule to show cause. *Maguire v. Rabenan*, 16 Weekly Notes (Pa.) 479.

4. Although a misjoinder of actions may be fatal in arrest of judgment or in error, if the misjoined count or counts were not good or were withdrawn, or not relied upon in any way, or a verdict thereon was given for the defendant, the verdict may stand, although such count or counts were not formally withdrawn or stricken from the declaration. *Knightly v. Birch*, 2 Maule & Sel. 333; overruling *Bage v. Brownel*, 3 Lev. 99; *Sellick v. Hall*, 47 Conn. 260; *Lyon v. Alvord*, 18 Conn. 66; *Johnston v. Riley*, 13 Ga. 97; *Fernald v. Garvin*, 55 Me. 414; *Penniman v. Winner*, 54 Md. 127; *Prescott v.*

the States, a misjoinder must be objected to in the trial court and before judgment, or the error is waived.¹

2. Under the Codes.—When the same cause of action is set forth in two or more counts, the defendant's remedy is by motion to elect.² When two or more causes of action which are inconsistent with each other are joined, the remedy is also by motion to elect.³ When two causes of action are joined in one paragraph, the remedy varies. In California and Missouri the remedy is by demurrer,⁴ but in a majority of the States the remedy is by motion.⁵ In either case, the objection is waived if not taken be-

Tufts, 4 Mass. 146; *Hallock v. Powell*, 2 Caines (N. Y.) 216; *Halleran v. Field*, 23 Wend. (N. Y.) 38, 40; *Miller v. Lockwood*, 17 Pa. St. 248; *Erie City Iron Works v. Barber*, 118 Pa. St. 6; *Schmidt v. Owens*, 10 Weekly Notes (Pa.) 5; *Finch v. State*, 9 S. W. Rep. (Tex.) 85; *Louisville & Portland Canal Co. v. Rowan*, 4 Dana (Ky.) 606. *Compare Bartlett v. Boyd*, 34 Vt. 256.

1. Where a complaint shows a substantial cause of action, and no objection was interposed to it in the primary court, a misjoinder of causes of action is not available on error. *Walker v. Mobile Marine Dock & Mutual Ins. Co.*, 31 Ala. 529. See *Bell's Admr. v. Troy*, 35 Ala. 184.

In *Maine*, "when the declaration contains a wrong joinder of counts and no written objection is made until after the cause is committed to the jury, and a general verdict has been recorded, the judgment cannot for such cause be reversed on writ of error," and "no motion in arrest of judgment in a civil action can be entertained." Rev. Stat. 1883, p. 699, §§ 30, 31. See *Fernald v. Garvin*, 55 Me. 414.

In *Maryland*, "no judgment shall be arrested or set aside because of any misjoinder of forms of actions or of counts." Public Gen. Laws, 1888, vol. 2, p. 1094, § 9.

Similar provision in *Massachusetts*. Pub. Stat. 1882, p. 974, § 82. In *Missouri*, prior to adoption of code provisions. See *Yates v. Kimmel*, 5 Mo. 87.

Possibly also in *Michigan*, where the statutes provide that no judgment shall be arrested for "mispleading." *Howell's Anno. Stat.* 1882, § 7635, p. 1918. *Schafer v. Boyce*, 41 Mich. 256. In *New York*, under a similar statute adopted prior to the adoption of the code in 1848, it was held that an objection on the ground of a misjoinder was not good in error. *Lovett v. Pell*, 22 Wend. 369; rev. 19 Wend. 546;

though the decision was criticized, and held to be a reversal of the common law rule, and not properly based on the statute in *Butler v. Van Wyck*, 1 Hill (N. Y.) 438.

2. Misjoinder Under the Codes.—See Division 2, 1 b, of this article.

3. When counts are inconsistent, the remedy is by motion to elect. *Keens v. Gaslin*, 24 Neb. 310; *Young v. Edwards*, 11 How. Pr. (N. Y.) 20.

4. Two Causes in One Paragraph—Demurrer.—If several causes of action are not separately stated, the defects cannot be taken advantage of by a motion to dismiss the action, or by a motion for judgment on the pleadings. *Watson v. San Francisco & H. B. R. Co.*, 50 Cal. 523.

The remedy is by demurrer and that specific cause must be assigned. *Fraser v. Oakdale Lumber & W. Co.*, 73 Cal. 187; *Bernero v. South Brit. Ins. Co.*, 65 Cal. 386; s. c., 3 West. Coast Rep. 292; *Mulholland v. Rapp*, 50 Mo. 42; *Scott v. Kobardo*, 67 Mo. 289.

The remedy in *Missouri* formerly was by motion to elect. *Mooney v. Kennett*, 19 Mo. 551.

When legal and equitable causes of action are not separately stated, the equitable claim can be considered, and the rest treated as surplusage. *Young v. Coleman*, 43 Mo. 179.

5. Two Causes in One Paragraph—Motion.—If causes of action are not separately stated, the remedy is only by a motion to make the complaint definite and certain. *Colton v. Jones*, 7 Robt. (N. Y. Super. Ct.) 164; *Anderson v. Hill*, 53 Barb. (N. Y.) 238; *Wood v. Anthony*, 9 How. Pr. (N. Y.) 78; *Freer v. Denton*, 61 N. Y. 492; *Gooding v. McAlister*, 9 How. Pr. (N. Y.) 123; *McKinney v. McKinney*, 8 Ohio 423; *Baxter v. State*, 9 Wis. 38; *Nichol v. Alexander*, 28 Wis. 118; *Riemer v. Johnke*, 37 Wis. 258; *Sentinel Co. v. Thomson*, 38 Wis. 489.

fore verdict.¹ When different causes of action are erroneously joined in a complaint, the remedy is by demurrer, if the error is apparent, and by answer if it is not, and the objection if not so taken is waived.² This is the express provision of all the codes except in

An order refusing such motion is not reviewable in error. *Goldberg v. Utley*, 60 N. Y. 427; *People v. Tweed*, 63 N. Y. 194.

A demurrer will not lie. *Bass v. Comstock*, 38 N. Y. 21; s. c., 36 How. Pr. (N. Y.) 382; expressly overruling a number of earlier cases to the contrary.

But a demurrer is proper if two causes that cannot be joined even when stated separately are included in one paragraph. *Wiles v. Suydam*, 64 N. Y. 173; *Townsend v. Coon*, 7 N. Y. Civ. Proc. 56; *Goldberg v. Utley*, 60 N. Y. 427.

In a few States, the remedy is by a motion to separate the causes of action into paragraphs and number them, and not by demurrer. *Hendry v. Hendry*, 32 Ind. 349; *Craig v. Cook*, 28 Minn. 232; *Hardy v. Miller*, 11 Neb. 395.

The erroneous overruling of such a motion is ground for reversal. *Pierce v. Bicknell*, 11 Kan. 262.

When such a motion is allowed, and plaintiff refuses to separate the causes of action, the court may dismiss the action without prejudice to a future one. *Eisenhower v. Stein*, 37 Kan. 281; s. c., 15 Pac. Rep. 167.

1. Misjoinder in One Paragraph Waived.

—An objection to a petition for a union of several causes in one count is waived, if not made before verdict, and cannot be raised by motion in arrest of judgment. *Shelby v. Houston*, 38 Cal. 410; *Fuhn v. Weber*, 38 Cal. 636; *Valencia v. Couch*, 32 Cal. 339; *Treat v. Forsyth*, 40 Cal. 484; *Joy v. Bitzer* (Iowa), 3 Law Rep. Anno. 184; *Pickering v. Miss. Valley Nat. Tel. Co.*, 47 Mo. 457; *House v. Lowell*, 45 Mo. 381, overruling *McCoy v. Yager*, 34 Mo. 134; *Clark's Admx. v. Hannibal & St. J. R. Co.*, 36 Mo. 202; *Hoagland v. Hannibal & St. J. R. Co.*, 39 Mo. 451; *McKinney v. McKinney*, 8 Ohio St. 423.

2. Misjoinder of Causes of Action—

Remedy.—Most of the codes contain provisions that "the defendant may demur to the complaint (petition) when it shall appear on the face thereof (*inter alia*) that several causes of action have been improperly united," and that when such error does "not appear upon the face of the complaint (petition) the ob-

jection may be taken by answer," and that "if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same." *Pomeroy's Remedies and Remedial Rights* (2nd edition), §§ 433, 443, pp. 477-479, 488, 489; *Bliss on Code Pleading* (2nd ed.), § 412, p. 629; *Code of Civil Proc. California*, §§ 430, 434; *Code of Civil Proc. Dakota*, § 113, 117; *Levissee's Code*, pp. 33, 35; *Rev. Code Dist. of Columbia*, 1857, ch. 82, §§ 4, 9, 10, pp. 343, 344; *Rev. Stat. Idaho*, 1887, §§ 4174, 4177, 4178, p. 452; *Comp. Laws Kansas 1885* (Dassler), §§ (3888, 3890) 89, 91, p. 617; *Stat. Minnesota 1878*, §§ 92-95 (74-78), p. 720; *Rev. Stat. Missouri*, 1879, §§ 3515, 3519, pp. 602, 603 (see *Mulholland v. Rapp*, 50 Mo. 42); *Comp. Stat. Montana 1887*, §§ 87, 88, p. 81; *Comp. Stat. Nebraska 1885*, §§ 94, 96, p. 641; *Gen. Stat. Nevada 1885*, §§ 3062-7, p. 764; *New York Anno. Code 1889*, §§ 488, 498; pp. 158, 162; *Code of North Carolina*, vol. 1, §§ 239, 241-2, pp. 90-91; *Rev. Stat. Ohio*, 1890, §§ 5062, 5064, pp. 1274-5; *Gen. Laws Oregon 1872*, p. 119, §§ 63-70; *Code of South Carolina*, pp. 117-119, §§ 164-169; *Allen v. Read*, 66 Tex. 13; *Laws of Utah 1884*, pp. 205-6, §§ 292, 295-6; *Code of Washington 1881*, pp. 47-48, §§ 77-81; *Anno. Stat. Wisconsin* (S. & B. 1889), pp. 1533-7, §§ 2649-54; *Rev. Stat. Wyoming 1887*, pp. 569-570, §§ 2449-52.

In *Indiana*, the remedy is by demurrer, and it is expressly provided that a judgment shall not be reversed for error in sustaining or overruling such a demurrer. *Rev. Stat. 1888* (Myers & Co.), §§ 339, 341, (85, 87) (50, 52).

These provisions have been justly criticised, in so far as they relate to joinder, as follows: "These rules are identical with those which regulate the method of objecting to a defect of parties. . . . If the objection appears on the face of the pleading, it *must* be raised by demurrer, and not by answer; and this is substantially the same as saying that it must always be raised by demurrer, because the misjoinder will *always* appear on the face of the pleading." *Pomeroy's Remedies and Remedial Rights* (2nd ed.). § 443, p. 489, note 1, and § 448, p. 492.

Arkansas, Iowa and Kentucky, where the remedy is by motion,¹ in Connecticut, where there is no express direction as to the manner of taking the objection,² and in Texas, where the remedy seems to be a plea in abatement.³ A demurrer for a misjoinder must allege that specific ground and be general.⁴ It will not be allowed if the misjoined causes are not sufficiently stated,⁵ or the court

The misjoinder was *held* to be waived in *Macondray v. Simmons*, 1 Cal. 393; *Marius v. Bicknell*, 10 Cal. 217; *Lawrence v. Montgomery*, 37 Cal. 183; *Shelby v. Houston*, 38 Cal. 410; *Faymonville v. McCollough*, 59 Cal. 285; *Roberts v. Eldred*, 73 Cal. 394; *Eversdon v. Mayhew* (Cal.), 21 Pac. Rep. 431; *Rankin v. Collins*, 50 Ind. 158; *Simpson v. Greeley*, 8 Kan. 586; *Wilson v. Thompson*, 1 Met. (Ky.) 123; *Gardner v. Kellogg*, 23 Minn. 463; *James v. Wilder*, 25 Minn. 305; *Jamison v. Copher*, 35 Mo. 483; *Sumner v. Tuck*, 10 Mo. App. 269; *Blossom v. Barrett*, 37 N. Y. 434; *Smith v. Orser*, 43 Barb. (N. Y.) 187; *Hubbell v. Meigs*, 50 N. Y. 480, 487; *Finley v. Hayes*, 81 N. Car. 368; *McCarthy v. Garraghty*, 10 Ohio St. 438; *Field v. Hurst*, 9 S. Car. 277; *Cary v. Wheeler*, 14 Wis. 281.

Even by a judgment on a default. *Bratton v. Smith*, 2 West. L. Monthly (Ohio) 497; *Mead v. Bagnall*, 15 Wis. 156.

1. By the codes of *Arkansas*, *Iowa* and *Kentucky* the remedy for a misjoinder is by a motion to strike out, and the objection will be considered to have been waived unless such motion is made. A misjoinder is not a ground of demurrer. Dig. of Stat. of Arkansas, 1884, p. 983, §§ 5016, 5017; *Terry v. Rosell*, 32 Ark. 478; *Clements v. Lampkin*, 34 Ark. 598; *Riley v. Norman*, 39 Ark. 158; *Turner v. Alexander*, 41 Ark. 254; *Organ v. Memphis & L. R. Co.*, 51 Ark. 235; *Adams v. Edgerton*, 48 Ark. 419; s. c., 3 S. E. Rep. 628; Rev. Codes Iowa 1888 (Miller), §§ 2632, 2633, p. 913; *Grant v. McCarty*, 38 Iowa 468; *Knott v. Tincher*, 39 Iowa 628, 630; *Flynn v. Des Moines & St. Louis R. Co.*, 63 Iowa 490; Kentucky Code 1888 (Carroll), §§ 85, 86 (113, 114), pp. 58, 59; *Hancock v. Johnson*, 1 Met. (Ky.) 242; *McKee v. Pope*, 18 B. Mon. (Ky.) 548; *Caldwell v. Caldwell*, 2 Bush (Ky.) 446; *Sale v. Crutchfield*, 8 Bush (Ky.) 636. Such waiver will not operate to give a court jurisdiction. *Randall v. Shropshire*, 4 Met. (Ky.) 327.

If the plaintiff refuse to proceed after

such motion has been granted, the action will be dismissed. *Dragoo v. Levi*, 2 Duv. (Ky.) 520. By a later code the court is required to strike out a misjoined cause. *Sheppard v. Stephens*, 2 S. W. Rep. (Ky.) 548.

In *Iowa*, however, it has been decided that if there be both a misjoinder of parties as well as of causes of action, failure to make the motion will not operate as a waiver, but the defect may be taken advantage of by answer and by motion in arrest of judgment. *Cogswell v. Murphy*, 46 Iowa 44.

2. The *Connecticut* code provides simply that if it appear to the court that all the causes of action joined cannot all be conveniently heard together, the court may order separate trials, or expunge any one or more of them. Gen. Stat. 1888, § 878, p. 211. This would be done presumably by demurrer, as demurrers are still allowed. Gen. Stat. 1888, § 872, p. 210.

3. It seems that in *Texas* the remedy for a misjoinder is a plea in abatement. *Young v. Smith*, 22 Tex. 345.

But the objection cannot be made for the first time in the supreme court. It will be considered to have been waived. *Allen v. Read*, 66 Tex. 13.

4. **Demurrer—Form of.**—A demurrer for a misjoinder must allege that specific ground. *Cox v. West. Pac. R. Co.*, 47 Cal. 87; *Haverstick v. Trudel*, 51 Cal. 431; *Smith v. Jordan*, 13 Minn. 264; *Turner v. Althaus*, 6 Neb. 54; *Ruhling v. Hackett*, 1 Nev. 360; *Carter v. De Camp*, 40 Hun (N.Y.) 258; *Dodge v. Colby*, 108 N. Y. 445; *Stillwell v. Kellogg*, 14 Wis. 461. An allegation of multifariousness was *held* sufficient in *Cohen v. Ottenheimer*, 13 Oreg. 220. Compare *Dyer v. Jacoway*, 42 Ark. 186. The demurrer must be to the whole complaint, and not to each paragraph supposed to be misjoined. *Bougher v. Scobey*, 16 Ind. 151.

5. **Demurrer—When Not Allowed.**—A demurrer for a misjoinder will not be allowed if one of the causes is insufficiently stated. *New Home Sewing Machine Co. v. Wray*, 28 S. Car. 86; s. c., 5 S. E. Rep. 603; *Bassett v.*

has no jurisdiction over them.¹ The objection is waived if the demurrer is not prosecuted.² The erroneous overruling of such a demurrer, if the defendant is injured thereby, is available in error except in Indiana.³ But a number of the codes expressly authorize, and in some cases require, the court to divide the action if the demurrer is sustained.⁴ When the misjoinder is occasioned by the fact that all the parties are not affected by the action, the remedy is by demurrer, except also in Indiana.⁵

Warner, 23 Wis. 673; Truesdell v. Rhodes, 26 Wis. 215; Willard v. Reas, 26 Wis. 540; Welsh v. Chicago & N. W. Ry. Co., 34 Wis. 494; Lee v. Simpson, 39 Wis. 333; Lochmiller v. Indian Ford Water Power Co., 51 Wis. 683.

When, however a demurrer was sustained for a misjoinder, and it appeared that if any cause of action was stated, the complaint stated two, which could not be joined, the order sustaining the demurrer was affirmed without enquiring whether the complaint sufficiently states any cause of action. *Leidersdorf v. Second Ward Savings Bank*, 50 Wis. 406.

1. A cause of action over which the court has not jurisdiction will be rejected as surplusage, an objection being taken of misjoinder of actions. *Allen v. Wilmington & Weldon R. R.*, 102 N. Car. 381.

2. **Demurrer Waived.**—If a demurrer is filed, but not prosecuted, it will be presumed to have been abandoned and the misjoinder waived. *Gray v. Dougherty*, 25 Cal. 266, 277; *Hibernia S. & L. Soc. v. Ordway*, 38 Cal. 679.

Defendant, by answering upon the merits after demurrer overruled, abandons the demurrer. *Pickering v. Miss. Valley Nat. Tel. Co.*, 47 Mo. 457.

3. **Error in Overruling Demurrer.**—If a demurrer is erroneously sustained on ground of misjoinder of causes of action, and the plaintiff files an amended complaint uniting all his causes of action in one count the erroneous decision on the demurrer is waived. *Loveland v. Garner*, 71 Cal. 541; s. c., 12 Pac. Rep. 616. And it seems the court will not reverse where the substantial rights of the parties are not affected, under the code provisions that error without prejudice is not a ground of reversal. *Reynolds v. Lincoln*, 71 Cal. 183; *Angeli v. Hopkins*, 79 Cal. 181.

The code of *Indiana* provides that "no judgment shall be reversed for

any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." See *Srong v. Taylor School Tp.*, 79 Ind. 208; *Hart v. Walker*, 77 Ind. 331; *Coan v. Grimes*, 63 Ind. 21.

4. **Division of Action.**—A number of the codes provide that if the demurrer is sustained, the court may, in its discretion, and on such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned. *Gen. Stat. Connecticut 1888*, § 873, p. 211; *Dakota Code (1 Levissee)*, § 141, p. 42; *Rev. Code District of Columbia*, ch. 82, § 50, p. 351; *Code of South Carolina 1883*, § 193, p. 131; *Anno. Stat. Wisconsin (S. & B. 1889)*, p. 1562, § 2686.

A number of the codes require that this shall be done. *Rev. Stat. Indiana 1888 (Myers & Co.)*, § 340, (86), (51); *Rev. Codes Iowa 1888 (Miller)*, § 2634, p. 913; *Comp. Laws Kansas 1885 (Dassler)*, § (3891) 92, p. 618; *Comp. Stat. Nebraska 1885*, § 97, p. 641; *Code North Carolina 1883*, § 272, p. 104; *Rev. Stat. Ohio 1890*, § 5065, p. 1276; *Rev. Stat. Wyoming 1887*, p. 570, § 2452.

5. **Misjoinder Actions Against Different Parties.**—When all the defendants are not affected by all the causes of action the objection to be taken is not to the misjoinder of parties, but of causes of action, and the remedy is by demurrers. *Nichols v. Drew*, 94 N. Y. 22; *Farmers' Bank of Mo. v. Bayliss*, 41 Mo. 274, overruled. See *Mead v. Brown*, 65 Mo. 552; *Kellogg v. Malin*, 62 Mo. 429. See also *Neil v. Board of Trustees*, 31 Ohio Stat. 15.

In *Indiana*, where the causes of action are improperly joined, because they are not joint actions against all the defendants, but separate causes of action against each, the remedy is not by demurrer, but by motion to strike out. *Rogers v. Smith*, 17 Ind. 323; *Lane v. State*, 27 Ind. 108.

VI. JOINDER OF CAUSES OF ACTION IN LOUISIANA.—By the Code of Louisiana, several demands may be generally consolidated when they are consistent.¹ Actions by and against different parties may be joined when the actions have a cognate origin, or there is a common interest to be adjudicated upon in one judgment.² Different reliefs may be demanded in the same action.³ Actions

1. Louisiana.—"Separate actions may be cumulated in the same demand, except in the cases hereafter expressed; this is termed cumulation of actions.

The plaintiff is not allowed to cumulate several demands in the same action, when one of them is contrary to or precludes another. As when one has bought a thing in the name of another, and with his funds, without his authorization, the person for whom the purchase has been made, cannot demand, by the same action, both the thing bought in his name and the money employed for paying the price. Nor can a vendor demand, at the same time, the rescission of the sale he had made and the price for which it was made; he must decide for one or the other of the two causes of action, as the one precludes the other.

If the plaintiff has several causes of action tending to the same conclusion, not contrary to nor exclusive of each other, though they arise from different contracts, he may cumulate and bring them in the same suit; as, for example, if one claim from another one hundred dollars in virtue of a sale and one thousand dollars in virtue of a loan, or if he claim a movable from another both by inheritance and by purchase." Rev. Code 1875 (Voorhies), art. 148, 149, 151, p. 66.

A defendant cannot be sued on his endorsement, and as the illegal possessor of the property for which his endorsed note was given. *Petitpain v. Frey*, 15 La. 195.

A demand for certain specific property and a note given for the price thereof cannot be joined. *De l'Homme v. De Kerlegand*, 4 La. 353.

The validity of a sale may not be attacked and a share of the proceeds claimed in the same action, nor can an action to rescind a sale be joined with a claim to account for nonpayment of the price. *Copley v. Flint*, 16 La. 380; cf. *Bank of Louisiana v. Delery*, 2 La. An. 648; *Ouliber v. His Creditors*, 16 La. An. 287; *Theuver v. Knorr*, 24 La. An. 597.

Actions to have A declared a bank-

rupt and to rescind a sale of property made by him to B on the ground that he was insane at the time he made the conveyance may not be joined. *Kennedy v. Dow*, 10 Martin (La.) 577, 601.

Plaintiff may institute a petitory action for one tract of land and in the same petition sue for slander of title of another and distinct tract. *Williams v. Close*, 12 La. An. 873.

Actions against A on a warranty of B's good conduct and for fraudulent representations in regard to him may be joined. *Cross v. Richardson*, 2 Martin (N. S.) 323; cf. *Montross v. Hillman*, 11 Rob. (La.) 87.

Actions for slander and for false imprisonment may be joined. *Buquet v. Watkins*, 1 La. 131.

2. Different Parties.—Several creditors standing in the same predicament, and seeking the same relief (arrest of creditor for fraud, etc.), may join in one application. *Pecquet v. Golis*, 1 Martin N. S. (La.) 438.

But distinct creditors may not join in the same action their separate and distinct demands. *Dyas & Co. v. Dinkgrave*, 15 La. An. 502.

Joinder of demands against distinct defendants is not forbidden by the code as against A, as endorser of a note, and B, who had sold same to plaintiffs without endorsing it, for fraudulent representations. *Lafonta v. Poulitz*, 6 Martin (N. S.) 391.

An action against A for breach of contract may be joined with an action against B for a tort where the actions have a cognate origin, or there is a common interest to be adjudicated upon in one judgment. The defendants may sever in their defence, and if desired separate trials may be had. *Arrow-smith v. Mayor*, 17 La. 419; *New Orleans Ins. Asso. v. Harper*, 32 La. An. 1165; *Holzab v. New Orleans & Carrollton R. R. Co.*, 38 La. An. 185; *Riggs v. Bell*, 39 La. An. 1030.

Partition of different properties where there is no privity of estate between the parties cannot be had in the same suit. *Mavor v. Armant*, 14 La. An. 181.

3. Different Reliefs.—A wife may, in

must be by and against parties in the same right, except when this rule has been modified by statute.¹ The remedy for a misjoinder is by election and the misjoinder is waived by a joinder in issue on the merits, unless the actions preclude each other.²

VII. JOINDER OF PLEAS—(See PLEADING).—At common law a defendant could not plead several distinct pleas to the same declaration, though he could plead to a part of the declaration one ground of defence, and to another part a different ground.³ Such joinder was, however, authorized by the statute of 4 and 5

the same action, pray a separation of her property from her husband's and an injunction staying an execution on a judgment against him, and alleged to have been levied on her property. *Wrinckle v. Wrinckle*, 8 Martin N. S. (La.) 333; *Atkinson v. Atkinson*, 15 La. An. 491. She may in one proceeding enjoin execution on several distinct judgments. *Medart v. Fasnatch*, 15 La. An. 621.

Specific property may be demanded, or, if not able to recover it, its value, in the same suit. *Nouvet v. Bollinger*, 15 La. An. 293.

An injunction to extinguish a judgment in favor of an administrator, the execution and delivery of a deed for lands sold by said administrator, and a proceeding to remove him for malfeasance may all be joined. *Terron v. Durand*, 29 La. An. 506.

A partnership existence may be proved and its affairs liquidated in the same action. *Mills v. Fellows*, 30 La. An. 824; *McNair v. Gourrier*, 40 La. An. 353.

A partner may demand a liquidation and settlement of the partnership and a payment of the balance due him in the same action. *Millandon v. Sylvestre*, 8 La. 262.

A party may demand a recognition as heir, an account of the administration, and the property in the hands of the curator, in the same suit. *Miller v. Rongieux*, 20 La. An. 577.

1. See the cases cited under div. III of this article.

2. **Remedy for Misjoinder.**—When two causes of action contrary to and exclusive of each other have been cumulated in the same demand, the defendant may refuse to plead to the merits until the plaintiff has made his choice as to which of the two he means to proceed with, and if the exception be sustained by the court, the plaintiff shall be bound to amend his petition so as to preserve only one cause of action,

otherwise his suit shall be dismissed. Rev. Code 1875 (*Voorhies*), art. 152, p. 67.

It is a general rule that objections to form are waived by a joinder in issue on the merits; but where two actions are cumulated and one precludes the other, the defect is one of substance and is not cured by joining issue. *De l'Homme v. DeKerlegand*, 4 La. 353. See *Kenney v. Dow*, 10 Martin (La.) 577; *Mackoy v. Holton*, 8 La. An. 48.

3. **Joinder of Pleas.**—On the general subject of duplicity in pleading, see *Gould's Pleadings* (5th ed.), ch. 8; *Stephen on Pleading* (9th Am. ed.), rul. 1, *251; *Chitty's Pleadings* (16th ed.), vol. 1, *558, 586.

At common law a defendant could not plead several distinct defences to the same part of a declaration. The right to plead several matters in defence, in any case, is derived entirely from the statute. *HAINES, J.*, in *State v. Roe*, 2 Dutch. (26 N. J. L.) 215.

Several dependent facts which make but one point of defence may be pleaded together. *Patcher v. Sprague*, 2 Johns. (N. Y.) 462.

Two rejoinders to a single replication are inadmissible. *Judge of Probate v. Lane*, 50 N. H. 556.

A plea in abatement may not be joined with a plea in bar. *Kerr v. Willetts*, 48 N. J. L. (19 Vr.) 78.

This objection of duplicity prohibited the joinder of a plea and a demurrer to the same count, though a defendant may plead to one count and demur to another. *Stephen on Pleading* (9th Am. ed.), rul. 2, *278; *Rickert v. Snyder*, 5 Wend. (N. Y.) 104; *Davis v. Hines*, 6 Ohio St. 473. *Contra.* by statute. *Syme v. Griffin*, 4 Hen. & Mun. (Va.) 277.

To an assignment of errors a plea of *in nullo est erratum* cannot be joined with a plea of the statute of limitation. *Acker v. Ledyard*, 1 Denio (N. Y.) 677.

Anne, ch. 16, §§ 4 and 5.¹ This statute does not apply to the subsequent pleadings,² nor did it authorize the joinder of a plea and a demurrer to the same count,³ but under it inconsistent pleas were frequently allowed.⁴ In the various States there are now special statutory provisions allowing the joinder of pleas or answers.⁵ Several of the codes expressly require that the defences joined should not be inconsistent, and even where there is no express provision, the tendency of the decisions is to forbid such

1. Statutes 4 & 5 Anne, ch. 16, § 4, 5.—This statute provided that "it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record with the leave of the court, to plead as many several matters thereto as he shall think necessary for his defence." Chitty's Pleadings (16th ed.), vol. 1, *586; Gould's Pleadings (5th ed.), § 18, p. 399.

"The asking leave of court was formerly actually practiced in England; Tidd's Practice, 657; but it soon became a matter of course there, and so here in this State. But the power still remains in the court, to be exercised on a proper occasion. The court have power in a proper case to prevent frivolous or dilatory or catching pleas." POTTER, J., in *Slocomb v. Powers*, 10 R. I. 255, 256.

"The discretion vested in the court by the statute of Anne to refuse leave to put in more than one plea is clearly a legal discretion, to be exercised only when good reason exists." *Peters v. Ulmer*, 74 Pa. St. 402.

Double pleading is at the discretion of the court, and will be allowed only when there is reasonable ground for believing it will be for the furtherance of justice. *Wilton Mfg. Co. v. Woodman*, 32 Me. 185.

To an information in the nature of a *quo warranto* the defendant could plead but one plea, even under this statute. *Rex v. Newland*, Sayre's Rep. 66; *Rex v. Leigh*, 4 Bur. 2143; *Rex v. Blatchford*, 4 Bur. 2147; *State v. Roe*, 2 Dutch. (26 N. J. L.) 215; *People v. Richardson*, 4 Cow. (N. Y.) 113. Amended by act 32 Geo. III, ch. 58 (1792). *Rex v. Antridge*, 8 Term Rep. 467.

2. Gould's Pleadings (5th ed.), § 21, p. 400. See *Judge of Probate v. Lane*, 50 N. H. 556.

3. *Stephen on Pleading* (9th Am. ed.), rule 2, *279. Gould's Pleadings, (5th ed.), § 28, p. 405.

A plea and demurrer at the same time to the whole declaration are admissible under the Virginia code. *Syme v. Griffin*, 4 Hen. & Munf. (Va.) 277.

4. Gould's Pleadings (5th ed.), § 26, p. 406; Chitty's Pleadings (16th ed.), *587; *Granite State Bank v. Otis*, 53 Me. 133.

5. Code and Statutory Provisions.—In the code States the provisions as to the answer usually provide that "The defendant may set forth by answer as many defences and counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable or both. They must each be separate and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished;" or else that "the defendant may set forth by answer, as many grounds of defence, counter claim or set off as he may have, whether legal or equitable or both." See *Pomeroy's Remedies and Remedial Rights* (2nd ed.), § 582, p. 647. The statutes in the States not practicing under the codes are usually to the effect that "each party may plead as many matters as he may think proper, provided that they are pertinent to the cause." For these provisions see

Code of Alabama 1886, p. 594, § 2675; *Hopkinson v. Shelton*, 37 Ala. 306; *Rev. Stat. of Arizona* 1887, p. 175, § 734; *Dig. of Stat. Arkansas* 1884, p. 985, § 5033; *Lincoln v. Wilamowicz*, 7 Ark. (2 Eng.) 378, overruling *Pope v. Latham*, 1 Ark. 60; *Code of California* 1851, § 49, of 1872, § 441; *Deering's Anno.*, C. & S., vol. 2, p. 190; *Gen. Stat. of Connecticut* 1888, § 874, p. 210; *Dakota Code* (1 Levisce), § 119, p. 37; *Rev. Stat. Idaho* 1887, § 4187, p. 453; *Rev. Stat. Indiana* 1888, vol. 1 (Myers & Co.) § 347 (56); *Rev. Code Iowa* 1888 (Miller), § 2655, p. 922; *Comp. Laws Kansas* 1885 (Dassler), § (3803) 94, p. 618; *Kentucky Codes* 1888 (Carroll), § 113 (119), p. 82; *Pub. Stat. Massachusetts*, 1882, p. 967, §§ 13 etc.; *Stat. Min-*

joinders, except when the facts of the case require it.¹ If the de-

nesota 1878, § 98 (81), p. 721; Rev. Code Mississippi 1880, § 1546-7-8, p. 435-6; Rev. Stat. Missouri, 1879, vol. 1, § 3522, p. 604; Comp. Stat. Montana 1887, § 91, p. 82; Comp. Stat. Nebraska 1885, § 100, p. 642; Gen. Stat. Nevada, § 3071, p. 765; Revision New Jersey 1877, p. 867, § 118; Parks v. McClellan, 15 Vr. (44 N. J. L.) 552; Comp. Laws New Mexico 1884, § 1916; New York Anno. Code 1889, § 507, p. 171; Code of North Carolina, § 245, p. 93; Rev. Stat. Ohio 1890, § 5071, p. 1277; Gen. Laws Oregon 1872, p. 120, § 72; Pub. Stat. Rhode Island 1882, p. 579, § 7; Code of South Carolina 1888, § 171, p. 121; Sayles' Texas Civil Stat., vol. 1, art. 1262, p. 424; Laws Utah 1884, p. 207, §§ 304-5; Code of Virginia 1887, p. 778, § 3264; Code of Washington 1881, p. 48, § 83; Code of West Virginia 1887, p. 783, § 20; Anno. Stat. Wisconsin (S. & B. 1889), § 2657, p. 1545; Rev. Stat. Wyoming 1887, p. 571, § 2458.

Georgia.—"The defendant may also set up, as a defence, all claims against the plaintiff of a similar nature with the plaintiff's demand. Georgia Code 1882, § 3261 (3196) (3185); Ransone v. Christian, 49 Ga. 491. The meaning of which is that torts may be set against torts and contracts against contracts. Ransone v. Christian, 49 Ga. 491; Ingram v. Jordan, 55 Ga. 356; Smith v. Printup, 59 Ga. 610; Green v. Combs, 81 Ga. 210.

Texas.—There was a similar provision in Texas under the act of 1840. See Walcott v. Hendrick, 6 Tex. 406, 412. This has, however, been supplanted by the following rule:

"The original answer may consist of pleas to the jurisdiction, in abatement of privilege, or any other dilatory pleas; of exceptions, general and special; of general denial, and any other facts in defence, by way of avoidance or estoppel, the same being pleaded in the due order of pleading, as required by statute, and it may present a cross action, which to that extent will place defendant in the attitude of a plaintiff. Facts in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defence and numbered so as to admit of separate issues to be formed on them." Rules for the courts of Texas, adopted in 1877, 47 Tex. 617.

A defendant is allowed to plead as many inconsistent matters of defence as he pleases to reduce to writing. Wel-

den v. Texas Continental Meat Co., 65 Tex. 487.

Pennsylvania.—The act of May 25th, 1887 (P. L. 271), which provided that all demands recoverable in debt, assumpsit or covenant, should be recovered in one form of action, called an "action of assumpsit," and that damages recoverable in trespass, trover or trespass on the case should be recovered in one form of action, called an "action of trespass," further provides that "special pleading is hereby abolished. In the action of assumpsit, the plea of the general issue shall be 'nonassumpsit.' The defendant in the action of assumpsit shall be at liberty, in addition to the plea of 'nonassumpsit,' to plead payment set off, and also the bar of the statute of limitations, and no other pleas. The only plea in the action of trespass shall be 'not guilty.'" Purd. Dig. Sup., p. 2370.

1. **Consistent Defences.**—Bliss on Code Pleading (2nd ed.), § 343-4, pp. 498, 501.

A defendant is permitted to plead as many defences as he may have, if they be not contradictory. Burnham v. Call, 2 Utah 433; Woollen v. Whitacre, 73 Ind. 108; Caritt v. Tharp, 30 Mo. App. 131; Rooney v. Tierney, 82 Ky. 253 (under the prior code of Kentucky inconsistent pleas were allowed); Harper v. Harper, 10 Bush (Ky.) 447; Derby v. Gallup, 5 Minn. 119; Cook v. Finch, 19 Minn. 407; Smith v. Culligan, 74 Mo. 388.

They may, under proper circumstances, be inconsistent. Bell v. Brown, 22 Cal. 671; Buhne v. Corbett, 43 Cal. 264; Billings v. Drew, 52 Cal. 565.

A defendant may set up as many defences as he may have, notwithstanding it appear that if one of them be true the others are immaterial and unnecessary. Mott v. Burnett, 2 E. D. Smith (N. Y.) 50. Inconsistent pleas are, however, allowed in New York. Bruce v. Burr, 67 N. Y. 237.

In slander and assault and battery the defendant may deny the allegations of the complaint, and in another paragraph plead in confession and avoidance. Weston v. Lumley, 33 Ind. 486; Butler v. Wentworth, 9 How. Pr. (N. Y.) 282; Lansingh v. Parker, 9 How. Pr. (N. Y.) 288; Hollenbeck v. Clow, 9 How. Pr. (N. Y.) 289, overruling Roe v. Rodgers, 8 How. Pr. (N. Y.) 356; s. c., 4 Sand. 664, 680.

fences are inconsistent, the remedy is by motion.¹ Defences reflecting on the plaintiff's character, if alleged without reasonable hope of proving them, may be considered in aggravation of damages.² Each defence must be separately stated, and the remedy, if not so stated, is by motion.³ Each paragraph must be complete in itself.⁴

VIII. JOINDER IN DEMURRER AND IN ISSUE.⁵

IX. JOINDER OF COUNTIES.⁶

The execution of a note may be denied, and it may also be answered that the execution was obtained by a trick. *Citizens' Bank v. Closson*, 29 Ohio St. 78.

1. **Remedy.**—If inconsistent defences are not allowed, objection on that ground cannot be made by demurrer, but must be by motion to strike out or to elect. *Caldwell v. Ruddy* (Idaho), 1 West Coast Rep. 295. See the cases cited in the preceding note.

2. If a defendant sets forth in his answer as a defence facts with intent to injure plaintiff, and without reasonable belief that he will be able to prove them, that may be considered in aggravation of damages. *Haymond v. Saucer*, 84 Ind. 3.

3. **Separate Statement.**—Separate defences must be separately stated. If they are not, the remedy is not by a demurrer, but by a motion to strike out, or by some other appropriate proceeding. *Hogely v. Hogely*, 68 Cal. 348; *Freeman v. Fleming*, 5 Iowa 460; *Benedict v. Seymour*, 6 How. Pr. (N. Y.) 298. Remedy is by demurrer. *Wright v. Connor*, 34 Iowa 240. But if a demurrer is filed and sustained, the error is waived if the defendant files an amended answer setting up the same defences. *Hogely v. Hogely*, 68 Cal. 348.

4. Each paragraph of an answer must be complete in itself. *Knarr v. Conaway*, 42 Ind. 260; *Penna. Co. v. Holderman*, 69 Ind. 18.

Each answer must be complete, unless in terms it adopts or refers to the matter contained in some other answer; it must be tested by the matter itself contains. If not complete, it cannot be sustained by reference to other defences contained in the answer. *Hammond v. Earle*, 58 How. Pr. 426.

5. **Joinder in Demurrer—In Pleading.**—A pleading or formula, by which one of the parties to a suit joins in or accepts an issue in law tendered by the opposite party. It follows immediately after a demurrer, and with it constitutes the issue.

Joinder in Issue—In Pleading.—A formula by which one of the parties to a suit joins in or accepts an issue in fact tendered by the opposite party; more commonly called a *similiter*. *Burrill's Law Dict.* *Abbott's Law Dict.*, *Anderson's Law Dict.*, *Bouvier's Law Dict.* subtit.; *Stephen on Pleading* (9th Am. ed.), *56-60.

It is one of the rules of pleading that "issue when well tendered must be accepted." This applies to issues in law as well as in fact. *Stephen on Pleading* (9th Am. ed.), *237-240.

A joinder in demurrer is merely a matter of form, but it must be made within a reasonable time. *Thompson v. Gondelock*, 10 Rich. (S. Car.) 49.

A plaintiff cannot introduce into his joinder in demurrer new facts. He should amend his declaration. *Gibson v. Todd*, 1 Rawle (Pa.) 452. A trial without a plea is a waiver of all matter of form, and a tacit agreement to put the cause on its merits. *Good Intent Co. v. Hartzell*, 22 Pa. St. 277.

The word "issue" is often used as a *nomen collectivum*, and the phrase "issue joined" may embrace various distinct grounds of defence. Therefore when issue was joined on each of several distinct pleas, and a jury was sworn to try the issue joined, etc., and they found the issue in favor of the plaintiff, and a judgment was rendered accordingly, it was *held* there was no error. *Pointer v. Rust*, 7 Humph. (Tenn.) 532.

6. **Joinder of Counties.**—"There can be no joinder of counties for the finding of an indictment; though, in appeal of death, where a wound was given in one county and the party died in another, the jury were to be returned jointly from each county before the Stat. 2 & 3 Edw. VI. ch. 24; but by that statute the law is altered, for now the whole may be tried either on indictment or appeal, in the county wherein the death is." *Abbott's Law Dict.* subtit.

JOINT EXECUTORS AND ADMINISTRATORS—(See EXECUTORS AND ADMINISTRATORS; PROBATE AND LETTERS OF ADMINISTRATION).

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| I. Definition, 1016. | V. Actions By and Against Co-executors, 1033. |
| II. Constitute but One Person, 1016. | VI. Survivorship Among Co-executors, 1035. |
| III. The Act of One Is the Act of All, 1016. | VII. Division of the Commissions, 1035. |
| IV. Co-executors Not Liable for Each Other, 1022. | |

I. Definition.—Joint executors are those who are joined in the execution of a will.¹

II. Constitute but One Person.—Joint executors, however numerous, constitute but one person in the eye of the law.² Upon this fact depend many of the powers, duties and obligations incident to the office of joint executorship.

III. The Act of One Is the Act of All.—Joint executors can act independently of each other. The act of one, within the scope of his authority, is the act of all, and binds the estate.³

1. Bouv. Law Dict., tit. Joint Executors.

No Distinction Between Joint Executors and Joint Administrators.—At one time there seems to have been a difference between co-executors and co-administrators. *Hudson v. Hudson*, 1 Atk. 460. But no difference between them is now recognized. *Jacomb v. Harwood*, 2 Ves. Sr. 265; *Jeroms v. Jeroms*, 18 Barb. (N. Y.) 24; *Murray v. Blatchford*, 1 Wend. (N. Y.) 583; *Herald v. Harper*, 8 Black. (Ind.) 170; *Dean v. Duffield*, 8 Tex. 235; *O'Neill v. Herbert*, 1 McMull. Eq. (S. Car.) 495; *Williams on Executors*, 6 Am. ed. *950.

In respect of rights, duties and liabilities, co-administrators stand upon the same footing as co-executors, with, of course, the difference that their functions, being defined by general and positive law, are scarcely capable of special variation." *Schouler, Exrs. & Admsrs.* (2nd ed.), § 404.

An administrator has to give a bond in many cases where an executor is not obliged to, and the bond when joint makes the liability of co-administrators for each other greater than the liability of co-executors, who have not given a bond for each other. But the liability of a co-executor who has given a joint bond is precisely the same as the liability of a co-administrator under the same circumstances.

In this article whatever is said of co-executors is true also of co-administrators unless a distinction is drawn between them.

Joint letters of administration ought not to be granted if one of the parties thereto objects. *Brubaker's Appeal*, 98 Pa. St. 21.

2. *Viner's Abridg.*, tit. Exrs. & Admsrs., p. 369, § 11; *Bacon's Abridg.*, tit. Exrs. & Admsrs., p. 37, d; *Williams on Executors* *245, *946 (6th Am. ed.); *Schouler on Exrs. & Admsrs.* (2nd ed.), § 400; *Ames v. Armstrong*, 106 Mass. 15; *Barry v. Lambert*, 98 N. Y. 300; *Hall v. Boyd*, 6 Pa. St. 267.

"A testator may appoint different executors, in different countries, in which his effects may lie; or different executors, as to different parts of his estate in the same country." Opinion of the court in *Hunter v. Bryson*, 5 Gill & J. (Md.) 483, 488.

One executor may qualify for general purposes, and another for a special purpose, if this is the testator's plain intention. *Schouler, Exrs. & Admsrs.* (2nd ed.), § 40; *Williams on Executors* (6th Am. ed.) *245; *Lynch v. Bellevue*, 3 Phill. 424.

Where an executor renounces, letters of administration will be granted to his co-executor. *Schouler, Exrs. & Admsrs.* (2nd ed.), § 51; *Miller v. Meetch*, 8 Pa. St. 417.

3. "If a man appoint several executors, they are esteemed in law but as one person, representing the testator, and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession or release of the testator's goods are

deemed the acts of all, for they have a joint and entire authority over the whole." Bacon's Abridg., tit. Exrs. & Admr., p. 37, d; Story's Eq. Jurispr. (13th ed.), vol. 2, § 1280, a. See also Viner's Abridg., p. 367, § 16; Williams on Executors (6th Am. ed.), *946; Schouler, Exrs. & Admr. (2nd ed.), § 400; Edmonds v. Crenshaw, 14 Pet. (U. S.) 166; Williams v. Nixon, 2 Beav. 472, 475; First National Bank of Alleghany v. Farmers' Deposit National Bank of Pittsburgh (Pa.), 5 Cent. Rep. 505; Wood's App., 92 Pa. 379; 2 Kent's Com. (13th ed.), *416, note c, and cases cited; Ames v. Armstrong, 106 Mass. 15.

Lightcap's Appeal, 95 Pa. St. 455; Jackson v. Shaffer, 11 Johns. (N. Y.) 513; Wheeler v. Wheeler, 9 Cow. (N. Y.) 34; Lank v. Kinder, 4 Harr. (Del.) 457; Kerr v. Waters, 19 Ga. 136; Stewart v. Conner, 9 Ala. 803.

Probate of One Is Sufficient for All.—

Where one co-executor takes probate that enures to the benefit of all and it is not necessary for the remaining executors to do so. Williams on Executors (6th Am. ed.) *382; Webster v. Spencer, 3 B. & Ald. 363; Brookes v. Stroud, 1 Salk. 3; Walters v. Pfeil, 1 Mood. & Walk. 362; Watkins v. Brent, 7 Sim. 512; Scott v. Briant, 6 Nev. & M. 381; KENNEDY, J., in Heron v. Hoffner, 3 Rawle (Pa.) 393, 395.

One executor cannot prevent a co-executor from taking possession of the assets, or take them from him after he has obtained possession of them. Williams on Executors, *946, n. b. (6th Am. ed.); Hall v. Carter, 8 Ga. 388; Chew's Estate, 2 Pars. Eq. Cas. (Pa.) 153; Wood v. Brown, 34 N. Y. 337.

A release of a debt by one of several co-executors binds the rest. Jacomb v. Harwood, 2 Ves. Sr. 267; Shaw v. Berry, 35 Me. 279; Gilman v. Healy, 55 Me. 120; Stuyvesant v. Hall, 3 Barb. Ch. (N. Y.) 151; Devling v. Little, 26 Pa. St. 502; Shreve v. Joyce, 7 Vroom (N. J.) 44, 48; Hoke v. Fleming, 10 Ired. Law (N. Car.) 263.

A co-executor may borrow money for the purpose of administering the estate, and the estate will be liable for it. Child & Co. v. Thorley, L. R., 16 Ch. Div. 151.

A payment to one executor or a release from him extinguishes the debt, although he misapplies the money and no part of it comes to the estate. Herbert v. Pigott, 2 Crompt. & Mees. 384; Devling v. Little, 26 Pa. St. 502.

So also, one may, where the circum-

stances require it, take part and release the residue, or accept goods or securities in satisfaction. Smith v. Everett, 27 Beav. 446; Gilman v. Healy, 55 Me. 120; Gulledd v. Berry, 31 Miss. 346.

And it makes no difference if the case is free from fraud, that the compromise is without the knowledge of the co-executor, or that it is against his wishes. Herbert v. Pigott, 2 Crompt. & Mees. 384; Murray v. Blatchford, 1 Wend. (N. Y.) 583; Grace v. Sutton, 5 Watts (Pa.) 540; Weir v. Mosher, 19 Wis. 311; Wheeler v. Wheeler, 9 Cow. (N. Y.) 34; Son v. Miner, 37 Barb. (N. Y.) 466.

Two executors sent cotton belonging to the estate of their testator to Liverpool to be sold. Held, either one by himself could draw for the proceeds of the sale. Tompkins v. Tompkins, 18 S. C. 1.

One of two executors can transfer notes held by the decedent. Dwight v. Newell, 15 Ill. 333; Wheeler v. Wheeler, 9 Cow. (N. Y.) 34. Even where executors, in collecting assets, take a note payable to themselves as executors, either one of them can endorse and transfer it. Mackay v. St. Mary's Church (R. I.), 1 New Eng. Rep. 141. But see *contra*, Smith v. Whiting, 9 Mass. 334.

One executor can release or assign a mortgage held by the testator. Weir v. Mosher, 19 Wis. 311; Son v. Miner, 37 Barb. (N. Y.) 466; George v. Baker, 3 Allen (Mass.) 326; Cronin v. Hazeltine, 3 Allen (Mass.) 324.

So also where co-executors invest the assets of their testator in a mortgage, either one of them can satisfy, sell or assign it. D'Inwilliers v. Abbott, 12 Phila. (Pa.) 462; Bogert v. Hertell, 4 Hill (N. Y.) 492; Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151; Douglass v. Saterlee, 11 Johns. (N. Y.) 16; Murray v. Blatchford, 1 Wend. (N. Y.) 583; People v. Kyser, 28 N. Y. 226; People v. Miner, 37 Barb. (N. Y.) 466. But see *contra*, Beltzhoover v. Darragh, 16 S. & R. (Pa.) 329.

One co-executor can enter an amicable action or submit to an arbitration. Schouler Exrs. & Admr. (2nd ed.), § 400; Lank v. Kinder, 4 Harr. (Del.) 457. But see McIntire v. Morris, 14 Wend. (N. Y.) 90, where the appearance of one co-executor before an arbitrator, and his implied assent to the award, were held *prima facie* evidence against both.

As to how far one executor can bind

But in Certain Cases All the Executors Must Join—All Must Join in the Sale of Real Estate Under a Power in the Will.—Where executors are vested by the will with power to sell real estate, all who have accepted the administration and are still executors at the time of a conveyance, must join in it. In this case they become trustees¹ as well as executors, and as is the case with other trustees, all must join in the conveyance.²

his co-executor, *RUGER, C. J.*, says (*Barry v. Lambert*, 98 N. Y. 300, 309): "It would seem to follow as the result of the authorities, that the powers of executors, in the administration of estates confided to them, are commensurate with those expressly granted or necessarily implied from the nature of the duties imposed upon them, and their power to bind their associates by their acts, is limited only by the nature of the transactions they are called upon to perform." See also *Bodley v. McKinney*, 9 Sm. & M. (Miss.) 339.

One of several joint executors can make an agreement to determine and give up a lease reserving rent, entered into by his testator, for the payment of which rent the testator has given his bond. *Reber v. Gilson*, 1 Pa. St. 54; *Simpson v. Gutteridge*, 1 Madd. 616.

Co-Executors Can Plead Different Pleas.

—See article on Executors and Administrators, p. 380, n. 1.

Where a co-executor is also a legatee, his single assent to his legacy will vest the title to the legacy in him. 1 Rol. Abr. 618; *Williams on Executors*, 6 Amer. ed. *948; *Cole v. Miles*, 10 Hare 179.

As all the co-executors constitute but one person, each one has a joint and entire title to the assets of the estate at common law; and if he grants or releases his interest to his co-executor, nothing passes, for each was possessed of the whole before. *Godolph. pt. 2, ch. 16, § 1*; *Williams on Executors*, 6 Amer. ed. *911; *Schouler Exrs. & Admsrs.* 2nd ed., § 400.

One co-executor can sell or dispose of the assets in behalf of all. *Kelsock v. Nicholson*, Cro. Eliz. 478; *Murrell v. Cox*, 2 Vern. 570; *Schouler on Exrs. & Admsrs.* (2nd ed.), § 400.

But where an executor entered into a contract under the impression that his co-executor would ratify it, but his co-executor refused to do so, a court of equity would not decree specific performance of the contract. *Sneesby v. Thorne*, 7 De G. M. & G. 399.

A court of equity will not enforce

an unjust contract, nor will a court of equity enforce an unjust contract entered into by one co-executor, although it was, perhaps, one he had a legal right to make. *Schouler on Exrs. & Admsrs.* (2nd ed.), § 400; *Lepard v. Vernon*, 2 Ves. & B. 51; *Sneesby v. Thorne*, 7 De G. M. & G. 39.

Where a plaintiff purchased stock of the testator's estate from an executor, the co-executor taking no part in the sale, the plaintiff having reason to believe that the purchase money was to be used for the executor's benefit, and not for the benefit of the estate, the court refused to compel a transfer of the stock. *Le Baron v. Long Island Bank*, 53 How. Pr. (N. Y.) 286.

On the other hand, a court of equity will sometimes help out a contract made by one co-executor, when there are no grounds for setting it aside. *Giddings v. Butler*, 47 Tex. 535; *Taylor v. Adams*, 2 S. & R. (Pa.) 534; *Nelson v. Carrington*, 4 Munf. (Va.) 332; *Thorpe v. McCullum*, 6 Ill. 614.

1. *Alexander v. M'Murry*, 8 Watts (Pa.) 504.

2. *Denne v. Judge*, 11 East 288; *FINCH, J.*, in *Croft v. Williams*, 88 N. Y. 384, 390; *Wilder v. Ranney*, 95 N. Y. 7; *Fleming v. Burnham*, 100 N. Y. 1; *Kling v. Hummer*, 2 Pa. Rep. 349; *Wasson v. King*, 2 Dev. & Bat. (Law) (N. Car.) 262; *Johnston v. Thompson*, 5 Call (Va.) 248; *McRae v. Farrow*, 4 Hen. & Mun. (Ind.) 444; *Hart v. Rust*, 46 Tex. 556.

In *Wisconsin* it is provided by statute (*Rev. Stat. Wis.*, §§ 2102, 2137), that all the executors must join in a sale of land under a power in a will. *Crowley v. Hicks* (Wis.), 40 N. W. Rep. 151.

A court of equity will not compel an executor to join his co-executor in a contract for the sale of real estate under a power in a will. Unless all the executors voluntarily agree, the sale cannot be made. *Crowley v. Hicks* (Wis.), 40 N. W. Rep. 151.

Where a power is given co-executors to sell real estate for the purpose of converting it into money, this is not

such a conversion as will enable one executor to sell, as he could do in the case of personality. *Crowley v. Hicks* (Wis.) 40 N. W. Rep. 151; *Wilder v. Ranney*, 95 N. Y. 7.

At common law, where a power to sell land was given to executors by will, and one of them refused the trust, the remaining executors could not sell. *Williams on Executors*, 6 Amer. ed. *951; Co. Lit. 113 a; *WILDE, J.*, in *Tainter v. Clark*, 13 Met. (Mass.) 220; *Boston Franklinite Co. v. Condit*, 4 Green Ch. (N. J.) 395; *HUBBARD, J.*, in *Shelton v. Homer*, 5 Met. (Mass.) 462; *AMES, J.*, in *Chandler v. Rider*, 102 Mass. 268.

Some cases hold that all the executors who accept the administration, or all who are appointed executors by the testator, must join in a conveyance for it to be valid, even though one of them had resigned or been discharged before that time or has never qualified. In *Shelton v. Homer*, 5 Metc. (Mass.) 462, two executors had a naked power to convey real estate, both qualified and one was discharged. *Held*, the remaining executor could not convey the real estate; not, at any rate, during the life time of the discharged executor.

See also *Williams v. Murray*, 3 Vt. 189, where the court, *per HUTCHINSON, C.*, says, p. 197: "While the three are alive, all must join in a conveyance, to render it valid. The will makes no provision for the event that a part refuse to accept the trust. The testator has committed the trust to the united skill, judgment and fidelity of the three. Neither of them can make a title alone, unless he has become the only survivor of the three."

See also *Wooldridge v. Watkins*, 3 Bibb (Ky.) 349; *Halbert v. Grant*, 4 T. B. Mon. (Ky.) 580; *Smith v. Moore*, 6 Dana (Ky.) 417; *Floyd v. Johnson*, 2 Litt. (Ky.) 109; *Bank of Port Gibson v. Baugh*, 9 Sm. & M. (Miss.) 290.

The weight of authority at the present time, however, seems to be that under 21 Hen. VIII, ch. 4, only such executors as qualify need join in a conveyance, and when one or more of those who qualify either die, resign or are discharged, a conveyance by the remaining executors will be sufficient.

Houel v. Barnes, Cro. Cas. 382; *Eaton v. Smith*, 2 Beav. 236; *Forbes v. Peacock*, 11 M. & W. 630; *Leggett v. Hunter*, 19 N. Y. 445; In the matter of *Bull*, 45 Barb. (N. Y.) 334; *Hutchings v. Baldwin*, 7 Bosw. (N. Y.) 236;

Zebach v. Smith, 3 Bin. (Pa.) 69; *White v. Taylor*, 1 Yeates (Pa.) 422; *Warden v. Richards*, 11 Gray (Mass.) 277; *Chandler v. Rider*, 102 Mass. 268; *Gould v. Mather*, 104 Mass. 283 (overruling *Shelton v. Homer*, 5 Metc. (Mass.) 462, *supra*); *Leavens v. Butler*, 8 Porter (Ala.) 380; *Johnson v. Bowden*, 37 Tex. 621; *Britton v. Lewis*, 8 Rich. Eq. (S. Car.) 271; *Taylor v. Gallo way*, 1 Ham. (Ohio) 232; *Corlies v. Little*, 14 N. J. (Law) 373; *Putnam Free School v. Fisher*, 30 Me. 523; *Miller v. White*, 1 Taylor (N. Car.) 309.

But where a citizen of New York authorized his executors to sell his lands in Pennsylvania for purposes entirely unconnected with the office of executor, it was *held* that an administrator d. b. n. could not execute the trust, although the executors had renounced as to the estate in Pennsylvania. *Ross v. Barclay*, 18 Pa. St. 179.

Where an executor sells land under a power in the will, with the consent or approbation of his co-executors, or when the co-executors subsequently ratify the sale, this is a sufficient execution of the power. *Giddings v. Butler*, 47 Tex. 535; *Taylor v. Adams*, 2 S. & R. (Pa.) 534; *Nelson v. Carrington*, 4 Munf. (Va.) 332; *Thorp v. McCullum*, 1 Gill. (Ill.) 614.

Where two executors were authorized to sell the testator's land, it was *held* that one could not enable his co-executor to sell by giving him a power of attorney. *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368.

Sale of Land by Executors Under a Statute.—Where a State statute provides that an executor shall apply to the court for permission to sell the testator's real estate to pay his debts, if there are co-executors it is proper that all should join. *Hannum v. Day*, 105 Mass. 33.

The statute of *Massachusetts* (Gen. St., ch. 102) provides that when the personal estate of a deceased person is insufficient to pay his debts with charges of administration, his executor or administrator may sell his real estate for that purpose upon obtaining a license therefor. *Held*, in the above case, that if there are joint executors all must join. See also *Personette v. Johnson*, 40 N. J. Eq. 173; *Sanford v. Granger*, 12 Barb. (N. Y.) 392; *Gregory v. McPherson*, 13 Cal. 562.

Where all have joined in the petition, the subsequent refusal of one to proceed

Where executors are given powers to do other things than sell land, out of the usual course of their duty, all must join as in the sale of land.¹

One of several co-executors cannot confess a judgment against the estate of the decedent.²

Effect of Admissions.—Just when and how far an admission by one of several joint executors of an indebtedness against the testator's estate, binds his co-executors, is a nice question.

"The admission of one of several executors or administrators, will not bind the others; at all events, unless it is made in the character of executor."³

will not invalidate the actions of the others. *Osman v. Traphagen*, 23 Mich. 79.

But where two executors empowered to sell land did so, and took in partial payment a bond and mortgage in their joint names as executors, it was *held* that either of the executors could sell or assign the mortgage and bond as it was personally. *Bogert v. Hertell*, 4 Hill (N. Y.) 492.

1. Schouler Exrs. and Admrs. (2nd ed.), § 402. Thus in *Bank of Port Gibson v. Baugh*, 9 Sm. & M. (Miss.) 290, it was *held* that all the executors must join in giving a mortgage to raise money under a power in the will.

2. At one time it was *held* that one co-executor could confess a judgment against the estate. LORD CHIEF JUSTICE TRELY, in *Dyer* 23, marginal notes. But the law is now the other way and the co-executors must join in confessing a judgment. *Toller, Office and Duty of Exrs. and Admrs.* (3rd Am. ed.) 360; *Williams on Executors* (6th Am. ed.), *958, note S 1; *Hall v. Boyd*, 6 Pa. St. 267; *Heisler v. Knipe*, 1 Browne (Pa.) 319; *Karl v. Black*, 2 Pittsb. (Pa.) 19; *Hammon v. Huntley*, 4 Cow. (N. Y.) 493; *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558.

3. *Williams on Executors* (6th Am. ed.), *1894.

A testator sold land to plaintiff and gave a covenant for quiet enjoyment against all claiming under him. The defendants, who were testator's executors, entered the land sold and evicted the plaintiff. Plaintiff brought suit against the defendants, and in order to win was obliged to prove that the defendants entered under lawful title. One defendant admitted, after entry, that the two had a lawful title through the testator under a deed prior to the one sued on. *Held*, The executors did not enter as executors, and the admis-

sion of one would not bind the estate. *Fox v. Waters*, 12 A. & E. 43.

In *Atkins v. Tredgold*, 2 Barn. & Cr. 23, the court thought that an express promise by one co-executor, in his representative character, would bind the remaining executors in their representative characters. See also *McCulloch v. Dawes*, 9 Dow. & Ry. 40.

Effect of a Promise by a Co-executor Upon the Statute of Limitations.—But in *Tullock v. Dunn*, *Ryan & Moody* 416, it was *held* that an express promise by one of several co-executors does not take the case out of the statute of limitations; and *PARKE, B.*, in *Scholey v. Walton*, 12 M. & W. 509, approves of the principle of *Tullock v. Dunn*.

Tullock v. Dunn has been followed in some of the United States where it is *held* that one executor cannot revive a debt barred by the statute of limitations. *Pitts v. Wooten's Executors*, 24 Ala. 474; *Caruthers v. Mardis*, 3 Ala. 599; *Fritz v. Thomas*, 1 Whart. (Pa.) 66; *Reynolds v. Hamilton*, 7 Watts (Pa.) 420; *Hall v. Boyd*, 6 Pa. St. 267; *McWilliams' Estate*, 3 Clark (Pa.) 321; *Peck v. Botsford*, 7 Conn. 172.

But see *contra*, *Hammon v. Huntley*, 4 Cow. (N. Y.) 493, where *WOODWORTH, J.*, says, p. 494, that an admission by one co-executor "would undoubtedly be sufficient to take the case out of the statute of limitations." This is, however, but a *dictum*, and is questioned in *Cayuga County Bank v. Bennett*, 5 Hill (N. Y.) 236.

See, however, the following cases, where it was *held* that a promise by one co-executor would bar the statute of limitations. *Shreeve v. Joyce*, 36 N. J. L. 44; *Emerson v. Thompson*, 16 Mass. 431.

To pay a debt barred by the statute of limitations, the promise by one executor does not make his co-executors

Some cases make a third exception, and hold that where co-executors join in an act in regard to assets of the estate, they must join in any further acts in regard to the same assets.¹

personally liable even where it bars the statute. The judgment of the court is *de bonis testatoris*, unless the executors have been guilty of waste. *Shreeve v. Joyce*, 36 N. J. L. 44, 47.

As to the broad question of the effect of an admission by one co-executor, see *Hammon v. Huntley*, 4 Cow. (N. Y.) 493. This was an action of assumpsit by the vendor of land against the three executors of the vendee, for part of the purchase money. The plaintiff offered a letter written by two of the defendants to the plaintiff since the commencement of the suit acknowledging a balance of \$240 to be due from the decedent's estate to the plaintiff. *Held*, not admissible. See also *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558; and *Cayuga County Bank v. Bennett*, 5 Hill (N. Y.) 36.

But in *James v. Hackley*, 16 Johns. (N. Y.) 273, an admission by one co-executor of a debt due from the decedent was held to be *prima facie* evidence of the debt, but this presumption might be rebutted.

In *McIntyre v. Morris*, 14 Wend. (N. Y.) 90, 98, the court says, "Where the original indebtedness is proved, a statement or admission of the balance, by one of several executors or administrators, is competent evidence against all; but the others are at liberty to repel it by showing that there was in fact nothing, or not so much due, or that it had been paid or extinguished. According to this principle, the appearance of one of the administrators before the arbitrators, and his implied assent to the award, were probably competent *prima facie* evidence against both." See also *Walkup v. Pratt*, 5 Harr. & J. (Md.) 51.

Cannot Create a New Liability.—Nor can one co-executor create a fresh liability against the estate.

In *Scruggs v. Driver*, 31 Ala. 274, it was held that one executor could not create a pecuniary liability against his testator's estate, without the consent of his co-executor by a contract for the purchase of property, nor could the admissions of one executor establish such a contract. The court say in this case, page 287: "One executor could not subject the estate to a judgment, upon his promise to pay for

property purchased by him, without the participation of his co-executor; for, if he could, he might fasten a personal liability upon his co-executor without the consent or knowledge of the latter. Upon this principle the authorities fully recognize, as a general rule, the doctrine that one executor or administrator cannot create a debt against an estate where none existed before." See also *Nation v. Toyzer*, 1 Cr. M. & R. 172.

See also *McLane v. Belvin*, 47 Tex. 493. In this case a testator paid a promissory note in confederate treasury notes, and then died. After a time the payee repudiated the confederate note transaction, and two co-executors promised to pay him again, against the will of the third co-executor. *Held*, the promise of the two did not bind the estate. See also *Bailey v. Spofford*, 14 Hun. (N. Y.) 86.

1. Two administrators sold some of the decedent's real estate and took a mortgage on it in partial payment of the purchase money. One administrator entered satisfaction of this mortgage on the record, trusting to other security for the money covered by the mortgage. *Held*, one could not thus bind the estate. *Beltzhoover v. Darragh*, 16 S. & R. (Pa.) 329 (But see *contra* *D'Inwilliers v. Abbott*, 12 Phila. (Pa.) 462). See also *Hertell v. Bogert*, 9 Paige (N. Y.) 52 (Overruled in *Bogert v. Hertell*, 4 Hill (N. Y.) 492. See also *De Haven v. Williams*, 80 Pa. St. 480, where two executors deposited money of their testator in a bank to their joint account as executors. *Held*, both must join in a receipt in order to free the bank from responsibility.

In *New York* a statute authorizes the surrogate to require money to be deposited to joint credit. *Chambers v. Cruikshank*, 5 Dem. (N. Y.) 414.

In *Smith v. Whiting*, 9 Mass. 334, two executors took a promissory note as executors. *Held*, they both must endorse it. See *contra*, *Mackay v. St. Mary's Church* (R. I.), 1 New Eng. Rep. 141. See also *Sanders v. Blain Administrators*, 6 J. J. Marshall (Ky.) 446, in which it was held that one administrator could not assign a note made payable to himself, as executor,

Cases are not wanting, however, which take the opposite view.¹

IV. Co-executors Are Not Liable for Each Other.—As co-executors can act independently of each other, and each one is entitled to exercise control over the assets of the estate, it follows that one executor is not liable for assets received by his co-executor, or for the actions of his co-executor, so long as they act independently of each other.²

and his co-administratrix. See also *Pearce v. Savage et al.*, 51 Me. 410.

In *Turner v. Hardey*, 9 M. & W. 770, two co-executors, the plaintiffs, leased certain premises, belonging to decedent's estate, to the defendant, and brought an action for use and occupation. The defendant pleaded an agreement between himself and the plaintiffs whereby one W became tenant in the place of the defendant. It appeared that this agreement was entered into by one of the executors only, and it was held that he could not bind the estate in this manner.

1. *Hirtell v. Bogert*, 9 Paige (N. Y.) 52, is expressly overruled in *Bogert v. Hirtell*, 4 Hill (N. Y.) 492, which holds that an executor can assign or sell a mortgage executed by himself and co-executor as executors.

See also *D'Inwilliers v. Abbott*, 12 Phila. (Pa.) 462; and *Hyatt v. McBurney*, 18 S. Car. 199, where it was held that one executor could satisfy a mortgage executed by himself and his co-executor.

In *Mackay v. St. Mary's Church* (R. I.), 1 New Eng. Rep. 141, it was held that where executors in collecting the assets take a note payable to themselves as executors, either one of them can endorse and transfer it. See also *Tompkins v. Tompkins*, 18 S. Car. 1.

2. Bacon's Abridg., tit. Exrs. & Admsrs., p. 39, d. 2; Wentworth on Off. Exrs. (14th ed.), p. 306; Williams on Exrs. (6th Am. ed.) * (1820); Schouler Exrs. & Admsrs. (2nd ed.) § 402.

"They [co-executors] are liable, personally and individually, no further than assets have come into their hands, or where they have done some act which the law considers as an equivalent to an admission that the assets were in their hands and culpably and negligently parted with." Opinion of the court in *Hall v. Boyd*, 6 Pa. St. 267, 270.

"When there are two or more executors, questions often arise as to the liability of one for another's misappropriation of assets. There are three questions in such cases:

"First. Has the executor whom it is sought to charge for the other's default ever had possession of the assets in question?

"Second. If he has had possession, and has delivered them over to another executor, what reason had he for so doing?

"Third. If he has not had possession, did he know of the misappropriation by the other executor?" S. G. Croswell in 24 Cent. L. J. 147.

Littlehales v. Gascoyne, 3 Bro. C. C. 74; *Hargthorpe v. Milforth*, Cro. Eliz. 318; *Williams v. Nixon*, 2 Beav. 472; *Dix v. Burford*, 19 Beav. 412; *State v. Belin*, 5 Har. (Del.) 400; *Ray v. Dougherty*, 4 Black. (Ind.) 115; *Davis v. Walford*, 2 Ind. 88; *Call v. Ewing*, 1 Black. (Ind.) 301; *Hall v. Carter*, 8 Ga. 388; *Clarke v. Jenkins*, 3 Rich. Eq. (S. Car.) 318; *Anderson v. Earle*, 9 S. Car. 460; *Douglass v. Saterlee*, 11 John. (N. Y.) 16; *Williams v. Holden*, 4 Wend. (N. Y.) 223; *Mesick v. Mesick*, 7 Barb. (N. Y.) 120; *White v. Bullock*, 20 Barb. (N. Y.) 91; *Wood v. Brown*, 34 N. Y. 337; *Gaultney v. Nolan*, 33 Miss. 569; *Fonte v. Horton*, 36 Miss. 350; *Noland v. Calvit*, 20 Miss. 273; *Peter v. Beverley*, 10 Peters (U.S.), 532; *Roach v. Hubbard*, 6 Litt. (Ky.) 235; *Moore v. Tandy*, 3 Bibb (Ky.) 97; *Brazier v. Clark*, 5 Pick. (Mass.) 104; *Newcomb v. Williams*, 9 Met. (Mass.) 525; *AMES, J.*, in *AMES v. Armstrong*, 106 Mass. 18; *Royall v. McKenzie*, 25 Ala. 363; *Latrobe v. Tiernan*, 2 Md. Ch. 474; *Kerr v. Kirkpatrick*, 8 Ired. Eq. (N. Car.) 137; *Clarke v. Cotton*, 2 Dev. Eq. (N. Car.) 51; *Worth v. McAden*, 1 Dev. & Bat. Eq. (N. Car.) 199; *Fennimore v. Fennimore*, 2 Green Ch. (N. J.) 292; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Sparhawk v. Buell*, 9 Vt. 41; *Nettman v. Schramm*, 23 Iowa 521; *Stell's Appeal*, 10 Pa. St. 149.

An executor is not personally liable for a misrepresentation made by his co-executor in selling the estate. 8 Cent. L. J., p. 86. article by O. F. Bump, Esq.; *Heath v. Allin*, 1 A. K. Marsh.

Negligence or Bad Faith Makes a Co-executor Liable.—Where an executor is guilty of negligence or an act of bad faith, he becomes liable for the waste of his co-executor.¹

Just what is and what is not negligence on the part of one of several co-executors is not always easy to determine. In the cases given below one executor was held to be negligent, and therefore liable for the devastavit of his co-executor.²

(Ky.), 442. In this case an executor who made a fraudulent representation as to a slave which he sold, was *held* liable, but his co-executor, who was not a party to the fraud, was not answerable.

Nor does the fact that the executors are trustees, as well as executors, make any difference as to their liability for each other. *Banks v. Wilkes*, 3 Sanf. Ch. (N. Y.) 99; *Kip v. Deniston*, 4 Johns. (N. Y.) 23; *Kirby v. Turner*, Hop. Ch. (N. Y.) 309; *DeForest v. Insurance Co.*, 1 Hall (N. Y.), 130; *Ormiston v. Olcott*, 84 N. Y. 339 (overruling *Bates v. Underhill*, 3 Redf. (N. Y.) 365).

"But wherever either a trustee or an executor, by his own negligence or laches, suffers his co-trustee or co-executor to receive or waste the trust funds or assets of the testator when he has the means of preventing such receipt and waste by the exercise of reasonable care and diligence, then, and in such case, such trustee or executor will be held personally responsible for the loss occasioned by such receipt and waste of his co-trustee or co-executor." *Story's Equity Jurisprudence* (13th ed.), vol. 2, § 1283.

1. *Williams on Exrs.* (6th Am. ed.) *1820, note y; *Schouler Exrs. & Admrs.* (2nd ed.), § 402; *McDowall v. McDowall*, 1 Bailey Eq. (S. Car.) 324; *Holcombe v. Holcombe*, 13 N. J. Eq. 413; *Irwin's Appeal*, 35 Pa. St. 294; *Weigand's Appeal*, 28 Pa. St. 471; *Hengst's Appeal*, 24 Pa. St. 413; *Blake v. Pegram*, 109 Mass. 541, 552.

"And, inasmuch as each executor has an independent right to control and transfer the assets, one is bound not to be heedless as to his co-executor's conduct, but rather, as in requiring a joint deposit or transfer, or joint investment of funds, to impose a check upon the other's authority. For, if an executor, by any act or default on his part, places the estate and its management in the exclusive power of his co-executor, he takes the perils of the latter's maladministration upon himself, unless he exercised what American courts would

call ordinary prudence." *Schouler Exrs. & Admrs.* (2nd ed.), § 402.

"The question reverts, in short, to the customary issue of good faith and prudence, considering all the circumstances, as in the case of a sole executor or administrator." *Schouler Exrs. & Admrs.* (2nd ed.), § 402, n. 5.

2. An executor who has reason to suspect his co-executor of improper management of the estate, becomes liable for his co-executor's mismanagement, unless he tries to prevent it. *Smith v. Pettigrew*, 34 N. J. Eq. 216; *Head v. Bridges*, 67 Ga. 227.

An Executor Who Doubts the Solvency of His Co-executor Is Liable for His Waste unless He Endeavors to Prevent It.—In *Styles v. Guy*, 1 Mac. & G. 422, it was *held* that where executors had reason to suspect the solvency of one of their number, but did not attempt to get possession of the assets, they would be held liable for his *devastavit*, unless they could prove that an effort to get the money would have been useless. An executor must not allow a part of the estate to remain outstanding in an improper state of investment, whether it is in the hands of a co-executor or a stranger. See also *Williams v. Nixon*, 2 Beav. 475; *Horton v. Brocklehurst*, 29 Beav. 510; *Kincade v. Conley*, 64 N. Car. 387; *Carter v. Cutting*, 5 Munf. (Va.) 223. (But see *contra*, *Croft v. Williams*, 88 N. Y. 384, and *Worth v. M'Aden*, 1 Dev. & Bat. Eq. (N. Car.) 199).

So an executor, who allowed his co-executor to retain funds of the estate for a long time without seeing to their proper investment, is responsible for the loss. *Hays v. Hays*, 3 Tenn. Ch. 88.

An executor who is privy to the misapplication of the funds of the estate by his co-executor, the latter appropriating them as commissions before his account has been settled, and who does not remonstrate, is liable for the sum appropriated and interest. *Whitney v. Phoenix*, 4 Redf. (N. Y.) 180. See also *Booth v. Booth*, 1 Beav. 125; *Wood v. Brown*, 34 N. Y. 337; *Heath v. Allin*, 1 A. K.

In the following cases it was held that the executor was not guilty of negligence so as to be responsible for the waste of his co-executor.¹

Marsh. (Ky.) 442; Weigand's Appeal, 28 Pa. 471; Wayman v. Jones, 4 Md. Ch. 500.

One executor allowed his co-executor to act as receiver without supervising him with due care. *Held* he was responsible for his co-executor's administration. Cressman's Estate, 2 Phila. (Pa.) 76; Hess's Estate, 2 Phila. (Pa.) 243.

Where one executor sold land to his co-executor without taking security for it, he was *held* guilty of such negligence as to make him liable to the heirs. Sobringer v. Mechling, 2 Am. L. J. (Pa.) 256. See also Gilbert's Appeal, 78 Pa. St. 266.

Nor can one executor permit his co-executor to use the funds of the estate in his private business. Brown's Estate, 17 Phila. (Pa.) 127; Power's Estate, 39 Leg. Int. (Pa.) 129.

Must Exercise Personal Supervision.

In certain cases a co-executor must inform himself by personal observation that his co-executor is not wasting the estate and must not trust to the word of someone else. In Mendes v. Guedella, 2 John. & Hem. 259, two executors with powers of trustees committed a box containing securities payable to bearer to a third executor for conversion. The two executors took the word of the solicitor of the trust that he had seen the box returned to the bankers. *Held*, they were responsible for securities appropriated by the third executor because they did not examine the box for themselves on its return. See also Underwood v. Stevens, 1 Mer. 712; Hewett v. Foster, 6 Beav. 259; Broadhurst v. Balguy, 1 Y. & Coll. 16. See also Shipbrook v. Hinchinbrook, 11 Ves. 252; Clark v. Clark, 8 Paige (N. Y.) 152.

Two executors sold testator's land, under a power in his will, took in part payment of the purchase money a covenant from the purchaser. It was stipulated in the covenant that debts due to the purchaser by either of the executors should be set off against the purchase money. One of the executors became indebted to the purchaser to the extent of the money covered by the covenant, and surrendered the covenant to the purchaser in the presence of the co-executor. At the trial the first ex-

ecutor was supposed to be insolvent. *Held*, the co-executor was liable. Hauser v. Lehman, 2 Ired. Eq. (N. C.) 594.

In McCormick v. Wright, 79 Va. 524, there were two executors, A & B. A allowed his co-executor to apply the assets of the estate in full payment of his own (B's) debts, instead of *pro rata* with the other creditors. *Held*, A was liable as principal debtor.

Where executors keep their accounts so loosely that it is impossible to decide in whose hands the assets actually are, this is such negligence that both will be responsible for the whole sum. Botten v. Bateman, 2 Dev. Eq. (N. Car.) 115.

In Gilbert's Appeal, 78 Pa. 266, A and B were partners. A died and B, C, & D became his administrators. C & D sold A's interest in the firm to B at less than it was worth. *Held*, the sale was voidable at the election of any party in interest, and all the administrators were chargeable with the actual value.

Where co-executors unite in the misapplication of the assets, each is liable for the whole. Hargthorpe v. Milforth, Cro. Eliz. 318; Sutherland v. Brush, 7 Johns. Ch. (N. Y.) 17; Worth v. M'Aden, 1 Dev. & Bat. (N. C.) 199.

In Williams v. Mower (S. Car.), 7 S. E. Rep. 505, executors, through improper motives, omitted to include in their inventory certain money belonging to the estate of their testator. *Held*, that one would not be allowed to prove that his co-executor received and retained the money for the purpose of charging his administrator with it.

Where, however, one executor takes the assets of the estate and gives a note to his co-executor for the assets he has received, the courts hold the contract valid and will allow the co-executor to bring a suit on the note. Berry v. Tart, 1 Hill (S. Car.) 4. See also Faulkner v. Faulkner, 73 Mo. 327.

1. An Executrix and Two Executors.—

The executors managed the estate without consulting the executrix, and she never had possession of any of the assets. *Held*, she was not responsible for losses to the estate caused by acts of the executors done without her acquiescence or consent, express or implied; but that she was liable for the result of

any improper action of her co-executors to which she consented, or which she could have prevented. *Lacey v. Davis*, 5 Redf. (N. Y.) 301.

A testator by his will directed that his widow "shall remain in the full possession and enjoyment of all his estate, real and personal." His widow was an executrix. *Held*, her co-executors were not responsible for her unjust or improvident conduct. *Vanpelt v. Veghte*, 14 N. J. L. 207.

In *Croft v. Williams*, 88 N. Y. 384, C & W, executors, sold real estate under a power in the will. W received the purchase money, C being present, and wasted it. C had reason to believe that W was insolvent. *Held*, that in the absence of any acts of negligence on C's part contributing to the loss, he was not responsible for W's devastavit. The court through FINCH, J., said: "One (executor) therefore, may sit passive and see the other receive funds of the estate and making no objection be deemed to assent, but that does not make him responsible for what has been received. He must in some manner know and assent to the misapplication, he must be a consenting party to the waste, or neglect some duty consequent upon his knowledge of a misapplication intended or in progress. *Williams v. Nixon*, 2 Beav. 472. A wrong done or a duty omitted must lie at the foundation of this liability." See also *Langford v. Gascoyne*, 11 Ves. 333, and *Ray v. Doughty*, 4 Black. (Ind.) 115. But see *contra*, *Styles v. Guy, Mac. & Gor.* 422.

In *Williams v. Nixon*, 2 Beav. 472, two executors were directed by the will to invest and accumulate the income of the estate. One executor received the dividends on the stock for several years and misapplied them. It did not appear that his co-executor had any knowledge of the misapplication. *Held*, he was not liable for it.

An executor did not examine the bank account of his co-executor in good financial standing for two years. *Held*, he was not negligent. *Irwin's Appeal*, 35 Pa. St. 294. See also *Evangelical Association's Appeal*, 35 Pa. St. 316.

A sale of property was made under order of court, and one co-executor bought it, but did not pay for it. *Held*, the other executor was not responsible for the price. *Senior v. Winn*, 4 Desaus. (S. Car.) 65.

Two executors sent cotton belonging to the estate of their testator to Liver-

pool to be sold. One executor drew for the proceeds and misappropriated them. *Held*, the other one was not responsible. *Tompkins v. Tompkins*, 18 S. Car. 1.

In *Nation v. Tozer et al.*, 1 Cr. M. & R. 172, one of two executors of a deceased tenant for a term of years entered upon the leasehold. *Held*, the co-executor was not liable for the rent.

In *English v. Newell*, 42 N. J. Eq. 76 (affirmed in *English v. Hendrickson* (N. J.), 14 Atl. Rep. 811, a co-executor qualified, but gave the beneficiaries to understand that he would not act as such. All parties trusted the solvency and probity of another co-executor, who received the assets and took charge of the estate. *Held*, the first co-executor was not personally liable.

An executor is not liable for a loan made to his co-executor without his own assent or request, although the money was for the benefit of the estate. *Bryan v. Stewart*, 83 N. Y. 270.

Responsibility for the Proceeds of a Joint Sale.—The question often arises whether, when the executors join in a sale of the assets, and one receives the proceeds and wastes them, his co-executor will be liable for the waste. The cases are not unanimous on this point.

In *Williams v. Nixon*, 2 Beav. 472, the executors joined in the sale of certain stock or bonds, for the purpose, as was claimed, of raising money to be used in administering the estate. One executor received the proceeds and became bankrupt. *Held*, his co-executor was liable for the proceeds of the sale.

In *Matthews v. Matthews*, 1 McM. L. Eq. (S. Car.) 410, W and M were executor and executrix. W alone proved the will and acted in execution of it. A bill was filed in equity signed by M for the sale of testator's real estate, but W took all the money. It was not necessary to sell this real estate in order to pay the debts of the testator. *Held*, M was liable, though she thought she was acting merely *pro forma*, for she did not follow the decree of the court directing that the proceeds of the sale should be reinvested by the executor and executrix and the investment reported to the court. This case seems to be an example of the exception rather than of the rule in *South Carolina*. See *Atcheson v. Robertson*, 3 Rich. Eq. (S. Car.) 132.

See also *Ochiltree v. Wright*, 1 Dev. & Bat. (N. Car.) 336; *Hauser v. Lehman*, 2 Ired. Eq. (N. Car.) 594; *Dead-*

Must Follow the Directions in the Will.—Where executors are given directions for the management of the testator's assets by his will, a higher degree of care is required of them than is otherwise the case. Each one must see that the directions in the will are carried out, and will be responsible if they are not.¹

An Executor Must Not Enable His Co-executor to Obtain Possession of the Assets.—Where an executor does any act which enables his co-executor to obtain possession of any part of the decedent's estate, he becomes liable for the waste of the latter. He is guilty of negligence, just as he would be if he enabled a stranger to get possession of the estate.²

rick v. Cantrell, 10 Yerg. (Tenn.) 263; Johnson v. Johnson, 2 Hill Ch. (S. Car.) 277, where it is held that where executors join in a sale under a power in a will, all will be responsible for the proceeds, and not alone he who received it. See also to the same effect Roberts v. Thomas, 32 Ga. 31.

But in Croft v. Williams, 88 N. Y. 384, the executors joined in the sale of land and one received the proceeds and wasted them. His co-executor was not held liable for them. In this last case the land was sold under a power in the will which made it necessary for the executors to join in the sale, and this probably distinguishes the case from Williams v. Nixon, *supra*, where apparently the executors need not have joined. See opinion of the court by FINCH, J., pp. 390, 391.

See also Kip v. Deniston, 4 Johns. (N. Y.) 25; Morrell v. Morrell, 5 Johns. Ch. (N. Y.) 283; Paulding v. Sharkey, 88 N. Y. 432; Atcheson v. Robertson, 3 Rich. Eq. (S. Car.) 132; Terrell v. Matthews, 1 Mac. & G. 433, note. See, however, Wms. Exrs. (6th Am. ed.), *1833, n. u.; and the cases cited after Williams v. Nixon, *supra*, which make no such distinction.

1. "We regret the loss that falls upon the surviving executor, as we are satisfied that there was no intentional neglect of duty on his part. There is but one safe course for executors to pursue, and that is to implicitly follow the directions contained in the will under which they are appointed." Opinion of the court in Weigand's Appeal, 28 Pa. St. 471, 474. See also Cressman's Estate, 2 Phila. (Pa.) 76; and Weldy's Appeal, 162 Pa. St. 454.

In Deadrick v. Cantrell, 10 Yerg. (Tenn.) 263, the court held that where the trust is directory, and the fund is not vested or is vested in a different manner from that pointed out, it is an

abuse of the trust for which all will be liable, though but one received the money, "because: both are bound to attend to the directions of the trust, and must be careful to execute it faithfully, according to its terms and the intention of the person by whom it was created."

See also Booth v. Booth, 1 Beav. 125, and Wilmerding v. McKesson, 103 N. Y. 329. In this case, a testator, W, created a trust for the benefit of the plaintiff, the fund for which he directed to be separately invested. W's executor's were G, a member of W's firm, and the defendant McK. G put the money of the estate into the firm and no part of the estate was set apart for the plaintiff's share. McK knew how G used the money. G's firm failed and McK was held responsible for the funds lost. Even if he did not know that the funds were in the firm's hands, he could have found out about it by enquiry, and he was bound to enquire. But G hypothecated securities belonging to the estate without McK's knowledge. Held, McK was not liable for this loss; as his failure to make a separation of the securities as contemplated by the will had nothing to do with the loss.

See also Wise v. Murphy, 5 Redf. (N. Y.) 365; Cocks v. Barlow, 5 Redf. (N. Y.) 406; Egbert v. Butter, 21 Beav. 560; Lincoln v. Wright, 4 Beav. 427; Burrows v. Walls, 5 De G. M. & G. 233.

Where from the circumstances of the case a co-executor cannot follow the directions of the will, he must apply to the proper court for instructions, in order to free himself from liability on account of not having followed the will. Holcombe v. Holcombe, 13 N. J. Eq. 313.

But see Williams v. Nixon, 2 Beav. 472, which seems to be scarcely in keeping with these cases.

2. Williams on Executors (6th Am.

An executor who receives assets of the estate and hands them to his co-executor instead of applying them to the settlement of the estate, is guilty of such negligence as to make him liable if his co-executor wastes the assets.¹

ed.) *1821; Story, Equity Jurispru. (13th ed.), vol. 2, § 1284; Toller, Law of Executors (3rd Am. ed.), p. 484.

"If one executor does any act which enables his co-executor to obtain possession of the money belonging to the testator's estate, which, but for that act, he could not have obtained possession of, and this money is afterwards misapplied, the executor who thus enables his coexecutor to obtain possession of the money is liable to make good the loss. Opinion of ROMILLY, M. R., in *Candler v. Tillett*, 22 Beav. 257.

See also opinion of the court by CHANCELLOR KENT in *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283, 296, and HUSTON, J.'s, opinion in *Sterrett's Appeal*, 2 Pa. Rep. 419, 422; opinion of the court by O'NEAL, J., in *Johnson v. Johnson*, 2 Hill Ch. (S. Car.) 277, 293; Mr. Cox's note to *Churchill v. Hobson*, 1 P. Wms. 241; *Sadler v. Hobbs*, 2 Bro. C. C. 114; *Toplis v. Hurrell*, 19 Beav. 423; *Candler v. Tillett*, 22 Beav. 263; *Cowell v. Gatcombe*, 27 Beav. 568; *Ingle v. Partridge*, 32 Beav. 661; *Hewett v. Foster*, 6 Beav. 259; *Bone v. Cooke*, 1 McClell. 168; *Stewart v. Conner*, 9 Ala. 803; *Wayman v. Jones*, 4 Md. Ch. 500; *Schenck v. Schenck*, 1 C. E. Green (N. J.) 174.

In *Lees v. Sanderson*, 4 Sim. 28, there were several executors, and they appointed one of their number acting administrator, who became insolvent. *Held*, the others were liable for what the acting executor had received. See also *Hanbury v. Kirkland*, 3 Sim. 265; *Broadhurst v. Balguy*, 1 Y. & Coll. 16; *Trutch v. Lamprell*, 20 Beav. 116; *Harrison v. Graham*, 1 P. Wms. 241; note *y* to 6th ed.; *James v. Frearson*, 1 Y. & Coll. 370. See also *Johnson v. Johnson*, 2 Hill's Ch. (S. Car.) 277; *Knox v. Pickett*, 4 Dessaus. (S. Car.) 199; *Clarke v. Jenkins*, 3 Rich. Eq. (S. Car.) 318; *Head v. Bridges*, 67 Ga. 227; *Cameron v. Justices*, 1 Ga. 36; *Hall v. Carter*, 8 Ga. 388; *Kerr v. Waters*, 19 Ga. 136; *Sutherland v. Brush*, 7 Johns. Ch. (N. Y.) 17; *Banks v. Wilkes*, 3 Sandf. Ch. (N. Y.) 99; *Douglass v. Saterlee*, 11 Johns. (N. Y.) 16; *Clark v. Clark*, 8 Paige (N. Y.) 152.

But this rule is not always strictly enforced.

In *Paulding v. Sharkey*, 88 N. Y. 432; *G, M and S*, three executors, took a check payable to M in payment for some real estate. M endorsed it to G, and gave it to him in good faith. G obtained the money and died. *Held*, S and M were not responsible for it. See also *Kip v. Deniston*, 4 Johns. (N. Y.) 23; *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283; *Croft v. Williams*, 88 N. Y. 384; *Tichenor v. Tichenor*, 43 N. J. Eq. 163.

In *Candler v. Tillett*, 22 Beav. 257, one executor kept a box containing securities of the estate, and the other one kept the key of the box. The one who had the key took out a certain security and gave it to the other one, who received money for it which he misapplied. *Held*, the one who had the key was not responsible for this misapplication, for it appeared that the one who had the box had another key, and could and probably did open the box. See also *Atcheson v. Robertson*, 3 Rich. Eq. (S. Car.) 132; *Hovey v. Blakeman*, 4 Ves. 596. In this last case it is said that where a testator during his life time sends a bill of exchange to two persons with directions for its investment, and subsequently appoints the same two persons his executors, and one executor endorsed the bill merely to enable the other one to obtain the money on it, the executor who endorses the bill but does not obtain the money on it will not be responsible for his co-executor's waste.

1. "One executor having received funds cannot exonerate himself, and shift the trust to his co-executor, by paying over to him the funds received." *McLEAN, J.*, in *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166, 169.

Langford v. Gascoyne, 11 Ves. 333. In this case there were three executors, A, B and C, and the widow of the testator gave the assets, a bag of gold, to A, who counted it and gave it to B, C being present all the time. B wasted the assets and A was held liable for the *devastavit*, but not C. See also *Townsend v. Barber, Dick*, 356; *McPherson v. McPherson*, 1 Macq. H. of L. 243; *Edmonds v. Crenshaw*, 14 Pet.

Cases in Which an Executor Can Give Assets to a Co-executor.— Sometimes, however, the facts of a particular case justify an executor in giving assets of the estate to his co-executor. If an executor acts with proper diligence and in good faith, he is not liable for the insolvency or misconduct of such agents as it was necessary for him to employ in the administration of the estate.¹ So where an executor would be justified in handing the assets to a stranger as his agent, for the payment of debts of the estate, investment, etc., it seems he will be justified in handing them over to his co-executor for the same purposes.²

(U. S.) 166; *Fairfax's Executors v. Fairfax*, 5 Cranch (U. S.) 19; *Croft v. Williams*, 88 N. Y. 384; *Adair v. Brummer*, 74 N. Y. 539, 566; *Clark v. Clark*, 8 Paige (N. Y.) 152; *Knight v. Haynie*, 74 Ala. 542; *Sparhawk v. Buell*, 9 Vt. 41; *Worth v. Maden*, 1 Dev. & Bat. Eq. (N. C.) 199.

Where an executor turns over part of the assets to his co-executor, he is not entitled to credit for the amount so delivered on accounting, unless he can show that in some way it has been charged against himself. *Matter of Estate of Deyo* (N. Y.) 3 Cent. Rep. 657.

In the case of *Wyckoff v. Van Siclen*, 3 Demarest (N. Y.) 75, the court held that even where one executor handed over assets of the estate to his co-executor to pay the debts of the testator, he was liable for his co-executor's waste. But good faith would relieve him from the payment of interest. See also *Dixon v. Storm*, 5 Redf. (N. Y.) 419; *Underwood v. Stevens*, 1 Mer. 712; *Chambers v. Minclin*, 7 Ves. 193; *Shipbrook v. Hinchinbrook*, 11 Ves. 252; *Brice v. Stokes*, 11 Ves. 319.

But an executor will not be responsible for assets handed over to his co-executor so far as they have been applied properly. *Shipbrook v. Hinchinbrook*, 11 Ves. 252; *Williams v. Nixon*, 2 Beav. 472; *Underwood v. Stevens*, 1 Mer. 712.

Where executors unite in selecting an agent they become jointly liable for his misconduct. *Brown's accounting*, 16 Abb. Pr. (U. S.) (N. Y.) 457; *Earle v. Earle*, 93 N. Y. 104; *Cowell v. Gatecombe*, 27 Beav. 568. But in *Champneys v. Broune*, 1 Barnes' Notes Cases 440, an agent appointed to collect money, paid part of it to one executor and part of it to another. Held, each one was responsible only for what he received.

So where executors appoint one of their number acting executor, they become liable for him. *Lees v. Sanderson*, 4 Sim. 28.

But, where two were appointed executors, and one proved and the other did not, and the one who did not prove assisted the other in collecting the debts of the estate, it was held that the one who had not proved did not act as executor, and that he could not be decreed to account as such. *Orr v. Newton*, 2 Cox Ch. 274.

So where one appointed executor disclaims and renounces and then acts as agent for a co-executor, he cannot be forced to account. See also *Stacy v. Elph*, 1 My. & K. 195. So an executor who proved but never acted cannot be charged for his co-executor's insolvency.

Nor can co-executors, when they are given power by the will to loan money, loan it to one of their number. *Williams on Executors* (6th Am. ed.), *1810; *Gleadow v. Atkin*, 2 Cr. & Jew. 548; *Stickney v. Sewell*, 1 My. & Cr. 8.

1. *Williams on Executors* (6th Am. ed.), *1820, note u¹.

2. Thus in *Churchill v. Hobson*, 1 P. Wms. 241, an executor, A, gave assets to his co-executor, B, a banker with whom the testator, during his lifetime, had kept his money. Held, A was not liable for the assets handed to B on B's insolvency. See also *Chambers v. Minchin*, 7 Ves. 198; *Home v. Pringle*, 8 Cl. & Fin. 264; *Daly's Estate*, 1 Tuck. (N. Y.) 95.

In *Bacon v. Bacon*, 5 Ves. 331, there were two executors; one near the testator's residence, in Suffolk, and the other in London. The latter had the assets and paid part of them over to the executor in Suffolk to pay the local debts, for the purpose of saving money for the estate. The executor in Suffolk wasted the assets. Held, that the executor in London was not liable for his

Cannot Arrange to Divide the Administration.—Co-executors cannot make an arrangement between themselves to divide the administration of the estate, each one being responsible only for what he receives.¹ A court of equity will not enforce specific performance of such a contract.² And if the executors administer the estate in pursuance of such an agreement, both will be responsible for all the assets.³

Effect of Joint Receipts and Accounts.—Where executors join in signing a receipt, or filing a joint account, it is *prima facie* evidence that the assets were under the control of both, and therefore, when one wastes them the other will be liable for the waste. Co-executors need not join in signing a receipt, and therefore if they do join, the presumption is that both actually received the money, but this presumption may be rebutted.⁴

co-executor's waste any more than he would have been for the waste of an agent employed for the same purpose. See also *Joy v. Campbell*, 1 Sch. & Lef. 341; *Castle v. Warland*, 32 Beav. 660. But in *Moses v. Levi*, 3 Y. & Col. 359, where the facts were in many respects very similar to those in *Bacon v. Bacon*. The court held both executors liable.

In *Davis v. Spurling*, 1 Rus. & M. 64, one of two executors, A, had power under the will to sell the estate, and employed his co-executor, B, to do so for him. B sold the estate and gave the proceeds to A, who wasted them. Held, B was not responsible for A's waste, for he acted merely as an agent. Had he, however, himself had the power to sell, and then handed over the money to his co-executor, he would have been responsible for his co-executor's waste.

1. Viner's Abridg., tit. Exrs., p. 362,

25; Gill v. Attorney General, Hardres

314.

2. Wilson v. Lineberger, 94 N. Car. 641.

3. Viner's Abridg., tit. Exrs., p. 362, § 25; Wms. Exrs. (6th Am. ed.) *1822; Gill v. Attorney General, Hardres 314; Weldy's Appeal, 102 Pa. St. 454.

In *Bankes v. Wilkes*, 3 Sandf. Ch. (N. Y.) 99, a testator was a trustee and at his death his executors became trustees in his place. The four executors agreed to let H, one of their number, take charge of the estate. The *cestui que trust* acquiesced in letting H control the estate, and thereby lost her right to hold the other executors responsible for the waste of H.

See, however, *Burrows v. Walls*, 5 De G. M. & G. 233, where it was held that the fact that the *cestui qui trust* knew of the arrangement between the co-

executors did not free the co-executors from joint liability, because the *cestui que trusts* did not know that the co-executors would otherwise have been responsible to them.

4. Williams Executors (6th Am. ed.) 1833; Schouler Executors and Administrators (2nd ed.), § 402. "The weight of modern authority, both English and American, is that a joint receipt is only presumptive evidence that the money came into the possession or under the control of both." *Per* COLT, J., in *McKim v. Aulbach*, 130 Mass. 481, 484. See also *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283; *Ochiltree v. Wright*, 1 Dev. & Bat. Eq. (N. Car.) 336; *Graham v. Davidson*, 2 Dev. & Bat. Eq. (N. Car.) 155; *Williams v. Maitland*, 1 Ired. Eq. (N. Car.) 92; *Hall v. Carter*, 8 Ga. 388; *Gaultney v. Nolan*, 33 Miss. 569; *Stearn v. Mills*, 4 Barn. & Adol. 657. In *McNair's Appeal*, 4 Rawle (Pa.) 148, the court says: ". . . there is no good reason for making executors or administrators liable more than trustees for moneys which they have never received, merely because they have joined in a receipt with a co-executor or co-administrator who did receive it."

The old rule in England was that joining in a receipt in itself made co-executors jointly liable. Cotrustees must join in signing a receipt; co-executors need not do so; but if they did join, both are held to have received the money, and both were liable for its misapplication. *Murrell v. Cox*, 2 Vern. 570; *Aplyn v. Brewer*, Prec. Chan. 173; *Moses v. Levi*, 3 Yo. & Coll. 359, 367; *Leigh v. Barry*, 3 Atkyns 584.

But the old rule is no longer fol-

In the same way filing a joint account is *prima facie* evidence that the assets actually were in the hands of both executors, so as to make one liable for the devastavit of the other.¹

lowed. In *Westley v. Clarke*, 1 Eden 357, one executor, in good credit at the time, called in a mortgage and received the money. His co-executors joined in the receipt. *Held*, as only one had received the money the others were not responsible for the devastavit of the one who did receive it.

See also *Walker v. Symonds*, 3 Swan. Ch. 2, where LORD ELDON says, p. 64: "It may be laid down now, as in *Brice v. Stokes*, that, though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. *Brice v. Stokes*, 1 Ves. 323; *Hovey v. Blakeman*, 4 Ves. 596; *Scurfield v. Howes*, 3 Bro. Ch. Rep. 94; *Doyle v. Blake*, 2 Sch. & Lef. 229. The true principle is laid down by LORD CHANCELLOR REDESDALE in *Joy v. Campbell*, 1 Sch. & Lef. 328, 341.

"The distinction seems to be this with respect to a mere signing: that if a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving, but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such receipt shall charge, and the true question in all those cases seems to have been, whether the money was under the control of both executors; if it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor; for it could have no other meaning; he becomes responsible for the application of the money just as if he had received it. But this does not apply to what is done in the discharge of a necessary duty of the executor."

1. In some States coexecutors can file separate accounts. As each one is entitled to receive and keep the assets, he is entitled to file a separate account and will be responsible only for what this charges against him. *Barclay v. Morrison*, 16 S. & R. (Pa.) 129; *Davis' Appeal*, 23 Pa. St. 206; *Heyer's Appeal*, 34 Pa. St. 183; *Patterson's Estate*, 1 W. & S. (Pa.) 291; *Steinman v. Saunderson*, 14 S. & R. (Pa.) 357; *Bellerjeau v. Kott*, 4 New Jersey Law 359.

Where, however, a joint account is filed both executors will be liable unless the presumption raised by the account is rebutted.

"In this State the doctrine is firmly established that where two or more executors receive the estate of their testator jointly and afterwards file a joint account, they stand jointly liable to the persons entitled to the estate, for all the account shows to be in their hands, no matter what may have been the fact as to the actual custody of the estate when they accounted, or what arrangements they may have subsequently made among themselves as to its custody." Opinion of the court by VAN FLEET, V. C., in *Suydam v. Bastedo*, 40 New Jersey Eq. 433, 434. See also *Bunting's Appeal*, 4 W. & S. (Pa.) 469.

In *Murrell v. Cox*, 2 Ves. 570, two executors filed a joint account making themselves jointly liable for the balance. They then sold certain stock and divided the balance. *Held*, both were liable for all.

See also *Conner v. McIlvaine*, 4 Del. Ch. 30; *Wilson v. Fisher*, 5 New Jersey Eq. 493.

In *Glacius v. Fogel*, 88 N. Y. 434, the executors qualified acted as such and filed a joint account, which spoke of the property "which has come into our hands," etc. One testified he had never had any part of the assets in his possession. *Held*, both liable.

Some cases seem to hold that filing a joint account is more than mere *prima facie* evidence of joint liability; that doing so in itself makes co-executors jointly liable. *Haage's Appeal*, 17 Pa. St. 181; *Ducommon's Appeal*, 17 Pa. St. 268; *Hengst's Appeal*, 24 Pa. St. 413; *Laroe v. Douglass*, 13 New Jersey Eq. 308; *Schenck v. Schenck*, 16 New Jersey Eq. 174; *Suydam v. Bastedo*, 40 New Jersey Eq. 433. But perhaps all that these cases really decide is that the presumption raised by the joint account has not been rebutted; and that, therefore, the co-executors are all liable. *Doebler v. Snavelly*, 5 Watts. (Pa.) 225; *Young's Appeal*, 99 Pa. 74.

In *Metz's Appeal*, 11 S. & R. (Pa.) 204, it was *held* that where two executors had filed a joint account the court would not, after an interval of four

No Distinction Between a Co-executor's Liability to Creditors and that to Legatees.—At one time it was held in England that the liability of an executor who had received assets and turned them over to his co-executor towards creditors of the decedent, was different from his liability towards legatees. While in the former case he would be responsible for the devastavit of his co-executor, in the latter case he would not be so.¹

But the later English cases do not recognize this distinction.²

Joint Bonds.—For the effect of joint bonds on the mutual liability of co-executors, see article on EXECUTORS AND ADMINISTRATORS, p. 216.

Terms of the Will Do Not Affect Co-executor's Liability.—The liability of co-executors for each other is not effected by the fact

years, discharge one of them from a responsibility thus incurred. See also McCoy's Appeal, 15 S. & R. (Pa.) 57, where it was held that coexecutors could not file separate accounts six years after filing a joint account.

Accounts joint in form may prove to have been filed only by one executor, in which case the co-executor will not be responsible. English v. Newell, 42 New Jersey Eq. 76; affirmed in English v. Hendrickson (N. J.) 14 Atl. Rep. 811.

A joint account does not make co-executors jointly liable for assets not yet collected, although they credit themselves with them in the account. In Lightcap's Appeal, 95 Pa. 456, three executors filed a joint account and credited themselves in it with the amount of certain mortgages not yet collected. One executor only received the money on the mortgages and entered satisfaction on the record in his own name. Then he went off with the money. Held, his co-executors were not liable. See also Beatty v. Cory Universalist Society (N. J.), 4 Cent. Rep. 831; Beckley's Appeal, 3 Pa. St. (Pa.) 425.

In Taylor v. Shnit, 4 Demarest (N. Y.) 528, an inventory and account were filed by co-executors. One executor was a lawyer and one a farmer. The former managed the estate, but the farmer did nothing to give the lawyer greater power than one of two executors ordinarily possesses. Held, the farmer was not responsible for the lawyer's deficit.

In an Iowa case, where two executors gave a joint receipt for money in bank, directed the bank to place one half the sum to the credit of one executor and the other half to the credit of the other,

and then filed a joint account charging each one with all the money in the bank, it was held, under a statute of the State, that each executor was responsible only for himself. Nettman v. Schramm, 23 Iowa 521.

1. Viner's Abridg., tit. Exrs. & Admrs., p. 362, § 25; Doyle v. Blake, 2 Sch. & Lef. 229; Gibbs v. Herring, Prec. Ch. 49; Churchill v. Lady Hobson, 1 P. Wms. 241.

2. Sadler v. Hobbs, 2 Bro. Chan. Rep. 95; Langford v. Gascoyne, 11 Ves. 333.

In the United States, for the most part, the later English cases have been followed, and an executor who turns over assets of the estate to his co-executor is liable to legatees of the decedent no less than to his creditors. Monell v. Monell, 5 Johns. Ch. (N. Y.) 283; Sutherland v. Bush, 7 Johns. Ch. (N. Y.) 17; Johnson v. Johnson, 2 Hill's Ch. Rep. (S. Car.) 277. In the last case, the court says: "It is, I think, therefore, clear beyond all doubt, from this array of authorities, that in a suit by a legatee as well as a creditor, both in law and in equity, that where by an act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger whom he had enabled to receive it."

In Pennsylvania, the old rule was at first followed. Brown's Appeal, 1 Dallas (Pa.) 311; McNair's Appeal, 4 Rawle (Pa.) 148; Verner's Estate, 6 Watts (Pa.) 250. But the court does not recognize the distinction in Sterrett's Appeal, 2 Pa. Rep. 419; and in Weldy's Appeal, 102 Pa. St. 454, the court, per GORDON, J., says, after giving the reason for the distinction: "This

that the testator's will declares that they shall not be answerable for each other, but each one only for his own acts, deeds and defaults.¹

Concurrence on the Part of an Injured Party Frees a Co-executor from Liability.—Concurrence or acquiescence in an act of waste by co-executors on the part of the parties injured, will free co-executors from the liability for the devastavit.²

Liability of a Co-executor's Estate.—Where a co-executor dies his estate becomes liable for everything that he was liable for at time of his death.³

may be a very good reason for the rule, though we confess our inability to see it."

Should the question ever come fairly before the court again, it is very possible that the later English cases would be followed.

1. Williams *Executors* (6th Amer. ed.) *1828. *Moses v. Levi*, 3 Yo. & Coll. 359; *Mucklow v. Fuller*, Jacob. 198; *Underwood v. Stevens*, 1 Meriv. 712; *Hanbury v. Kirkland*, 3 Sim. 265; *Williams v. Nixon*, 2 Beav. 472; *Dix v. Burford*, 19 Beav. 409; *Brumridge v. Brumridge*, 27 Beav. 5. But see *Wilkins v. Hogg*, 3 Giff. 116, where trustees under a will were relieved from responsibility for each other by the terms of the will.

Difference Between a Co-executor's Liability at Law and in Equity.—In general, there is a difference as to co-executors' liability for each other in law and in equity. "So as between co-executors, they may be jointly liable at law, but they are never so here (in equity). In this court, each is liable for what is in his own hands. It is true, he may also be liable for what is in the hands of others; but not jointly. He is not liable for the estate as if in his own hands. He is only responsible for the other and after him. They stand as reciprocal sureties for each other." Opinion of the court in *Brotten v. Bateman*, 2 Dev. Eq. (N. Car.) 115. See also *Massey v. Cureton*, 1 Cheves Eq. Rep. (S. Car.) 181; *Gayden v. Gayden*, 1 McM. Eq. (S. Car.) 435; *Lenoir v. Winn*, 4 Dessaus. (S. Car.) 65; *Johnson v. Corbett*, 11 Paige (N. Y.) 265.

2. *Griffiths v. Porter*, 25 Beav. 236; *Banks v. Wilkes*, 3 Sandf. Ch. (N. Y.) 99.

But in *Barrows v. Walls*, 5 De G. M. & G. 233, the *cestui que trusts* had knowledge of certain acts on the part of the co-executors that would make them (the co-executors) liable for

each other, and acquiesced in these acts; yet the executors were held responsible for each other, because the *cestui que trusts* did not know that they could have held the co-executors jointly liable for each other if they had not acquiesced in their actions. See also *Walker v. Symonds*, 3 Swanst. 1; *Davies v. Hodgson*, 25 Beav. 177.

3. *Spreenke's Estate*, 12 L. Bar. (Pa.) 170; *Shelby v. Dailey*, 2 S. & R. (Pa.) 548. So where an executor renounces and pays the assets he has received to a co-executor he will still be responsible for them. *Read v. Truelove*, Ambler 417.

But the estate of an executor is not liable for a waste committed after his decease by his co-executor. *Young's Appeal*, 99 Pa. St. 74; *Stephens' Appeal*, 56 Pa. St. 409; *Conner v. McIlvaine*, 4 Del. Ch. (Pa.) 30; *Marsh v. The People*, 15 Ill. 284; *Brazier v. Clark*, 22 Mass. 96; *Towne v. Ammidown*, 37 Mass. 535. But see *contra Dobyns v. McGovern*, 15 Mo. 662; *Prichard v. State*, 34 Ind. 137.

Where a co-executor is discharged by the court and ordered to pay over the funds in his hands to his co-executors, his responsibility ceases. *McNeal v. Holbrook*, 25 Pa. St. 189.

Co-executors who have undertaken the administration can be discharged from liability only by administering the assets themselves, or giving them to a court of equity. *Williams on Executors* (6th Am. ed.) *1829; *Doyle v. Blake*, 2 Sch. & Lef. 231; *Riky v. Kemmis*, 1 Lloyd & Goold 101; *Horton v. Brocklehurst*, 29 Beav. 504.

In *Graham v. Keble*, 2 Dow. 17, an executor in India proved the testator's will and then a power of attorney was sent to him by co-executors in Europe to act for them. *Held*, his responsibilities towards the executors in Europe were those of a co-executor and not those of an attorney.

Notice to One Is Not Notice to All.—As co-executors are not responsible for each other, so notice to one is not notice to all, so as to make the one without notice guilty of waste, in cases where the one with notice would have been.¹

V. Actions by and Against Co-executors.—*Actions Between Co-executors and Outsiders.*—1. *Actions by Co-executors.*—See article on EXECUTORS AND ADMINISTRATORS, p. 360.

At common law all the executors named in a will must join in bringing an action, though one be an infant, or has not proved the will, or administered the estate, or has renounced.²

But in equity it is sufficient if such of the co-executors as prove the will and have not renounced, join in the suit.³

2. *Actions Against Co-executors.*—See article on EXECUTORS AND ADMINISTRATORS, p. 377.

In actions against co-executors, such of them as have administered must be joined as defendants.⁴

1. In *Hawkins v. Day*, Ambler 160, the testator owed a specialty debt and a simple contract debt. An executor without knowledge of the specialty, paid the simple contract debt first. *Held*, he was not guilty of waste though his co-executor knew of the specialty debt. See also *Tinsom v. Ramsbottom*, 2 Keen 35; *Smith v. Smith*, 2 Cr. & M. 231; *Meux v. Bell*, 1 Hare 73.

2. *Williams Executors* (6th Am. ed.) *956 and *n. k.*; *Schouler Executors and Administrators* (2nd ed.), §403, *n. 5*; *Hensloe's Case*, 9 Coke 37; *Brookes v. Stroud*, 1 Salk. 3; *Bodle v. Hulse*, 5 Wend. (N. Y.) 313; *Scranton v. Farmers and Mechanics' Bank*, 33 Barb. (N. Y.) 527; *Ryerson v. Ryerson*, 1 South. (N. J.) 363; *Cole v. Wooden*, 3 Harr. (N. J.) 15; *Cole v. Smalley*, 5 N. J. Law 374; *Call v. Ewing*, 1 Black. (Ind.) 301; *Duncan v. Watson*, 28 Miss. 187; *Smith v. Smith*, 11 N. H. 459.

But in *England* it is provided by statute (20 & 21 Vict., ch. 77, § 79) that an executor who has renounced need not join in a suit.

In *New York* a statute of 1838, ch. 149, p. 103, provides that in actions brought by or against co-executors, it shall not be necessary to join those as parties to whom letters testamentary shall not have been issued and who have not qualified. *Moore v. Willett*, 2 Hilton (N. Y.) 522.

In *North Carolina* only such executors as qualify need join in a suit. *Alston v. Alston*, 3 Ired. Law (N. Car.) 447.

In *Heron v. Hoffner*, 3 Rawle (Pa.) 393, it was *held* that where two out of

three co-executors, authorized by will to sell land, entered into a contract for that purpose, the third having renounced, only those by whom the contract was made should bring an action for its breach. But where one of several co-executors sells the goods of the testator, he alone may bring an action for the price, but not in his capacity as executor. *Brassington v. Ault*, 2 Bing. 177; *Aiken v. Bridgman*, 37 Vt. 249; *Laycock v. Oleson*, 60 Ill. 30.

So one of several co-executors may bring an action to recover goods taken from his possession. *Williams Executors* (6th Am. ed.) *1868.

Where one executor contracts on his own account, he must sue alone on the contract, although the money recovered will be assets. *Williams Executors* (6th Am. ed.) *1868; *Heath v. Chilton*, 12 M. & W. 632.

3. *Williams Executors* (6th Am. ed.) *956, *n. k.*; *Schouler Executors and Administrators* (2nd ed.), §403, *n. 5*; *Davies v. Williams*, 1 Sim. 5; *Thompson v. Graham*, 1 Paige (N. Y.) 384. In this case one executor renounced and it was *held* that his co-executor could bring suit. This case also *held* that if it is necessary to bring the executor who renounces before the court, he should be made a defendant. See also *Rinehart v. Rinehart*, 15 N. J. Eq. 44.

4. *Williams Exrs.* (6th Am. ed.) *1935.

In an action of ejectment, service on one of two executors is sufficient. *Strickland v. Roe*, 4 Dow. & L. 431.

But where an action is brought against

Actions Between Each Other—Cannot Sue Each Other in Law.
—As co-executors in the eye of the law constitute but one person, they cannot sue or be sued by one another at law, as one man would thus be both plaintiff and defendant in the same suit.¹

co-executors in their representative capacity, service must be made on them all to support a judgment against any. *Barnes v. Jarnagin*, 12 S. & M. (Miss.) 108; *Owen v. Brown*, 2 Ala. 126; *Jones v. Wilkinson*, 3 Stew. (Ala.) 44.

Where only one of two executors is served, there can be no proceedings in the case after his death. *Greiner v. Hummel*, 2 Watts (Pa.) 345.

In an action against several, in a representative character, the plaintiff may have a verdict against such of them as he proves to be chargeable, though he fail to show the liability of all. *Judson v. Gibbons*, 5 Wend. (N. Y.) 224.

1. *Williams Exrs.* (6th Am. ed.), *957; *Schouler Exrs. & Admrs.* (2nd ed.), § 403; *Whitney v. Coapman*, 39 Barb. (N. Y.) 482; *Saunders v. Saunders*, 2 Litt. (Ky.) 314; *Martin v. Martin*, 13 Mo. 36; *Coles v. Wooden*, 3 Harr. (N. J.) 15; *McDivitt v. McDivitt*, 4 Watts (Pa.) 384.

Simon v. Albright, 12 S. & R. (Pa.) 429. In this case the court says: "The two administrators jointly represent the intestate, and one has no more right to recover a debt than the other."

Nor can surviving executors sue the executor of a deceased co-executor for a debt due to their testator by the deceased executor. *Williams Exrs.* (6th Am. ed.) *957.

But a surviving executor can sue the representatives of a deceased co-executor on their bond for the due administration of their decedent's estate, to recover the amount of the estate received by the deceased executor, and not accounted for by him. *Shelby v. Dailey*, 2 S. & R. (Pa.) 548. But see *contra*, *McWilliams' Estate*, 3 Clark (Pa.) 321; *Bowen v. Miller*, 3 Clark (Pa.) 326. So also unconverted assets can be recovered. *Bowen v. Miller*, 3 Clark (Pa.) 326.

And where an executor has been removed, his co-executors can sue him at law, as they could anyone else. And this although the money, to recover which suit is brought, became due before the executor was removed. *Hendricks v. Thornton*, 45 Ala. 299.

And the fact that the executors filed

a joint and several bond, makes no difference. *Sperb v. McCoun* (N. Y.), 18 N. E. Rep. 441.

So also an executor who renounces, if he is also a creditor of the estate, can proceed against it, as any other creditor could. *Rawlinson v. Shaw*, 3 Durn. & East 557.

Where one of two co-executors executed a note in favor of himself and his co-executor, it seems that the payee of the note can bring a suit on it against an endorser. *Faulkner v. Faulkner*, 73 Mo. 327.

In *Berry v. Tart*, 1 Hill (S. Car.) 4, one executor gave a promissory note to his co-executor for funds in his hands belonging to the estate. *Held*, the contract between them might have had a legal and proper consideration, and that the co-executor could bring suit on the note.

In *Cowper v. Fletcher*, 34 L. J. (N. S.) Q. B. 187, co-executors agreed that one of them should hold the land devised to them in trust at a certain rent, and when the rent fell into arrear, it was *held* the one owing it could be distrained for it.

And if a creditor of the testator is appointed executor, but does not act as such, he can sue such of the executors as do act. *Williams on Exrs.* (6th Am. ed.) *955; *Schouler Exrs. & Admrs.* 2nd ed., § 403; *Dorchester v. Webb*, W. Jones, 345; *Hunter v. Hunter*, 19 Barb. (N. Y.) 631; *Marsh v. Oliver*, 14 N. J. Eq. 259.

Under the New York Code of Civil Procedure, where one co-executor presents his account for settlement without the other's signature, his associates may contest it. *Mead v. Willoughby*, 4 Demarest (N. Y.) 364.

Where an executor is a residuary legatee, he can sue his co-executor to recover his legacy. *Bacon's Abridg.* tit. Exrs. & Admrs. (D) 2, p. 41; *Godolph.* 135.

See also *Hunter v. Hunter*, 19 Barb. (N. Y.) 631. In this case a donee of the testator was named executor, but did not act as such. *Held*, he could bring an action against the acting executor to enforce the gift.

In *Alabama*, an executor can sue

But in equity one executor may maintain proceedings against his co-executor to compel him to file an account, cease from maladministration, or do otherwise as justice may require, if there is no adequate remedy at law.¹

VI. Survivorship Among Co-executors.—See article on EXECUTORS AND ADMINISTRATORS, p. 200.

VII. Division of Commissions.—See article on EXECUTORS AND ADMINISTRATORS, p. 441.

his co-executor on the latter's express promise. *Phillips v. Phillips*, 1 Stew. (Ala.) 71. (Approved in *Faulkner v. Faulkner*, 73 Mo. 327.)

An action will lie by executors against their co-executor, for the purpose of recovering a debt owing by him to the estate, in order to reimburse themselves for an amount decreed in their favor, where the defendant has not accounted for the same before the surrogate. *Wurts v. Jenkins*, 11 Barb. (N. Y.) 546.

Where an executor, before acting, gives to his co-executors a bond for a debt due by himself to the testator, and afterwards qualify as executor, his co-executors may maintain an action against him on the bond. *Gardner v. Miller*, 19 Johns. (N. Y.) 188; *Hunter v. Hunter*, 19 Barb. (N. Y.) 631.

1. *Williams Exrs.* (6th Am. ed.) *1911; *Schouler Exrs. & Admrs.* (2nd ed.), § 403; *Peake v. Ledger*, 8 Hare 313; *Case's Appeal*, 35 Conn. 115; *Storms v. Quackenbush*, 34 N. J. Eq. 201; *McGregor v. McGregor*, 35 N. Y. 218; *Wood v. Brown*, 34 N. Y. 337; *Strever v. Feltman*, 1 Thomp. & C. (N. Y.) 277; *Elmendorf v. Lansing*, 4 Johns. Ch. (N. Y.) 562; *Turner v. Wilkins*, 56 Ala. 173; *Chew's Appeal*, 3 Grant's Cas. (Pa.) 294; *Nason v. Smalley*, 8 Vt. 118; *Sheehan v. Kennelly*, 32 Ga. 145.

Equity Only Interferes When Justice Requires.—"But a court of equity will not interfere between co-executors, unless it appears to be imperatively required for the purposes of justice." *Williams Exrs.* (6th Am. ed.) *1911, note c; *Rogers v. Moore*, 1 Root (Conn.) 472; *Beach v. Norton*, 9 Conn. 181; *Stiver v. Stiver*, 8 Ohio 217; *Wurts v. Jenkins*, 11 Barb. (N. Y.) 546.

In *Bowen v. Richardson*, 133 Mass. 293, co-executors united in misusing the funds in their hands for their own benefit, and one of them kept the profits. It did not appear that the persons interested in the estate were debarred from their right to avail themselves of

the profits. *Held*, that under these circumstances, the executor who did not receive the profits could not maintain a bill in equity against the one who did, for an account and a payment to him of a proportionate share of the profits.

But in *Maryland*, one executor cannot maintain a bill in equity against his co-executor to force him to account for and pay over to him money alleged to be due to the estate of the decedent by the defendant executor. *Beall v. Hilliary*, 1 Md. 186; *Whiting v. Whiting*, 64 Md. 157.

In *Maryland*, proceedings against delinquent are brought in the orphans court, under the Code, art. 93, § 241. *Whiting v. Whiting*, 64 Md. 157.

Where a decedent executed a mortgage and made the mortgagor one of his executors, it was *held* that the bill by the co-executors should be for a sale and not for a foreclosure. *Williams Executors* (6th Am. ed.) *1911; *Lucas v. Seale*, 2 Atk. 56.

In *Fay v. Fay*, 4 Cent. Rep. 241 (N. J.), one of several co-executors continued to carry on the business of his decedent with the consent of his co-executors. *Held*, his co-executors could not maintain a bill to compel him to account for the good will of the business, for they were equally in the wrong for not turning such good will into assets of the estate.

In *King v. Shackelford*, 13 Ala. 435, it was *held* that an executor, who was also a creditor of the testator, could file a petition in the orphans court to compel a settlement and distribution of the estate, the co-executor having assets for which he had not accounted.

Where a co-executor behaves improperly or becomes unsuitable for the trust, a desirable course to pursue is to procure his removal or resignation. *Schouler Executors and Administrators* (2nd ed.), § 403, n. 3; *Hesson v. Hesson*, 14 Md. 8.

The refusal of an executor to permit his co-executors to inspect the papers

JOINT STOCK COMPANIES—(See CORPORATIONS; LIMITED PARTNERSHIP; PARTNERSHIP; SOCIETIES AND CLUBS; STOCK-HOLDERS).

- I. Definition, 1036.
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I. DEFINITION.—A joint stock company is an association of individuals for the purposes of profit, possessing a common capital, being divided into shares, of which each member possesses one or more, and which are transferable by the owner.¹

belonging to the estate in his possession is a sufficient ground for his removal on his refusal to surrender the same. *Chew's Estate*, 2 Pars. Eq. Cas. (Pa.) 153.

For the other causes for which he can be removed, see article on PROBATE AND LETTERS OF ADMINISTRATION.

Authorities.—For joint executors see Williams on Executors (6th Am. ed.), with notes by J. C. Perkins, Esq., title in index Co-executors; Schouler on Executors and Administrators (2nd ed.), title in index Joint Administration; Article by O. F. Bump, Esq., 8th Cent. L. J. 63, 82; Article by S. G. Crosswell, Esq., 24th Cent. L. J. 147.

1. Shelford's Law of Joint Stock Companies (London 1870), p. 1.

They have also been defined as "partnerships with a capital or joint stock divisible into transferable shares." Wentworth's ed. of Lindley on Partnerships (1888) 845; "partnerships with transferable shares," Phillips v. Blatchford, 137 Mass. 510; Attorney General v. Mercantile Marine Ins. Co., 121 Mass. 524; "quasi corporations," Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147. The words "joint stock company," as used in Massachusetts statutes, refer to companies organized under general laws as corporations. Attorney General v. Mercantile Marine Ins. Co., 121 Mass. 524.

In the act of June 2nd, 1874, known as the Joint Stock Companies act in Pennsylvania, the association is treated as a partnership. *Eliot v. Himrod*, 108 Pa. St. 569; *In re Henry Diston & Sons File Co.*, 8 Weekly Notes of Cases (Pa.) 58. See Logan v. McNaughton, 88 Pa. St. 103; *Tide Water Pipe Co. v. Kitchenman*, 108 Pa. St. 630. Their real organization and character must in each case be determined by reference to the laws and articles of agreement under which they are formed; whether they are to be called copartnerships, or joint stock companies or corporations is solely a question of definition. Morawetz on Private Corporations, § 6; *School District v. St. Joseph's Ins. Co.*, 103 U. S. 707.

A partnership or a joint stock company is not necessarily the result of an abortive attempt to organize a corporation. *Blanchard v. Kaull*, 44 Cal. 440.

"Joint stock company" denotes a union of persons owning together a capital stock which they have devoted to a common purpose, under an organization analogous to that of a corporation, or a body upon which some of the privileges or powers of corporations have been conferred by statute, but which is not in a full sense a corporation. Addison on Contracts, *805, note.

A joint stock company is a partnership whereof the capital is divided or

agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners. *Hedge's Appeal*, 63 Pa. St. 273; 8 & 9 Vict., ch. 110.

"Speaking with reference to general usage, and disregarding local peculiarities, it may be said that 'joint stock company' denotes a union of persons owning together a capital stock which they have devoted to a common purpose under an organization analogous to that of a corporation, or a body upon which some of the privileges or powers of corporations have been conferred by statute, but which is not in a full sense a corporation. As sometimes used, however, the idea of incorporation is not excluded; thus insurance companies are called mutual or joint stock companies, without intending to imply that they are not incorporated." *Abbott's Note*, on page 805, vol. 2, *Addison on Contracts*, 8th Eng. ed.

Stock Exchanges.—The law of the "stock exchange," while in some respects allied to that of joint stock companies, yet is so essentially different from it in many particulars, that a discussion of it under the law of stock companies would seem out of place. *Dos Passos*, in his work on *Stock Brokers and Stock Exchanges*, 11-17, says: "The board of brokers is a voluntary association of persons who, for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their individual business, agreeing among themselves to pay the expenses incident to the support of the objects of the association, in which each for himself, at stated hours of the day, and for his individual profit, may prosecute his own business, and enter into separate engagements with his fellow members. The association does not share in the losses of the individual associates; each member takes his own gains, and individually sustains the losses incident to his engagements." "The obligations and rights of its members are not determined by any statutory provision. There is no contribution of capital by its members for the prosecution of any kind of business by the association. It issues no stock, nor can the individual members claim any rights of property in it as stockholders."

Unlike an incorporated commercial joint stock company, the privilege of membership in such a voluntary association may be conferred or withheld, at

its pleasure, and the law cannot compel the admission of an individual into the society against its wish.

The above are some of the general elements which distinguish stock exchanges from corporations, incorporated joint stock associations or partnerships.

The exchange is in no wise interested in the pecuniary gains or profits of its members, and the sole source of its revenue is derivable from such dues, fines, assessments, or contributions as it may, from time to time, collect or receive from its members, together with any increase of its present accumulations. At common law, the legal title of the personal property of the exchange, it being unincorporated, is vested in all of its members, in like manner as the title to partnership property is vested in all the partners. But, unlike the relation of partners, a member of the exchange or his legal representatives, has no right to call for an account of the property and a division of the same. A member has no several proprietary interest in it, or a right to any proportionable part of it, upon withdrawing. He has merely the enjoyment and use of it while he is a member; but the property remains with, and belongs to, the body while it continues to exist, like a pew, the ultimate and dominant property in which is in the congregation, and not in the pewholder; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets."

Produce Exchanges.—The law of the produce exchange is also peculiar to itself. "As a general rule, the members of unincorporated associations are regarded as partners, and are subject to the whole law of partnership. The application of this principle, however, to the unincorporated exchange, should be restricted. For the acts of its officers or servants, directly authorized by the constitution, laws or regulations of the unincorporated exchange, its members would be individually liable, under the general principle above cited. But in the main, this question is now purely speculative as regards the exchange. For the proposition, as presented in the reports, has been raised in cases where the officers or servants of unincorporated social or literary societies have incurred obligations without any express authorization from the organization." *Bisbee and Simonds, Law of the Produce Exchange*, § 64.

1. **Distinguished from Ordinary Partnerships.**—In an ordinary partnership the death or withdrawal of a member works a dissolution of the firm. In joint stock companies, however, the death of a member or the withdrawal or transfer of his interest, does not involve a dissolution of the company. In such companies there is no *delectus personæ*. In the absence of legislation to the contrary, the members of a joint stock company, like the members of a partnership, are liable for all the debts of the association; and in other essential respects such companies are similar to ordinary partnerships.¹

1. Joint stock companies are nothing more than ordinary partnerships, unless they are expressly sanctioned by some special or general act of the legislature. *Butterfield v. Beardsley*, 28 Mich. 412; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *Moore v. Brink*, 3 Hun (N. Y.) 402; *Lafond v. Deems*, 52 How. (N. Y.) 41; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *Dennis v. Kennedy*, 19 Barb. (N. Y.) 517.

An unincorporated building association is only a partnership. 9 Weekly Notes Cas. (Pa.) 79.

The constitution of an association provided for a choice of officers, and that the president and directors should "have the exclusive direction and arrangement of all the concerns of the company and treasury department." Thus constituted it became rather a joint stock company than a proper copartnership. If they had been copartners, each individual could have disposed of the whole property, incurred liabilities and made purchases. In this association no one, nor even all the members, not being directors, could have done this. And the law applicable to partnerships proper does not decide the rights of the members. *Cox v. Bodfish*, 35 Me. 302; *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573; *Irvine v. Forbes*, 11 Barb. (N. Y.) 587.

A provision that each member may sell and transfer his interest and thus introduce a new partner, though unusual, is not inconsistent with the contract of copartnership. *Hoadley v. County Commissioners*, 105 Mass. 519.

When the association is for private and individual profit or pleasure, with no public object, it is treated as a copartnership. So where the association is for private emolument or for benevolence, confined exclusively to the associates, and in which none others participate, as between themselves, they are partners. *Thomas v. Ellmaker*, 1 Parsons Sel. Eq. Cas. (Pa.) 98.

Clubs.—A social club without formal constitution and without objects of profit or pecuniary advantage may be held liable under the *New York* statute as a joint stock company or association of seven or more persons having a common interest. *Effinghausen v. Worth Club*, 4 Abbott's New Cases (N. Y.) 300. See *contra*, *Park v. Simmons*, 10 Hun (N. Y.), 128. In *In re St. James Club*, 2 De Gex, McN. & G. 383, it was held that a club is neither a partnership nor a joint stock company.

A joint stock company to trade in land is an ordinary partnership. *Kramer v. Athens*, 7 Pa. St. 165; *In re Account of Fry*, Treasurer of North Branch Coal Co., 4 Phila. (Pa.) 129; *Clagett v. Kilbourne*, 1 Black. (U. S.) 346.

In mining partnerships there is usually no *delectus personæ*, and as a consequence such a partnership is not dissolved by the death of a partner or a sale of an interest by a partner to a stranger. *Taylor v. Castle*, 42 Cal. 367; *Skillman v. Lachman*, 23 Cal. 199; *Duryea v. Burt*, 28 Cal. 569; *Jones v. Clark*, 42 Cal. 180; *Dougherty v. Creary*, 30 Cal. 290. See also *Troy Nail Factory v. Corning*, 45 Barb. (N. Y.) 231; *Bradley v. Harkness*, 26 Cal. 69; *Abel v. Love*, 17 Cal. 233; *Settembre v. Putnam*, 30 Cal. 490; *Rich v. Davis*, 6 Cal. 163.

Liability to Taxation.—In several cases it has been held that joint stock companies, being corporations within the meaning of the constitution, are liable to taxation on their capital. *Sandford v. Board of Supervisors*, 15 How. Pr. (N. Y.) 172. See also *Oliver v. Liverpool etc. Ins. Co.*, 100 Mass. 531.

But in the recent case of *People v. Commissioners of Taxes* in the supreme court of *New York*, not yet reported, JUDGE BARRETT held that the National Express Company, a joint stock

2. Distinguished from Corporations.—The shareholders of a corporation are liable for the debts of the company only to the extent of the share of the capital stock actually contributed by them. Joint stock companies are distinguished from corporations in the fact that, apart from legislation, their members are liable to contribute to the debts of the company. In other respects they are similar. They both have a continued existence unaffected by the death or withdrawal of members; the operations of both are carried on through officers or agents, and they both assume and hold themselves out to the world under a corporate name.¹

company, was not taxable upon its capital stock as a corporation, that while the legislature had conferred many corporate incidents upon such companies, yet they were not corporations and the acts allowing such companies to be formed declared the opposite intent. He says: "It is true this is not always the test of corporate existence, but it is at least conclusive of the absence of any legislative attempt to confer corporate franchises. A corporation cannot be formed by a private agreement between individuals. The franchise must proceed from the State, and even the State cannot compel people to accept its bounty. Joint stock companies may be formed without regard to these statutes, and the promoters may choose to proceed solely upon their common law rights and responsibilities. There is, in fact, no statute of the State providing for the formation of joint stock companies or limiting their organization. . . . The true test

is whether the being is natural or artificial. It is artificial if created by statute or called into being by compliance with statutory provisions. It is natural when solely the creature of private contract. The nature of the being is not affected by the character of the contract. "The company under consideration was not formed under any general or special statute. It became what it is—a joint stock company—solely by force of the contract between its members, embodied in their articles of association. They were required by no law to file or, as in England, register these articles and merely become an artificial being, a legal entity with a defined status, subject to legislative control. They were not even required to reduce the provisions of these articles to writing. It would seem to be reasonably clear, therefore, that general legislation, merely conferring certain of the privi-

leges incident to corporations upon these subjects of private agreement, fails to change a natural into an artificial being, and no more creates a corporation than would general legislation conferring similar privileges upon ordinary partnerships." See also *Hoadley v. County Commissioners*, 105 Mass. 519; *Gleason v. McKay*, 134 Mass. 419.

A joint stock company, as a general thing, is an ordinary copartnership, and subject to all the rules relating to partnerships. *Hedge's App.*, 63 Pa. St. 274; *Babb v. Reed*, 5 Rawle (Pa.) 151; *In re Account of Fry, Treasurer, etc.*, 4 Phila. (Pa.) 129; *Kramer v. Arthurs*, 7 Pa. St. 165; *Manning v. Gasharil*, 27 Ind. 399; *Robbins v. Butler*, 24 Ill. 387; *Dennis v. Kennedy*, 19 Barb. (N. Y.) 517; *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; *Cross v. Jackson*, 5 Hill (N. Y.) 478; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539; *Tappan v. Bailey*, 4 Metc. (Mass.) 529; *Vigers v. Sainet*, 13 La. 300; *Tenney v. N. E. Protective Union*, 37 Vt. 64; *Bullard v. Kinney*, 10 Cal. 60; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513; *Hess v. Werts*, 4 Serg. & Rawle (Pa.) 356; *Henry v. Jackson*, 37 Vt. 431; *Pennsylvania Ins. Co. v. Murphy*, 5 Minn. 36; *Bailey v. Baucker*, 3 Hill (N. Y.) 188; *English v. Wall*, 12 Rob. (La.) 132; *National Bank of Schuylersville v. Lasher*, 1 Thomp. & C. (1 N. Y. Sup. Ct.) 313; *Pettis v. Atkins*, 60 Ill. 454; *Ex parte Grisenwood*, 4 De G. & J. 544; *Whitman v. Porter*, 107 Mass. 522; *McGreary v. Chandler*, 58 Me. 537.

1. Liability of Members.—If the terms of the association do not, by fair and necessary construction, negative the intention of personal liability, in judgment of law and equity, the members of the company are individually responsible for all debts contracted, for the objects, and within the scope, of the association. If they did not mean to be personally liable for deficiencies,

good faith required that they should speak unequivocally, and give notice that such were the terms on which they contracted. If they had accepted the franchise of an incorporation offered to them by the legislature, their rights and duties would have been distinctly marked and understood, and no person would have confided in their personal responsibility. *Skinner v. Dayton*, 19 Johns. (N. Y.) 513.

The words "joint stock company" have never been used as descriptive of a corporation created by special act of the legislature, and authorized to issue certificates of stock to its shareholders. They describe a partnership made up of many persons acting under articles of association, for the purpose of carrying on a particular business, and having a capital stock divided into shares transferable at the pleasure of the holder. *Attorney General v. Mercantile Ins. Co.*, 121 Mass. 524.

"If we look into the books for elementary definitions, we shall find that corporations have no other attributes except the technical one of a common seal to distinguish them from common law partnerships. On the other hand, simple partnerships have none of the attributes or qualities here mentioned. Mere names are of but little importance. Looking at the substance and nature of things, it is plain that in respect to the absence of a common seal merely these joint stock associations are like partnerships. In the other and vastly more material respects mentioned, they are like corporations, although they are not declared to be such by the legislative acts referred to. *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157.

"It has been impossible for me to see the force of the argument that, because the legislature have constantly avoided to call these associations, or any of their machinery, a corporation, therefore we cannot adjudge them to be so. If they have the attributes of corporations, if they are so in the nature of things, we can no more refuse to regard them as such than we could refuse to acknowledge John or George to be natural persons, because the legislature may, in making provisions for their benefit, have been pleased to designate them as belonging to some other species. Should the legislature expressly declare each of them to be corporations, without giving them corporate succession, or other artificial attributes, the declaration

would not make them so. On the other hand, even an express legislative declaration that certain associations are not included in the definition of corporations, would not change their character, provided they should in fact be clothed with all the essential powers of corporations." *Thomas v. Dakin*, 22 Wend. (N. Y.) 9 (COWEN, J.); *Liverpool and London Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Sandford v. Board of Supervisors*, 15 How. (N. Y.) 172; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157, 3 Abb. Pa. (N. Y.) 163; *Westcott v. Fargo*, 61 N. Y. 542; *Oliver v. Liverpool etc. Ins. Co.*, 100 Mass. 531; *Maltz v. American Express Co.*, 1 Flippin (U. S.) 611; *Fargo v. Louisville etc. Ry. Co.*, 6 Fed. Rep. 787.

Land Company.—Five persons being tenants in common of a tract of land formed themselves into a company called the Hastings Town Company, for the purpose of selling lots in the town site of Hastings for the mutual benefit of the members. The articles of association provided that the capital should be \$4000, divided into shares of \$100 each; that there should be five directors who should elect from their number a president, a secretary and a treasurer; that the president should have power to convey the property of the corporation, such conveyances to be countersigned by the secretary. The president in due form having conveyed or dedicated part of the land to county purposes, one of the members of the association conveyed his interest in the land so dedicated and his assignee bringing ejectment, it was *held* that the organization, though designated a corporation, was in fact a joint stock company or *quasi* partnership for the purpose of disposing of the lots in question. The lots became in fact partnership property from the sale of which each shareholder received his proportion of the amount received. That as the express authority of each partner had been given to the president and secretary to execute deeds in the name of the co-partnership, they were the proper parties to make the deeds, and that the purchaser from one of the partners took the property subject to the contract made by the president and secretary with the county. *Batty v. Adams County*, 16 Neb. 44. See also *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573; *Irvine v. Forbes*, 11 Barb. (N. Y.) 587.

3. Recognized at Common Law.—Joint stock companies, the shares in which are represented to be transferable at the will of

If the organization of a proposed corporation be so defective as to fail in effecting its purpose, the members become in legal effect partners. *Whipple v. Parker*, 29 Mich. 369; *Blanchard v. Kaull*, 44 Cal. 440.

Mining Companies.—The powers of members and managers of mining partnerships are limited to acts necessary to the transaction of the business of mining. All persons dealing with them are bound to take notice of the peculiarities of such associations. A stranger by his purchase of shares presumptively becomes a partner. There is, however, no relation of trust or confidence between associates in a mining operation which is violated by the sale or assignment by a partner of his share or interest. *Charles v. Eshleman*, 5 Colo. 107; *Manville v. Parks*, 7 Colo. 128; *Higgins v. Armstrong*, 9 Colo. 38; *Lamar v. Hale*, 79 Va. 147; *Santa Clara Mining Assoc. v. Quicksilver Mining Co.*, 17 Fed. Rep. 657; *Jones v. Clark*, 42 Cal. 180; *Taylor v. Castle*, 42 Cal. 367; *Kahn v. Smelting Co.*, 102 U. S. 641; *Bissell v. Foss*, 114 U. S. 252; *Bybee v. Hawckett*, 8 Sawyer (U. S.) 176; *Snyder v. Burnham*, 77 Mo. 52.

In an action against an unincorporated ditch company upon a note given by its agent, it was held "that the defendants constituted one of the ordinary unincorporated ditch companies so common in the mining regions, owning a ditch which conveyed water from a certain stream to a distant mine, for sale to the miners for mining purposes. The interests were held by the owners in different proportions, in shares, represented by certificates of stock, which were bought and sold at the pleasure of the owners, without consulting the co-owners. The ordinary relations of the stockholders in these associations, like those in the usual mining companies, organized and conducted upon similar principles, and sometimes called mining partnerships, are not those of strict commercial partnerships, but are more in the nature of tenancies in common. Some of the incidents of a partnership pertain to them, and some of mere tenancies in common, but the powers of the several members by virtue of being members are different from those of commercial partnerships. A member of one of these asso-

ciations has no general authority, by virtue of such membership, to bind the company by his contracts. Nor has the managing agent any authority other than that conferred upon him, either expressly or by necessary implication from his acts recognized by the company, with full knowledge of the acts at the time of the recognition." *McConnell v. Denver*, 35 Cal. 365; *Skillman v. Lachman*, 23 Cal. 198; *Bradley v. Harkness*, 26 Cal. 69; *Abel v. Love*, 17 Cal. 233.

Voluntary Associations in Massachusetts—Car Trusts.—A number of persons formed an association by an instrument in writing containing numerous articles, for the purpose of buying, selling and leasing railroad rolling stock, to be sold or leased to the New York & New England R. R. Co. with provisions for admitting other persons to membership. The members of the car trust were to furnish money for the purchase of the rolling stock, and were to have certificates for the amounts so furnished, providing that the principal sum contributed by each member should be repaid in ten annual instalments, with interest; both principal and interest being payable only out of the rentals received for the rolling stock. Every owner of one or more shares was to be entitled to a proportionate share of the rentals received. The contemplated profits were limited to six per cent. interest on the money advanced; the losses, if any, to be borne proportionally. There were also provisions looking to the purchase of rolling stock from time to time, and to the issue of new certificates to those who should advance the money on the occasion of each purchase, and to the making of a new and separate lease of each lot or series of rolling stock. *Held*, that the car trust association was not a corporation. It was a mere voluntary association. There is no intermediate form of organization between a corporation and a partnership, like the joint stock companies of England and of some of the United States, known to this commonwealth. Since this association is not a corporation, its members must be partners, unless, indeed, as the defendant contends, they are simply co-owners. But we cannot look upon them simply as co-owners.

the holder, are not illegal at common law. This has been expressly decided both in England and in the United States.¹

II. STATUTORY ENACTMENTS.—1. In England.—The Companies act of 1862 and its supplements provide that any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the act in respect to registration, form an incorporated company, with or without limited liability. It is also provided that the subscribers of the memorandum of association, together with such other persons as may from time to time become members of a company, shall be a body corporate by the name contained in the memorandum of association, capable of exercising all the functions of an incorporated company, having perpetual succession and a common seal, with power to hold lands. Under these acts, joint stock companies have been formed in large numbers and have absorbed to themselves a large share of the business of Great Britain.²

Ricker v. American Loan & Trust Co., 104 Mass. 346; Whitman v. Parke, 107 Mass. 522; Hoadley v. County Commissioners, 105 Mass. 519; Gleason v. McKay, 134 Mass. 419.

1. English Bubble Act.—The act of 6 Geo. I, ch. 18, commonly known as the Bubble act, was aimed to suppress joint stock companies altogether. It declared them common nuisances; enacted penalties for membership in them, and made it an offence for brokers to deal in their shares. This act was repealed by the act of 6 Geo. IV. ch. 91. The illegality of joint stock companies seems to have rested entirely upon the Bubble act. Before its passage and after its repeal such companies were not illegal at common law. In Harrison v. Heathorn, 6 Man. & G. 79, the court in speaking of the Bubble act, said "that statute having been repealed, the question is now altered, and we have to determine whether such a company as the present has been shown to be a nuisance and grievance at common law. The raising of transferable shares of the stock of a company can hardly be said to be of itself an offence at common law; no instance of an indictment at common law for such an offence can be shown, the raising of stocks with transferable shares being indeed a modern proceeding; and the very great particularity with which it is described in the statute seems to show that it was an offence created by the statute only." In Mexican & South American Company, *Ex parte* Aston, 5 Jur. N. S. 615; 6 M. & G. 81;

27 Beav. 480, the master of the rolls said: "I have listened in vain for any case, or indeed for the statement of any principle, whereby, at common law, and independent of any statute, a partnership between persons who agree among themselves that their shares shall be legally assignable *in perpetuum*, or indefinitely assignable, is absolutely void and illegal. I find no case which determines it, and no principle on which it can rest; nor am I able to conjecture why such an association should be void at common law. It does not appear to me to offend against society, or to injure any class of individuals, and, therefore, unless bound by distinct authority, I should not be the first judge to hold that such an association was void at common law." See also Welburn v. Ingilby, 1 Myl. & K. 61; Garrard v. Hardey, 5 Man. & G. 471.

Bubble Act in Massachusetts.—In Massachusetts joint stock companies have been held legal at common law. In Phillips v. Blatchford, 137 Mass. 510, HOLMES, J., said: "It is too late to contend that partnerships with transferable shares are illegal in this commonwealth. They have been recognized as lawful by the court from Alvord v. Smith, 5 Pick. (Mass.) 232, to Gleason v. McKay, 134 Mass. 419. Even if the question were a new one we should come to the same result." In the same case it was decided that the Bubble act had never been in force in Massachusetts.

2. 25 and 26 Vict., ch. 47 (1862). Benjamin Vaughn Abbott, in a

2. In the United States.—In some of the United States, statutes have been passed regulating the organization, government and management of joint stock companies. Such statutes usually fix the minimum number of members, authorize the companies to sue or be sued in their own name, provide for the management of the business, and establish the extent of the liability of the members. These statutes also usually require that the organizers of the company shall record articles of association containing the names of the members, the amount of capital, the name of the company, and the character and location of the business.¹

note to Addison on Contracts (8th Eng. ed.), p. 805, says: "The English use of the term [joint stock company] is more definite and extensive than the American. In both countries there has been a great extension of the principle of allowing men to combine for a large enterprise without assuming the full liability of partners, and in both countries a danger has been seen in giving to members of such combinations the entire immunity from liability possessed by members of corporations, formed under the old common law forms of incorporation. In *England*, the policy has been to confine incorporation to its original meaning, and grant it only in rare cases; while laws have been passed which allow partnerships under such names as joint stock companies, public companies, etc., to assimilate themselves to corporations, and enjoy, to a considerable extent, corporate powers, and exemption from personal liability, but which do not affect to recognize such bodies as "corporations" in the fullest sense of that term. In this country, upon the other hand, it has been thought convenient to create corporations under that name for almost any purpose for which simple partnership forms were inadequate, and to secure creditors by imposing an individual liability upon members or officers of the corporation. Hence much of the law of English joint stock companies applies directly to what in this country are termed "corporations," especially the corporations allowed by the laws of the various States to be formed by filing articles of association under what are known as 'general laws' of incorporation."

1. In *Pennsylvania*, the act of June 2nd, 1874, P. L. 271, is known as the "Joint Stock Companies act." The first section of this act is as follows: "When any three or more persons may desire to form a partnership association, for the

purpose of conducting any lawful business or occupation, within the United States or elsewhere, whose principal office or place of business shall be established and maintained within this State, by subscribing and contributing capital thereto, which capital alone shall be liable for the debts of such association, it shall and may be lawful for such persons to sign and acknowledge before some officer competent to take the acknowledgment of deeds, a statement in writing, in which shall be set forth the full names of such persons and the amount of capital of said association subscribed for by each; the total amount of capital, and when and how to be paid; the character of the business to be conducted, and the location of the same; the name of the association with the word 'limited' added thereto as part of the same; the contemplated duration of said association, which shall not in any case exceed twenty years, and the names of the officers of said association selected in conformity with the provisions of this act. And any amendment of said statement shall be made only in like manner; which said statement and amendments shall be recorded in the office of the recorder of deeds of the proper county."

Under the other sections of this act and its supplements, it is provided: (1) That the members of such partnership association shall not be liable for the debts of such association beyond the amount of their unpaid subscription to the capital, and no execution shall issue therefor without an order of court. (2) That the word "limited" shall be the last word of the name of such association, and shall plainly appear upon all signs, bills and papers of whatever kind used by the association, and the omission of this word shall make the members severally liable as general partners. (3) Interests in such associations shall be personal estate and may be trans-

ferred subject to such regulations as the association may prescribe, but no transferee thereof shall be entitled to an interest in the management of the business without a vote of a majority of the members. If the transferee be not elected to membership in the association, the price of his interest shall be mutually agreed, and in default thereof appraisers shall be appointed by the court. (4) There shall be at least one meeting a year, at one of which there shall be elected not less than three nor more than seven managers, one of whom shall be elected chairman; the other officers shall be a secretary, a treasurer (both of which offices may be held by one person), and such other officers as may be deemed necessary; and no liability for more than \$500, except against the person incurring it, shall bind the association unless reduced to writing and signed by at least two managers. (5) Profits shall be divided as a majority of the members may determine, but such profits shall not diminish the capital. (6) Credit, name or capital shall not be loaned to any member of the association, nor to anyone else without the written consent of a majority in number and value of interest. (7) Association may be dissolved by expiration of time limited in statement, or by vote of majority in number and value of interest. Upon dissolution members shall elect three liquidating trustees, who shall wind up the affairs and distribute funds as follows: (a) To payment of wages. (b) Other liabilities. (c) To and among members in proportion to their interests. (8) Deeds, bonds and mortgages shall be executed under the common seal of the association, and be acknowledged by the chairman and secretary. (9) The association shall be sued in its association name and service shall be made upon the chairman, secretary or treasurer, but service may be made upon the association in any county in this State, where it may have an office, by serving the process upon any agent, clerk, director or manager.

By the supplementary act of May 1st, 1876 (P. L. 89), it is provided that a contribution to the capital of the association may be made in real or personal estate; a schedule containing a description and valuation of the property so contributed must be inserted in the statement.

Under this act, prior to May 1st, 1876, the capital was to be paid in

cash. *Bement v. Brick Machine Co.*, 12 Phila. (Pa.) 494; *Keystone Boot & Shoe Co. v. Schoelkopf*, 11 Weekly Notes of Cases (Pa.) 132; *Eliot v. Himrod*, 108 Pa. St. 569.

If parties seek to have all the advantages of a partnership and yet limit their liabilities as to creditors, they must comply strictly with the act. *Maloney v. Bruce*, 94 Pa. St. 249; *Keystone Boot & Shoe Co. v. Schoelkopf*, 11 Weekly Notes of Cases (Pa.) 132; *Eliot v. Himrod*, 108 Pa. St. 569; *Pears v. Barnes* (Pa.), 1 Cent. Rep. 569; *Hill v. Stetler* (Pa.), 12 Cent. Rep. 138.

The rule applicable to corporations, that in a suit brought upon an evidence of debt either by or against a corporation *de facto*, the corporate existence and liability cannot be questioned, cannot be applied to associations formed under this act. *Eliot v. Himrod*, 108 Pa. St. 569.

Before members of the association can be subjected to execution process, they have a right to notice and must be given an opportunity to be heard before they can be adjudged debtors and therefore liable to execution. *Lauder v. Tillia*, 117 Pa. St. 304.

The schedule of property contributed must not be a lumping valuation, but such a description as to enable one to form a correct estimate of the extent of the property. *Maloney v. Bruce*, 94 Pa. St. 249; *Hite Natural Gas Co.'s Appeal*, 118 Pa. St. 436.

A person who buys stock from the treasurer of the association is affected with notice that the stock has never been paid for. He is thereby put upon enquiry into the manner of the organization, and is chargeable with notice of all that such an enquiry would have disclosed. *Hill v. Stetler* (Pa.), 12 Cent. Rep. 138. The transferee of an interest or an executor of a deceased member is entitled to an allowance for good will in making up the value of the interest. Appraisement of interest considered. *In re Henry Disston & Sons File Co.*, 8 Weekly Notes of Cases (Pa.) 58.

The powers of the members of a partnership association are subject to the restraints and limitations imposed by law, and these are operative as well against strangers dealing with the partnership as against the members themselves. *Pittsburgh Melting Co. v. Reese*, 118 Pa. St. 355.

It is not necessary to a valid organization that the entire subscribed capital

should be paid into the treasury before an association can begin business, but an association has no right to enter upon business until some part of the subscribed capital has been paid. The statement should show how much has been paid, and the "subscription list book" should show thereafter the payment or the failure to pay the instalments falling due. *Hill v. Stetler* (Pa.), 12 Cent. Rep. 138.

The association is not liable upon a promissory note given and delivered by the chairman not in the ordinary course of business, and for the purpose of loaning the credit of the association to the payee, without the consent and knowledge of the other members of the association. *Lerch Hardware Co. v. First National Bank*, 109 Pa. St. 240.

Associations formed under this act of 1874 are mere limited partnerships, and a judgment confessed by one member for a firm debt binds the firm property. *Leming v. Penn Morocco Co.*, 16 Weekly Notes of Cases (Pa.) 114. See also *Crowther v. Upland Assoc.*, 1 Del. Co. Rep. (Pa.) 264.

Joint Stock Companies in New York.—In *New York*, by chapter 258 of the Laws of 1849, as amended by the laws of 1853, chapter 153, any joint stock company or association, consisting of seven or more shareholders or associates, may sue and be sued in the name of the president or treasurer, for the time being, of such joint stock company or association, and the suit shall have the same force and effect as regards the joint rights, property and effects of such joint stock company, etc., "as if such suits and proceedings were prosecuted in the names of all the shareholders or associates, in the manner now provided by law." The second and third sections provide that the suit shall not abate by reason of the death, removal or resignation of the president or treasurer, or the death or legal incapacity of any shareholder or associate; but it may be continued against his successor. Other clauses provide that the president, etc., shall not be liable in his own person or property by reason of any such suit brought against him as nominal plaintiff or defendant.

The fourth section provides that suits against any such joint stock company or association in the first instance shall be prosecuted in the manner provided in the first section of the act, but after judgment shall be obtained against the company, and execution shall be re-

turned unsatisfied, suits may be brought against all or any of the shareholders, individually etc.

The fifth section provides as follows: "Nothing herein contained shall be construed to confer on the joint stock companies or associations mentioned in the first section of this act, any of the rights or privileges of corporations, except as herein specially provided."

Prior to the act of 1849, all the members of an incorporated joint stock company or association were necessary parties to an action by or against such company or association, whatever the number of its members might be. *Van Aernam v. Bleistein*, 102 N. Y. 355; *Austin v. Searing*, 16 N. Y. 112; *Witherhead v. Allen*, 4 Ch. App. Dec. (N. Y.) 628. See also *Nat. Bank v. Van Derwerker*, 74 N. Y. 234. See also *Kingsland v. Braisted*, 2 Lansing (N. Y.) 17; *New York Marbled Iron Works v. Smith*, 4 Duer (N. Y.) 362. See also *West Point Assoc. v. Brown*, 3 Ed. Ch. (N. Y.) 284. The remedy against the joint property must be exhausted before an action can be brought against the individual associates. *Robbins v. Wells*, 1 Robertson (N. Y.) 666; *Waterbury v. Merchants' Express Co.*, 50 Barb. (N. Y.) 157; *Flagg v. Swift*, 25 Hun (N. Y.) 624; *Witherhead v. Allen*, 3 Keyes (N. Y.) 562.

The claim against the individual partners has no force as a judgment beyond the effect given it by the statute, and is not a substantive cause of action against them. *Bailey v. Bancker*, 3 Hill (N. Y.) 188. See also *Allen v. Clark*, 65 Barb. (N. Y.) 563; *Witherhead v. Allen*, 3 Keyes (N. Y.) 562.

By the laws of 1854, ch. 245, it is provided (1) Whenever, in pursuance of its articles of association, the property of any joint stock association is represented by shares of stock, it shall be lawful for said association to provide by their articles of association that the death of any stockholder, or the assignment of his stock, shall not work a dissolution of the association, but it shall continue as before; nor shall such company be dissolved, except by judgment of a court for fraud in its management, or other good cause to such court shown, or in pursuance of its articles of association. (2) Said association may also, by its articles of association, provide that the shareholders may devolve upon any three or more of the partners the sole management of their business. (3) This act shall in no court

be construed to give said associations rights and privileges as corporations." By the laws of 1867, ch. 289, such stock companies may hold real estate necessary for the accommodation of their business, or such as may be mortgaged to it, or bought under judicial proceedings, but "the said joint stock company shall not purchase, hold or convey real estate for any other purpose; and all conveyances of such real estate shall be made to the president of such joint stock company, as such president, and who, and his successors, from time to time, may sell, assign and convey the same, free from any claim thereon against any of the shareholders, or any person claiming under them."

If one of the members of such association die, the creditor must first pursue his remedy against the survivors. *Moore v. Brink*, 3 Hun (N. Y.) 402. See also *Robbins v. Wells*, 18 Abb. Pr. (N. Y.) 191.

Under the statute allowing an action against an unincorporated association, to be brought against the president or treasurer, an action against the president, secretary and treasurer is improperly brought. *Schmidt v. Gunther*, 5 Daly (N. Y.) 452.

The acts of 1849 and of 1851 do not include the fire companies of the city of New York. *Masterson v. Botts*, 4 Abb. Pr. (N. Y.) 130.

The statutes of 1849 and of 1851 conferred upon the plaintiff no right to sue, except in cases where the shareholders or associates could before have prosecuted. Their intent was to obviate the inconvenience of joining all the shareholders or associates as parties; to facilitate an existing right of action, and not to create a new one. *Corning v. Greene*, 23 Barb. (N. Y.) 33.

These acts were intended to apply to suits having in view a remedy against the "joint property and effects" of such companies and associations; an action which seeks to restrain the association from carrying into effect a resolution of suspension against one of its members, is not within the meaning of said acts. *Rorke v. Russell*, 2 Lansing (N. Y.) 242.

Joint Stock Companies in Virginia.—By the joint stock companies acts of Virginia, commissioners are appointed to receive subscriptions to the capital stock after giving thirty days' notice. The subscription books shall remain open ten days, or longer, as the commissioners may determine. The sub-

scriptions shall be in shares of \$100 each, upon which two dollars must be paid at the time of subscribing, and the balance at such times as the president and directors may designate. The board of directors shall be elected by the stockholders, and shall consist of five members, unless a different number be prescribed. The shares of stock shall be considered personal estate, and shall pass to the personal representative or assignee of the shareholder, and certificates shall be issued for such shares of stock. Annual reports shall be made by the board of directors, accompanied by statements of their receipts and disbursements.

Prior to 1883-4, joint stock companies were created or "incorporated" by act of the legislature. By acts of that session, ch. 97, it is provided that "any five or more persons who shall desire to form a joint stock company for the conduct of any enterprise or business, which may lawfully be conducted by an individual, or by a body politic or corporate, except to construct a turnpike to be constructed beyond the limits of the county, or a railroad or canal, or to establish a bank of circulation, may make, sign and acknowledge before any justice or notary, or county or corporation judge, or clerk of a county, corporation, or circuit court, a certificate in writing, setting forth the name of the company, the purposes for which it is formed, the capital stock and its division into shares, the amount of real estate proposed to be held by it, the place at which its principal office is to be kept, the chief business to be transacted, and the names and residences of the officers who for the first year are to manage the affairs of the company. This certificate may be presented to the circuit court of the county, or the circuit or corporation court of the county wherein the principal office of the company is to be located, or to the judge thereof in vacation. The said court or judge in vacation shall have a discretion to grant or refuse to said persons a charter of incorporation upon the terms set forth in the said certificate, or grant it upon such other terms as may be adjudged reasonable. If the charter be granted, it shall be recorded by the clerk of the said court, in a book to be provided and kept for the purpose, and shall be certified by him to the secretary of the commonwealth, to be in like manner recorded in his office.

Mining Partnerships in California.—

In *California*, associations for mining purposes, called in the statutes "mining partnerships," are analogous to joint stock companies, in that there is no *delectus personarum*, and there is no dissolution at the will of one of the parties. The following provisions with respect to such associations appear in Deering's Civil Code of California, § 2511, *et seq.*: "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same. An express agreement to become partners or to share the profits and losses of mining, is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interest in the mine, and working the same for the purpose of extracting the minerals therefrom. A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital or whole number of shares. Each member of a mining partnership has a lien on the partnership property for the debts due the creditors thereof, and by money advanced by him for its use. This lien exists, notwithstanding there is an agreement among the partners that it must not. The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property. One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. The purchaser, from the date of his purchase, becomes a member of the partnership. A purchaser of an interest in the mining ground of a mining partnership takes it subject to the liens existing in favor of the partners for debts due all creditors thereof, or advances made for the benefit of the partnership, unless he purchased in good faith, for a valuable consideration, without notice of such lien. A purchaser of the interest of a partner in a mine when the partnership is engaged in working it, takes notice of all liens relating from the relation of the partners to each other and to the creditors of the partnership. No member of a mining partnership or other agent or manager thereof can, by a contract in writing, bind the partnership, except by express authority derived from the members thereof. The

decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business."

Joint Stock Companies in Wisconsin.—The Joint Stock Companies act of *Wisconsin*, Revised Statutes of 1878, §§ 3210, *et seq.*, provides *inter alia*, as follows: "Any joint stock company heretofore formed under the laws of this State, consisting of seven or more shareholders or associates, may sue, and shall be sued, in the name of the president thereof for the time being, and all actions or proceedings so prosecuted by or against any such company, and the service of all process in such actions and proceedings on such president shall have the same force and effect as regards the joint rights, property and effects of such company, as if such actions and proceedings were prosecuted in the names of all the shareholders or associates. If such president cannot be found within the State, then all process in such actions or proceedings may be served personally on any authorized agent of such company within this State with like effect as if served upon such president. No action or proceeding so commenced shall abate by reason of the death, removal or resignation of such president, or the death or legal incapacity of any shareholder or associate during the pendency thereof; but the same may be continued by the successor of such president, or against such successor, if there be one, and if not, in the name of the president against whom the action or proceeding was commenced. If judgment shall be recovered in any such action or proceeding against any such company, the execution issued thereon shall be satisfied out of the property of such company or that which is owned jointly or in common by all the shareholders or associates; and if such execution be returned unsatisfied in whole or in part, actions may be brought against any or all the shareholders or associates individually, but no more than one action shall be brought against such stockholders or associates, at any one time, nor until the same shall have been determined, and execution issued thereon returned unsatisfied in whole or in part. The death, removal, resignation of officers, or shareholders, or sale or transfer of stock, shall not work a dissolution of any such joint stock company or association as against the parties suing or being sued as herein provided, or as

III. POWERS, RIGHTS AND LIABILITIES OF MEMBERS—1. As to the Public.—Unless the liability of members is limited by statute, every member is liable individually for all the debts of the company, and his liability begins as soon as he has signed the articles of association.¹

against any creditor or person having any demand against such joint stock company or association at the time of such death, removal, resignation, sale or transfer." See *First National Bank v. Goff*, 31 Wis. 77.

1. Every member of an unincorporated joint stock company is personally liable for all of its debts. *Frost v. Walker*, 60 Me 468; *Pipe v. Bateman*, 1 Iowa 369; *Tappan v. Bailey*, 4 Metc. (Mass.) 529; *Lewis v. Tilton*, 64 Iowa 220.

If a person contracts with a company doing business under articles of association which provide among other things for the incorporation of the company, and which incorporation is afterwards affected, but the style and general organization of the company continues the same, the responsibility of the company as partners is not changed by the act of incorporation, unless the express consent of the party who contracted with it be given, even though the act of incorporation declares that all contracts made with the association shall be as obligatory on the same, and on the parties thereto, as if they had been made subsequently to the act of incorporation, and that it shall be lawful for the corporation and the parties to maintain actions to enforce the performance thereof as fully and effectually as if the same had been made by or with the corporation. *Wilmer v. Schlatter*, 2 Rawle (Pa.) 359.

An application for shares and payment of the first deposit does not constitute one a partner, or member, where he had not interfered in the concern. He must act as a member or director, attend meetings, etc., or otherwise give himself out as member to make himself liable legally as a member. *Hedge's Appeal*, 63 Pa. 273.

A party who has subscribed the amount required by the articles of association will be liable though he has not signed such articles. *Tyrrell v. Washburn*, 6 Allen (Mass.) 466; *Frost v. Walker*, 60 Me. 468. See also *Butterfield v. Beardsley*, 28 Mich. 412.

Seventy-five persons agreed in writing to form an association or company for the purpose of establishing a scien-

tific journal. They appointed three of their number as managers for the first year, authorizing them to establish and conduct the paper for the benefit of the stockholders, as they called themselves, when sufficient capital should be paid in or secured. They also, at the same time, directed that a meeting of the stockholders should be called, when the first number should issue, to make such regulations and by-laws as should be necessary for the government of the association. They were not incorporated under any general or special act of the legislature. Two of the members, when they thought a sufficient amount was subscribed to justify them in commencing the publication of the journal, sent a person to New York to purchase a printing press and other necessary materials. Suit being brought to recover the price of the articles so purchased, it was held that the persons signing the agreement or articles of association were liable, as partners, for the amount of the debt thus incurred; that the associates were bound by the acts of the two managers who contracted the debt, although it did not appear that the third manager conferred and acted with them. *Wells v. Gates*, 18 Barb. (N. Y.) 554.

If a member of a mining company sells his interest in the mine, the purchaser takes it subject to any lien existing in favor of a copartner for debts due the creditors, or advances made for the uses of the concern, unless he becomes a purchaser in good faith for a valuable consideration, without notice of such lien. *Duryea v. Burt*, 28 Cal. 569.

In unincorporated companies, it is only necessary that a person should subscribe the articles of association, to entitle him to the rights, or make him subject to the liabilities of a proprietor. *Dennis v. Kennedy*, 19 Barb. (N. Y.) 517.

The members of a voluntary association, organized for educational purposes, employing a teacher are personally liable for her wages, in the absence of any agreement in the contract to the contrary. *Heath v. Goslin*, 80 Mo. 310; *Lewis v. Tilton*, 64 Iowa 220.

2. As Between Themselves.—As between members of joint stock companies, apart from special agreement, the general law of partnership prevails. Thus one member cannot maintain an action against his fellow members for a debt due to him by the company; nor can a member claim compensation for special services rendered by him to the company where there was no express agreement that he should be paid for them.¹

Persons associated for the purpose of carrying on a co-operative union store are liable as partners. *Manning v. Gasharie*, 27 Ind. 399; *Henry v. Jackson*, 37 Vt. 431. See also *Davison v. Holden*, 10 Atl. Rep. 515; *Farnum v. Patch*, 60 N. H. 294.

The liability of individual members of an unincorporated joint stock company formed in Canada, must be judged by the laws of Canada, where the association was formed and the business conducted, but a bill of exchange drawn by it may be governed by the laws of the place where the bill is made payable. *Cutler v. Thomas*, 25 Vt. 73.

A complaint alleging that defendants, as members of a voluntary unincorporated religious society, through their trustees and priests, who governed the members in secular affairs, and had power to incur debts for the association, which became the joint and several indebtedness of its members, stated an account with plaintiff's assignor, and agreed to pay him the balance found to be due him for his salary as priest and for money advanced for building the church and paying old debts, does not seek to hold defendants as a partnership, but states a valid cause of action against them individually upon an indebtedness incurred by them through their authorized agents. *Sheehy v. Blake*, 72 Wis. 411.

1. Where there is nothing in the constitution of a joint stock company which regulates the remedies of the shareholders, as between themselves, the general law of partnership must govern them. *Bullard v. Kinney*, 10 Cal. 60; *Robbins v. Butler*, 24 Ill. 387; *Moore v. Brink*, 3 Hun (N. Y.) 402. See also *Wilson v. Curzon*, 15 Mees. & W. 532; *Perring v. Hone*, 4 Bing. 28; *Holmes v. Higgins*, 1 B. & C. 74; *Crater v. Benninger*, 45 N. Y. 545.

A mechanics' lien filed by a member of an unincorporated association for mutual benevolence among its members is not available as against the liens of others not members. *Babb v. Reed*, 5 Rawle (Pa.) 151.

One member of an unincorporated association cannot maintain an action against the others for a debt due from the whole. *Bailey v. Bancker*, 3 Hill (N. Y.) 188.

Where the articles of association provide for the admission of new members, persons subsequently admitted will not be liable for debts incurred before they became members. *Lake v. Munford*, 12 Miss. 312.

A joint stock company formed for the purpose of trading in land is an ordinary partnership, and where one of the members of such association takes upon himself to perform special labor for the company without stipulating for compensation, he comes within the principle that in the absence of an agreement between partners, neither is entitled to compensation for services performed in furtherance of the partnership interests. *In re Account of Fry*, treasurer of North Branch etc. Coal Co., 4 Phila. (Pa.) 129. A member, however, may recover for services rendered before he became a member. *Lucas v. Beech*, 1 Man. & G. 417.

Where the articles of association of a private joint stock company provide that upon a stockholder's default in payment of assessments, all his shares, rights and interest in the company and its property shall be forfeited, the trustees are not authorized by a naked declaration to make a forfeiture against which a court of equity will not grant relief. Where the articles of agreement do not provide an express mode in which stock is to be forfeited, it seems a valid foreclosure cannot be made without the decree of a court of equity. *Walker v. Ogden*, 1 Bissell (U. S.) 287.

The rights and privileges of a stockholder and of assignees of interests, depend upon the articles of agreement and the by-laws. *Stimson v. Lewis*, 36 Vt. 91; *Alvord v. Smith*, 5 Pick. (Mass.) 232; *Fox v. Clifton*, 9 Bing. 115; *Henry v. Jackson*, 37 Vt. 431; *Ness v. Angas*, 3 Ex. Ch. 805; *Kingman v. Spurr*, 7 Pick. (Mass.) 235;

IV. THE OFFICERS—1. Responsibility of the Company for Their Acts.—The officers of a joint stock company have the same power, when acting within the scope of their authority, to bind the company and all the associates which an ordinary partner has to bind the partnership.¹

Cochran v. Perry, 8 W. & S. (Pa.) 262. See also *Ex parte Wood*, 17 E. L. & Eq. 236.

In an unincorporated joint stock company each individual shareholder has a direct proprietary interest in each and every individual part of the company's assets. *Kellogg Bridge Co. v. U. S.*, 15 Court of Cl. Rep. 111.

Where the members of a voluntary association contribute a fund for furnishing a lodge room, a minority cannot maintain a suit in equity to compel a majority to purchase their interests or submit to a removal or sale of the furniture. *Robbins v. Waldo Lodge*, 78 Me. 565.

Members who at any time without fraud withdraw from a trading association are thereafter, as among themselves, relieved from liability for debts. *Tyrrell v. Washburn*, 6 Allen (Mass.) 466.

Where it was agreed by the articles of association of a joint stock company that the property should be vested in trustees thereafter to be elected, and that the subscribers should pay their respective subscription to such trustees, an action to recover the amount subscribed may be brought in the name of the trustees. *Cross v. Jackson*, 5 Hill (N. Y.) 478. See *Ewing v. Medlock*, 5 Porter (Ala.) 82.

Where upon settlement between the members of an association, a member was allowed credit for a certain demand against the association assumed by him, he will be liable for payment of this claim, and an action may be brought directly against him by the claimant. *Secor v. Lord*, 3 Keyes (N. Y.) 525. See also *Wright v. Putnam*, 2 Thomp. & Cook. (N. Y.) 455.

The sum advanced by one of the original members of an association to pay dividends cannot be recovered by his representatives so long as the funds of the company were insufficient to pay the annual dividends guaranteed by him and his associates. *Moss' Appeal*, 43 Pa. St. 23.

In a statement of account between a stock company consisting of nine members, it appearing that some of the associates had contributed more than

their share, it was ordered that each of the associates recover from each other the one-ninth part of the amount paid by him, less the one-ninth part of the amount paid by the associate against whom such judgment was recovered. *Morrissey v. Weed*, 12 Hun (N. Y.) 491.

Where the laws governing a voluntary unincorporated association provide a remedy within the association for any offence committed by its officers, no misfeasance on the part of the officers will authorize a part of the members of the association to secede for the purpose of expelling its regularly elected officers. *McCallion v. Hibernia Society*, 70 Cal. 163.

Title to Real Estate.—A deed of land to a voluntary unincorporated association, which is well known and the members may be ascertained, but which is not authorized to hold real estate under the statute, may be construed as a grant to those who are properly described by the title used in the deed, who will hold as tenants in common. *Byam v. Bickford*, 140 Mass. 31; see also *Bartlet v. King*, 12 Mass. 537; *Hamblett v. Bennett*, 6 Allen (Mass.) 140.

Where land is conveyed to persons forming a mining company without naming all of them, the court may enquire and determine what persons composed the association at the date of the deed, and the interest to which each would be entitled in the land. *Pratt v. California Mining Co.*, 24 Fed. Rep. 860.

The *New York* act of 1867, ch. 289, as to joint stock companies, may be construed as a restraint upon the right of a joint stock association to purchase and hold the real estate not needed for their immediate use. If this statute be violated, it is the province of the state to see to its enforcement. *Howell v. Earp*, 21 Hun. (N. Y.) 393; *Rainey v. Laing*, 58 Barb. (N. Y.) 453.

1. *Van Aernam v. Bleistein*, 102 N. Y. 355; *Bodwell v. Eastman*, 106 Mass. 525.

Where the trustees for the stockholders of a company permitted stock to be transferred on the books of the associa-

2. **Responsibility of the Officers to the Company.**—The directors and officers of an unincorporated joint stock association are not liable to the company for mere errors of judgment.¹ They stand in the relation of trustees to the stockholders, and cannot take advantage of their official position to make any profit for themselves.²

V. SUITS BY OR AGAINST JOINT STOCK COMPANIES—1. In Local Jurisdiction.—Joint stock companies, which are not organized under a local statute, are mere partnerships, and suits by or against them must be brought in the names of the individual members.³

tion to a *bona fide* purchaser for value without notice, by a person not having authority to make the transfer, the loss in case of a contest must be borne by the stockholders and not by the innocent purchaser. *Cohn v. Gwynn*, 4 Md. Ch. 357.

The articles of an association provided that contracts involving liabilities for the payment of money should be signed by three managers. *Held*, that an order by a creditor for the payment to another of money to come due to the creditor, accepted by the secretary, would bind the company. *French Spiral Spring Co. v. New Eng. Car Trust*, 32 Fed. Rep. 44.

1. *Addam's Appeal*, 15 Weekly Notes of Cases (Pa.) 230; *Henry v. Jackson*, 37 Vt. 431.

But they are not entitled to credit in their accounts for expenditures not authorized by the powers under which they acted. *McKinley v. Irvine*, 13 Ala. 681; *Crum's Appeal*, 66 Pa. St. 474.

Neither opposition to the authority under which officers of an association act in the performance of their functions, nor irregularity in such performance will authorize members of the association to secede for the purpose of expelling such officers who were regularly elected, and declaring the offices vacant, constituting themselves as their successors in office. *McCallion v. Hibernia Sav. etc. Soc.*, 70 Cal. 163.

2. *In re Fry*, 4 Phila. (Pa.) 129.

3. Unincorporated voluntary associations, except for charitable purposes, whatever may be the number of their members, and of whatever nature or extent the object undertaken, are nothing more than partnerships; and when suit is brought in their behalf, it must be brought in the name of all the partners, or in the name of one or more for the use of all. *Pipe v. Bateman*, 1 Iowa 369. See also *Neven v. Specker-*

man, 12 Johns. (N. Y.) 401; *Birmingham v. Gallagher*, 112 Mass. 190; *Gorman v. Russell*, 14 Cal. 531.

If the directors of an unincorporated association have bound the association by a contract, all the members are bound by and liable for it. The suit in such a case should be against all the members, but if it is against only a portion of them, it is maintainable, unless they plead in abatement the non-joinder of their associates. *McGreary v. Chandler*, 58 Me. 537; *Chick v. Trevett*, 20 Me. 462; *Kingsland v. Braisted*, 2 Lansing (N. Y.) 17.

In an action upon a promissory note by one member "for the benefit of the National Fund Life Assurance Society" the complaint set forth that he was specially authorized to bring the suit for and on behalf of the society. Upon demurrer the court *held*, "The promissory note upon which the suit is founded is stated to have been given for account of the National Fund Life Assurance Society, and the complaint avers that this society is not incorporated; but it by no means follows that its individual members have therefore a right to maintain an action in their own names, and for their own benefit, upon every security given to the society, or to third persons for account of the society. Their right to do so must depend upon the nature of the association, the terms and conditions of the agreement by which its members are united. Although the society is not incorporated, its members are not necessarily either partners or joint owners. They may have only an equitable, and that only an eventual and contingent, interest in the property and funds of the society, and to permit them to appropriate these to their own immediate use, by a recovery in their own names, or by one in behalf of others, might be to aid them in deceiving the public, and defrauding credit-

Where such companies are organized under local statutes, it is usually provided by law that the company shall sue or be sued in its own name, or in the name of one of its officers.¹

ors. The society in question may be, and not improbably is, a *joint stock company*, organized as such under a general or special act of parliament, and if so, it is very doubtful whether it would not be treated as a corporation in our own courts, and still more so, whether the right to institute a suit on behalf of the society would not be limited to those to whom it may be exclusively given by the terms of the articles of agreement, or act of parliament, under which the society is organized. At any rate, these observations show not only the propriety, but necessity, of requiring that the contract or agreement by which the members are formed into and united as a society, shall be set forth in the complaint, as the only means of enabling the court to determine whether they have a legal title to maintain the suit. It is true, the complaint avers that the plaintiff is specially authorized to bring the suit for and on behalf of the society; but whether he has such an authority as can enable him to bring the suit in his own name is a question of law, which can only be determined when the nature and terms of his authority shall be set forth." *Habich v. Pemberton*, 4 Sandf. (N. Y.) 657.

In an action brought under the *New York* act of 1849, by an officer of a joint stock company, the allegation that the company is a joint stock company or association, consisting of more than seven shareholders or associates, is a material and issuable allegation. *Tiffany v. Williams*, 10 Abb. Pr. (N. Y.) 204; see also *Machinists' Bank v. Dean*, 124 Mass. 81.

In proceedings against the individual members of a joint stock company in New York to fix them with liability for the debts of the association, it was held that the judgment recovered in the action brought by the plaintiff against Smith, as president of the joint stock association, does not preclude the defendants from contesting their liability for the debts of the association. Such a suit was necessary, in the first instance, by the express terms of the statute, before the present action could be maintained. But the judgment in it was only so far effective as to reach the

property owned by the association itself. When that failed to secure satisfaction of the debt, then an action against the associates directly was proper, to enforce the payment of the debt out of their own individual property. At most, the judgment against the president of the association could be no more than *prima facie* evidence in the plaintiff's favor. *Allen v. Clark*, 65 Barb. (N. Y.) 563.

No action can be brought against the individual partners upon any demand against the company, until one has been first brought against the company *upon the same demand*, is the clear declaration of the statute. The cause of action, therefore, on which the individual partners are to be sued, is the same as that on which the association was sued. The judgment against the association is not a judgment against the individuals, either in form or effect. It is a statutory judgment, and the statute declares what its effect shall be, that is, as regards the joint rights, property and effects of the joint stock company, the same as though it were a judgment obtained in an action brought against the company in the ordinary way. As against the individual partners it has no force as a judgment beyond the effect given it by the statute, and is not a substantive cause of action against them. *Witherhead v. Allen*, 3 Keyes (N. Y.) 562.

Although the articles of association provide that all contracts with the company shall be in writing and shall be executed on behalf of the company by the president and treasurer, a person dealing with the association will still have a right to bring an action against all the associates upon a *quantum meruit*. *Sullivan v. Campbell*, 2 Hall (N. Y.) 271.

No action can be maintained by the treasurer of an unincorporated association upon a promise to pay a subscription, the same being payable to the treasurer only. *Ewing v. Medlock*, 5 Porter (Ala.) 82.

1. Actions Against Joint Stock Companies in New York.—Since the passage of the acts of 1849 and 1851 in the State of New York, an action may be maintained against the president or treasurer of an unincorporated association by the

members thereof. *Sander v. Edling*, 13 Daly (N. Y.) 238; *Wescott v. Fargo*, 61 N. Y. 542; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157; *Saltsman v. Shults*, 14 Hun (N. Y.) 256; *Brindenbeker v. Hoard*, 32 How. Pr. (N. Y.) 289; *Simonson v. Spencer*, 15 Wend. (N. Y.) 548; *De Witt v. Chandler*, 11 Abb. Pr. Rep. (N. Y.) 459; *Oley v. Brown*, 51 Howe. Pr. (N. Y.) 92.

Where it is alleged in a complaint that the defendant was a joint stock company or association duly formed and organized and then existing under and by virtue of the laws of the State of New York, but the number of associates is not stated, a stipulation signed by defendant's attorneys whereby it was admitted for the purposes of trial that the company was a joint stock association as alleged in the complaint and the defendant was its president, is a sufficient admission that the company consisted of the requisite number of members. *Van Aernam v. Bleistein*, 102 N. Y. 355. It is sufficient if the complaint avers that the association consists of seven associates and upwards. *Tibbetts v. Blood*, 21 Barb. (N. Y.) 650.

An action for libel published by its authority may be maintained against a joint stock company in the name of its president. *Van Aernam v. Bleistein*, 102 N. Y. 355; *Van Aernam v. McCune*, 32 Hun (N. Y.) 316.

When the statute provides that joint stock companies may sue and be sued in the name of their president or treasurer, for this purpose the officer is regarded as a corporation sole; he is a representative of the company, distinguished from the individuals composing it, and a suit may be brought against him by other shareholders in the company. *Maltz v. The American Express Co.*, 1 Flippin (U. S. C. C.) 611; *Wescott v. Fargo*, 61 N. Y. 542; *Cross v. Jackson*, 5 Hill (N. Y.) 478; *Fargo v. Louisville etc. R. Co.*, 6 Fed. Rep. 787; *Baltimore and Ohio R. Co. v. Adams Express Co.*, 22 Fed. Rep. 404.

The *New York Code of Civil Procedure* provides that an action may be maintained by the president of an unincorporated association, consisting of seven or more "persons" (§ 1919). The complaint in an action so brought averred that the association was composed of seven "members" and upward. *Held*, that the complaint did not place the qualifications of the members upon

the fact that they were not natural persons, or legal persons, so that their legal capacity to sue could be questioned by demurrers; and, therefore, defendant had the right to aver in the answer the existence of facts which, if proved, would show that the association was not empowered to sue under the section. Such answer makes an issue of fact, and is not virtually a demurrer. *Ruhl v. Ware*, 22 N. Y. St. Rep. 423.

An averment in a bill in equity, filed in the United States circuit court of Pennsylvania, that the complainants "are a joint stock association, composed of more than seven shareholders, formed July 1st, 1854, in the State of New York, by certain written articles, a copy whereof is hereto annexed, marked A, and then duly executed by the parties thereto, under the laws of the State of New York, and having the legal entity, powers and immunities in said laws, provided," is no authoritative warrant for the presumption that the complainants are citizens of another State than the State of Pennsylvania. It does not import that they are a corporation of another State, nor that the members of the association are citizens of another State. *Dinsmore v. Phila. & Reading R. Co.*, (U. S. C. C.) 11 Phila. (Pa.) 483.

Where an association becomes incorporated, and the incorporation accepts an assignment of all the property of the association, for the purpose of carrying out their object, they are primarily liable for their debts. *Hazlett v. Wotherspoon*, 1 Strob. (S. E.) Eq. 209.

A joint stock association is liable in trespass for removing coal, under an act imposing a penalty therefor upon "any person or corporation." *Oak Ridge Coal Co. v. Rogers*, 108 Pa. St. 147.

Suit by Members Against the Company.—In suits between a shareholder and the joint stock association to which he belongs, the analogies afforded by laws and jurisprudence in the case of corporations must be followed, instead of those derived from the law of simple partnership. *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157; *Fargo v. McVicker*, 55 Barb. 437.

The court will not appoint a receiver for an unincorporated joint stock company, to sell the property and divide the proceeds among the members, on a bill brought by a minority of the company, in absence of equity sufficient to require

2. In Foreign Jurisdiction.—A joint stock company, if a mere voluntary association, and not organized under a local statute, is everywhere regarded as a mere partnership.¹ If, however, the company has been organized under a local statute, it may be regarded as a *quasi* corporation, and in some of the States such a company is recognized as having the essential attributes of a corporation.²

it. *Hinkley v. Blethew*, 78 Me. 221.

1. While acts of the English parliament, conferring privileges upon a joint stock company, may expressly declare that they shall not be held to constitute the body a corporation, yet, whatever may be the effect of such declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from enquiring into its true character whenever that comes into issue. The local policy of England, with respect to joint stock companies, can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body. A joint stock company, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, cannot claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals. *Liverpool and London Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566.

The original organization of a voluntary association, in the State of New York, which prescribes and defines its own powers, manifestly to be exercised in other States as well as in it, does not denote that State as its permanent and exclusive domicile. Such a body is not a judicial person, the averment of whose existence and of the place of its original formation however full, would furnish the basis of a conclusive presumption as to the citizenship of its constituent members. *Dinsmore v. Phila. & Reading R. Co.*, (U. S.) 11 Phila. (Pa.) 483.

An action upon contract was brought in a Massachusetts court against A, B and C, "doing business at Boston, as a partnership or joint stock association, under the name and style of the 'Adams Express Company.'" The supreme court held that "the statutes of that State [New York], it is true, provide, in relation to actions against such companies, that suits shall be prosecuted, in the first instance, against the officers of the association only. But the common

law liability of the individual members or stockholders as partners, after a judgment had against the company, which remains unsatisfied, is not removed; the statutes themselves expressly declaring that nothing therein contained shall be construed as conferring the rights or privileges of corporations, except as specified. By a familiar rule, the laws of another State, which have reference solely to the mode of pursuing a remedy, are not binding here, and the personal liability of the individual partners may be enforced according to the laws of this commonwealth. No objection by way of plea in abatement is raised in the answer, on account of the nonjoinder of the other members of the company." *Gott v. Dinsmore*, 111 Mass. 45; *Taft v. Ward*, 106 Mass. 518. See also *Allen v. Sewall*, 2 Wend (N. Y.) 327; *Tappan v. Bailey*, 4 Metc. (Mass.) 529; *Bodwell v. Eastman*, 106 Mass. 525; *Boston and Albany R. Co. v. Pearson*, 128 Mass. 445.

2. "Whether a corporation or not, a joint stock association is a distinct legal entity, and so long as this fact exists, and it possesses the attributes of perpetual succession, and the capacity of suing and being sued, it is a judicial person, a proper party in this court, and must be regarded as a citizen of the State which created it. I deem it wholly immaterial whether it be termed a corporation, joint stock association or guild." *Maltz v. American Express Co.*, 1 Flippin (U. S. C. C.) 611. See also *Fargo v. Louisville etc. R. Co.*, 6 Fed. Rep. 787; *Fargo v. McVicker*, 55 Barb. (N. Y.) 437.

It seems to comport with reason, that when an association of persons assume a name, which implies a corporate body, and exercise corporate powers, they should not be heard to deny that they are a corporation. When they do act and contract they are estopped from denying their corporate liability. *United States Express Co. v. Bedbury*, 34 Ill. 459; *Clarkson v. Erie and North Shore Despatch*, 6 Bradw. (Ill.) 284. See also

VI. TRANSFER OF SHARES.—A stockholder may transfer his shares, but the transferee does not thereby become a member of the association without the consent of the other members;¹ nor does the transfer work a dissolution of the company.²

VII. DISSOLUTION—1. **By Mutual Consent.**—As in the case of partnerships, joint stock companies may dissolve by the mutual consent of their members.³

2. **By Equitable Proceeding.**—They may also be dissolved by the decree of a court of equity.⁴

Deems v. Albany Canal Line, 14 Blatchf. (U. S.) 474.

1. **Transfer of Shares.**—A stockholder may transfer his interest in any way that would be effectual at common law, whether in accordance with the rules of the association or not; but the transferee in such a case will not be a partner or associate, nor can he enforce a right to be recognized as such. *Alvord v. Smith*, 5 Pick. (Mass.) 232; *Fox v. Clifton*, 6 Bing. 726; *Kingman v. Spurr*, 7 Pick. (Mass.) 235; *Harper v. Raymond*, 3 Bosw. (N. Y.) 29; *Marquand v. N. Y. Manufacturing Co.*, 17 Johns. (N. Y.) 525; *Bray v. Fremont*, 6 Madd. (Eng. Ch.) 5; *Moddewell v. Keever*, 8 Watts & Serg. (Pa.) 63. See *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522.

Upon a sale by a member of his interest in a joint stock association, and delivery of the certificate and power of attorney to transfer, the title passes to the purchaser as against creditors of the transferor, without regard to the fact that by a rule of the company the stock is transferable only on the books and in a particular manner. *Tide Water Pipe Co. v. Kitchenman*, 108 Pa. St. 630.

Where by the articles of association of a company it was provided that any holder of shares should have a right to sell his stock, but before doing so he should offer the same and give it the refusal for ten days, and that no "purchaser shall acquire any interest whatever in the profits of said papers till he shall receive a certificate or scrip for his said shares signed by all the parties hereto, and duly registered in a book to be kept for that purpose," which scrip should certify that the holder was "entitled to participate in proportion to his shares, only in that portion of the profits which may be assigned to the party selling to such purchaser, and shall not be entitled to any voice or agency whatever in the conduct, control, manage-

ment or affairs of said company or of said newspapers:" it was held that a person who had bought shares in the association from a prior registered purchaser, was as between him and his vendor the owner thereof and entitled to profits declared while he was such owner, although such stock had not been offered to the association before it was bought by him. *Harper v. Raymond*, 3 Bosw. (N. Y.) 29.

2. *Tenney v. Protective Union*, 37 Vt. 64; *Tyrrell v. Washburn*, 6 Allen (Mass.) 466; *Jones v. Clark*, 42 Cal. 180; *Taylor v. Castle*, 42 Cal. 367.

3. The articles of association provided that within six years from the date thereof, the trustees should proceed to close the concerns of the association, and to that end should cause all effects and securities held by them or the association, to be collected or converted into money as fast as practicable, and should from time to time declare and pay to the shareholders dividends on the capital stock, until all the property and effects of the association should be divided among the shareholders. It was held that while it might not be for the interest of all the shareholders, or even a majority of them, to have the property and effects of the association converted into money and distributed at the time specified in the articles of association, yet, if any of the shareholders desired to have it done for their benefit they had a right to insist that the written contract should be carried into effect, according to its spirit and intent, without any unreasonable delay. *Mann v. Butler*, 2 Barb. Ch. (N. Y.) 362. See also *Penfield v. Skinner*, 11 Vt. 296; *Lake v. Munford*, 12 Miss. 312.

4. A joint stock company was formed in New York for the purpose of carrying on business in California. The articles of association provided that the company was to continue business from January 1st, 1849, to October 1st, 1853, and

3. Acts Amounting to Dissolution.—Abandonment of business and organization and sale of the property may also amount to a dissolution.¹

contained a prohibition against dissolution within one year after the arrival of the company in California. It was *held*, on application for dissolution, that a portion of the company could not, contrary to the articles of association, dissolve the company at their will and pleasure; but, it being found impracticable to keep the company together, or to continue the business successfully under the articles, the court could decree a dissolution and the distribution of the effects of the company. *Von Schmidt v. Huntington*, 1 Cal. 55.

When the object and purposes of a voluntary association have been abandoned by general consent of the members, a decree of dissolution and distribution of the funds on hand among the contributors will be granted, upon proper showing, by a court of equity. *Burke v. Roper*, 72 Ala. 138.

The dissolution of a limited partnership association, five years prior to the bringing of a suit against it, is a good defence to the action, and it is no answer to say that one month before the bringing of the suit the court rescinded its final order of dissolution, unless special circumstances are shown warranting such rescission. *Billington v. Gautier Steel Co.*, 9 Atl. Rep. 35.

1. When the organization of an association is abandoned, it ceases to exist, and whatever authority its trustees had ceased with it, as it could not continue beyond the life of the body that conferred it. It is like the death of a natural person, which revokes all authority given to his agent that is not coupled with an interest. The same is true of the death or dissolution of a corporation, and the reason is that there is no master to serve. *Hewett v. Hatch*, 57 Vt. 16; *Allen v. Clark*, 65 Barb. (N. Y.) 563; *Heath v. Sansom*, 4 Barn. & Ad. 175; *Grosvenor v. Lloyd*, 1 Metc. (Mass.) 19.

Upon the dissolution of a joint stock company, it is the duty of the trustees to convert the assets into money, and distribute the proceeds among the stock holders. They have no right to exchange the assets, or any portion thereof, of the old association for the corporate stock of any corporation without the consent of all the stock holders. A stock holder not consenting

to such exchange may recover the value of his stock so wrongfully disposed of. *Frothingham v. Barney*, 6 Hun (N. Y.) 366; *Mann v. Butler*, 2 Barb. Ch. (N. Y.) 362.

The articles of agreement between members of an unincorporated company for the regulation of their business provided that the capital stock should be divided into shares, that the shares should be transferable, and that trustees should be appointed to manage the affairs and that all the property should be vested in such trustees. In accordance with these articles, trustees were appointed who bought real and personal estate and conducted the business of the association. By transferred shares from time to time, twenty-nine fortieths of them became vested in one man. On a sale by him, not of his shares, but of twenty-nine fortieths of all the land and property of the company, it was *held* that the association was dissolved, and that the parties who held shares at the time of such dissolution were entitled, in proportion to the number of their shares, to all the assets of the company, and liable to contribute to the debts of the company in the same proportion. *Smith v. Virgin*, 33 Me. 148.

A partnership was formed under a declaration of trust, by which it was provided, among other things, as follows: "The decease of a member of the association shall not work a dissolution of it, nor shall it entitle his legal representatives to an account, or to take any action in the courts or otherwise, against the association or the trustee, for such; but they shall simply succeed to the rights of the deceased to the certificate and the shares it represents, subject to this declaration of trust." *Held*, that a deceased share holder's estate was liable to contribute to the other partners for the payment of debts incurred after his decease, and before his executor had done any act by which he assumed the decedent's place in the association. *Phillips v. Blatchford*, 137 Mass. 510; *Alvord v. Smith*, 5 Pick. (Mass.) 232.

Where the articles of association of a joint stock company prohibited the merger of the company with any other organization without the authority of a majority of the stock holders, but it was also provided that the articles might be

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I. DEFINITION.—Joint tenants and tenants in common may be

amended by a concurrent vote of two-thirds of the executive committee and a majority of the trustees, it was held that the authority to amend the articles of association did not take away from the stock holders the power to prohibit the merger with another company which they had expressly reserved. The authority to amend must be construed as intended for such amendments as were pertinent to the business and objects for which the association was organized. *Blatchford v. Ross*, 54 Barb. (N. Y.) 42.

Authorities.—Lindley on Partnership (Wentworth's edition, 1888; Ewell's edition, 1888); Wait's Actions and Defences, vols. 4 and 5; Morawetz on Private Corporations (2nd ed.) *111; Central Law Journal, 81; Dos Passos on Stock Brokers and Stock Exchange; Bisbee and Simonds, Law of Produce Exchange; Taylor on Corporations (2nd ed. 1888); Abbott's General Digest of Corporations, 1869 and supplements; Addison on Contracts, vol. 2; 2 Lawson's Rights, Remedies and Practice, § 693.

defined to be two or more persons who have an estate in or a right to enjoy a subject of property, together, jointly or in common, both or all together having and exercising a single right or ownership, the right or estate of 'all being no greater or different from that which might be exercised or possessed by a single person holding in severalty, the whole uniting and forming one ownership.¹

1. Joint Tenants.—Joint tenants are two or more persons who, not being husband and wife, at the date of its acquisition, have any subject of property jointly between them in equal shares by purchase,² or by dissisin of the rightful owner to their own use,³ their interest being one and the same, having accrued by one and the same conveyance or act, having commenced at one and the same time, and being held by one and the same undivided possession.⁴

2. Tenants in Common.—Tenants in common are two or more persons who hold possession of any subject of property by several and distinct titles. The quantities of their estates need not be the same, their proportionate share of the property may be unequal, and the mode of acquiring these titles may be unlike. Either or all these may differ, the only unity required between them being that of possession.⁵

1. See 2 Black. Com. (Chase's ed.), 179; 1 Washb. Real Prop. (5th ed.) 406; *Wright v. Searles*, 59 How. (N. Y.) Pr. 176.

Tenants in common altogether make but one party, and may exchange estates. Anon., *Lofft* (Eng.) 414.

2. *Freem. Part.*, § 10. LITTLETON defines joint tenants as follows: "Joint tenants are as if a man be seised of certalne lands or tenements, etc., and infeoffeth two, three, four or more to have and to hold unto them for term of there lives, or for term of another's life, by force of which feoffment or lease they are seised, these are joyntenants." 3 Co. Lit., 180, a.

COKE, in his commentary on Littleton (book 3, 180 b), referring to the above, says: "There be also joyntenants by other conveyances than Littleton here mentioneth, as by fine, recovery, bargain and sale, release, confirmation, etc. So there be divers other limitations than Littleton here speaketh of; as if a rent charge of ten pounds be granted to A until he be married, and to B until he be advanced to a benefice, they be joyntenants in the meantime notwithstanding the several limitations, and if A die before marriage, the rent shall survive; but if A had married, the rent should have ceased for a moietie

et sic e converso on the other side."

BLACKSTONE says (2 Black. Com., (Chase's ed.) 180), an estate in joint tenancy is where lands or tenements are granted to two or more persons, to hold in fee simple, fee tail, for life, for years, or at will.

American Definitions.—WASHBURN, in his work on Real Property (vol. 1 (5th ed.), page 406), says: "A joint tenancy is defined to be where several persons have any subject of property jointly between them, in equal shares, by purchase, each has the whole and every part with the benefit of survivorship unless the tenancy is severed."

And ABBOTT, in his "law dictionary," defines joint tenants to be persons who hold property which they acquired by purchase, at the same time, in virtue of the same title, interest and possession, and without anything to create a difference in their respective interests or possession.

3. 3 Co. Lit., 180 b.

4. 2 Black. Com. (Chase's ed.) 180.

5. Washb. Real Prop. (5th ed.) 415; Abb. L. Dict.; Bouv. L. Dict.

BLACKSTONE says: "Tenants in common are such as hold by several and distinct titles; but by unity of possession, because none knoweth his own severalty, and therefore they will oc-

II. CREATION OF TENANCY—1. Joint Tenancy.—The creation of an estate in joint tenancy depends upon the wording of the conveyance by which the tenants claim title, as such estate can only arise by purchase or act of the parties, and never by descent or act of law.¹

(a) *What Words Create Joint Tenancy.*—A conveyance to two or more and to their heirs and assigns, and to the heirs and assigns of the survivors of them forever, passes an estate in joint tenancy,² and a conveyance made to two or more as joint tenants and not as tenants in common creates a like estate.³ The common law rule seems to be that a devise or conveyance to one's wife with remainder over to one's children or other heirs creates a joint tenancy in such children or heirs,⁴ and a conveyance in mortgage to several persons in fee to secure the payment of a

cupy promiscuously. This tenancy, therefore, happens where there is a unity of possession merely, but perhaps an entire disunion of interest of title and of time. For if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail, or for life, so that there is no necessary unity of interest; one may hold by descent, the other by purchase; or the one by purchase from A, and the other by purchase from B; so that there is no unity of title; one's estate may have been vested fifty years, the other but yesterday; so there is no unity of time. The only unity there is is that of possession, and from this LITTLETON gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed. 2 Black. Com. (Chase's ed.) 191.

LITTLETON's definition is that "tenants in common are they which have lands or tenements in fee simple, fee tail or for terme of life, etc., and they have such lands or tenements by several titles, and not by a joynt title, and none of them know of this, his severall, but they ought by law to occupy these lands or tenements in common. Lit., § 292, and see 2 Cruise Dig. 399.

1. *Broom & Had. Com.* (Wait's ed.) 640.

2. *Davidson v. Heydon*, 2 Yeates (Pa.) 459.

3. *Fladung v. Rose*, 58 Md. 13.

4. *Campbell v. Heron*, 1 Tayl. (N. Car.) 199; *Ive v. King*, 16 Beav. (Eng.) 46; *Hobgen v. Neale*, 11 Eq. (Eng.) 48; and see *Dott v. Willson*, 1 Bay (S. Car.) 457.

A testator gave and bequeathed all his

real and personal estate to his wife for the use and benefit of herself and all his children, whether born of his former wife or such as might be born of his then present wife. *Held*, that the wife was entitled to an estate for life, with remainder to the children as joint tenants. *Nerrill v. Nerrill*, 12 Eq. (Eng.) 432.

A gift in trust for all and every the child and children of A, and his, her and their executors, administrators and assigns, for his, and their own absolute use and benefit, *held* to create a joint tenancy. *Morgan v. Butten*, 13 Eq. (Eng.) 28.

Testator, by will, gave all his estate (which consisted wholly of personalty, or of real estate distributable as personalty) to his wife absolutely, "for the benefit of herself and children," and appointed her executrix of his will. The widow proved the will and died. During her lifetime one of the children, a daughter, married and died. *Held*, that the children took as joint tenants, and, *semble*, that the wife took only an estate for life. *Held*, further, that the daughter did not by her marriage sever the joint tenancy. *Armstrong v. Armstrong*, 7 Eq. (Eng.) 518.

Testator directed all her property at the death of A and B "to pass to my relatives in America." *Held*, that the class was to be ascertained at the death of the testatrix; and that all her next of kin in America then living were entitled as joint tenants. *Eagles v. L. Breton*, 15 Eq. (Eng.) 148.

A joint purchase by two, to them and their heirs, with equal payments, creates a joint tenancy, and there is therefore a survivorship between them. *Aveling v. Knipe*, 19 Ves. (Eng.) 441.

joint indebtedness creates a joint tenancy;¹ but upon a foreclosure of the mortgage and the absolute vesting of the estate in the mortgagees, they become tenants in common.² Usually any words in the conveyance or any circumstances which show an intention to vest a joint estate or to establish a survivorship will constitute a joint tenancy, the presumption being that a joint tenancy is intended unless a contrary intent appears.³

Joint tenants are not, however, favored in law or in equity; a joint tenancy will never be inferred when the testator meant division,⁴ and an estate will be considered a tenancy in common where it appears that the purchase was made for the purpose of making great improvements on the property, even though the deed, in form, creates a joint tenancy;⁵ and the legislatures of most of the United States have enacted laws directing that all conveyances to two or more persons shall be construed to pass estates in common, unless it shall manifestly appear from the exact words of the instruments that it was intended to create an estate in joint tenancy,⁶ and in such case the intention cannot be

1. *Goodwin v. Richardson*, 11 Mass. 469; *Appleton v. Boyd*, 7 Mass. 131, 134; *Donnels v. Edwards*, 2 Pick. (Mass.) 617.

2. *Goodwin v. Richardson*, 11 Mass. 469.

3. B F and his wife, "for the purpose of creating a joint tenancy in said B F and his wife in all their property," conveyed the same to L, who immediately reconveyed it to the husband and wife "as joint tenants, and not as tenants in common, the survivor of them and the heirs, personal representatives, and assigns of such survivor." On a creditor's bill seeking to subject the property of B to the payment of his debts, it was *held* that B F and wife became joint tenants of the property so conveyed to them, and the husband's interests therein was liable to be seized in execution, and sold by his creditors during the life of his wife. *Fladung v. Rose*, 58 Md. 13.

In *Massachusetts* a conveyance or devise to husband and wife creates a joint tenancy, and not a tenancy in common. *Shaw v. Hearsey*, 5 Mass. 521; *Fox v. Fletcher*, 8 Mass. 274; *Varnum v. Abbot*, 12 Mass. 474, 479; *Draper v. Jackson*, 16 Mass. 480.

A deed to two persons, and to the survivors of them, his heirs and assigns conveys an estate for life, and a contingent remainder in fee to the survivor, and neither can, during the life of the other, convey more than a moiety for life. *Ewing v. Savary*, 3 Bibb (Ky.) 235.

A farmer and his two sons obtained separate patents for 400 acres of land adjoining each other, and the father then obtained another patent for 400 acres. Afterwards the three took one inclusive patent for the whole tract, and another tract of 1162 acres. *Held*, that this destroyed the separate estates and created a joint tenancy in the whole 2762 acres. *Jones v. Jones*, 1 Call (Va.) 458.

A conveyance of an undivided interest in mining ground expressly conditioned to convey no other rights except a mining right, *held*, not to create any joint tenancy, tenancy in common, or coparcenery, but simply to convey the right to take ore or minerals from the land. *Smith v. Cooley*, 65 Cal. 46.

L conveyed land to N and P, in fee, provided they pay and discharge all the just debts of their grantor. *Held*, that this proviso created a condition, and not a trust; that therefore the grantees took as tenants in common, and not as joint tenants, and that the survivor of them could recover only half the premises in an action of ejectment. *Lamb v. Clark*, 29 Vt. 273.

4. *Martin v. Smith*, 5 Binn. (Pa.) 16.

5. *Duncan v. Forrer*, 6 Binn. (Pa.) 193.

6. *Nicholson v. Caress*, 45 Ind. 479. *Massachusetts* statutes, 1785, ch. 62, § 4, converts an estate, held in joint tenancy previously, into a tenancy in common, where the right of survivorship had not accrued, as the statute is retrospective. *Annable v. Patch*, 3

gathered from the circumstances attending the execution of the instrument, but must be actually expressed therein.¹

(b) *In Personal Property*.—A joint tenancy may also be created in personal property;² the general rule at common law would seem to be that unless something to the contrary is expressed in the instrument or by the act creating the tenancy, it will be construed as a joint tenancy rather than a tenancy in common;³ and

Pick. (Mass.) 360, 363; *Miller v. Miller*, 16 Mass. 59.

New Jersey statute, 1812, respecting joint tenancies and tenancies in common, does not apply to estates created before the passage of the statute. *Berdan v. Van Riper*, 16 N. J. L. (1 Har.) 7.

It is not sufficient that the words employed by parties would, but for statute 1822, ch. 162, be constructed to create a joint tenancy, unless the instrument expressly provides that the land shall be held in joint tenancy. *Purdy v. Purdy*, 3 Md. Ch. 547.

Code *Mississippi*, 1880, section 1197, "All conveyances or devises of lands made to husband and wife shall be construed to create estates in common, and not in joint tenancy or entirety, unless it appears from the tenor of the instrument that the intention was to create an estate in joint tenancy, with right to" survivorship, etc., has no retroactive effect. *Gresham v. King*, 4 So. Rep. (Miss.) 120.

In *Vermont*, a devise to two or more, without words to create a joint tenancy, is held a tenancy in common. *Gillman v. Merrill*, 8 Vt. 77.

Constitutionality of Such Laws.—A statute providing that all gifts, grants, etc., of lands which have been, or shall be, made to two or more, shall be taken to be estates in common, unless words are used showing clearly the intent to be that the grantees should take as joint tenants, is not unconstitutional, as its operation is to make the estate more valuable to the grantees. *Haughabaugh v. Donald*, 1 Treadw. (S. Car.) Const. 90; *Miller v. Miller*, 16 Mass. 59; *Bambaugh v. Bambaugh*, 11 Serg. & R. (Pa.) 191; *Thornton v. Thornton*, 3 Rand. (Va.) 188.

Grants of land, by the legislature, to two or more persons in fee, are to be construed as conveying to the grantees estates in common, unless a different tenure should be expressed in the grant. *Higbee v. Rice*, 5 Mass. 344.

The statutes of *South Carolina* relative to joint tenancy operate only

where the interest is already vested and do not influence the creation of such a tenancy. *Herbement v. Thomas*, 1 Cheves (S. Car.) 21, 2nd part.

Under a devise of an estate "to my three daughters, Margaret, Elizabeth and Mary" (Mary's children to take their mother's share), held there was a tenancy in common between the two daughters and the children of the third, not a joint tenancy. *Martin v. Smith*, 5 Binn. (Pa.) 16.

1. *Nicholson v. Caress*, 45 Md. 479; *Purdy v. Purdy*, 3 Md. Ch. 547; *Gresham v. King* (Miss.) S. 120.

2. *Dott v. Willson*, 1 Bay (S. Car.) 457; *Gilbert v. Richards*, 7 Vt. 203; *Lowe v. Miller*, 3 Gratt. (Va.) 205.

3. In *Vermont*, a bequest or gift of personal property to two or more is *prima facie* a joint tenancy. *Gilbert v. Richards*, 7 Vt. 203.

In *South Carolina*, a devise of personal estate to a married daughter, and at her death "to the heirs of her body, and their heirs and assigns forever," constitutes a joint tenancy in the grandchildren of the devisor, who take as purchasers after the daughter's death. *Dott v. Willson*, 1 Bay (S. Car.) 457.

A depositor had his bank account changed into an account with him and his mother "order of either of them," she signing the signature book at the time. Afterwards speaking of the account and showing her the book, he said: "This is yours." He retained the pass book about a month, but on the day before his death sent it to his mother, with directions to tell her to keep it for him. Held, sufficient to create a joint tenancy in the fund, and that upon his death it vested in the mother as a survivor. *Mack v. Mechanics* etc. Savgs. Bank et al., 3 N. Y. S. 441.

Farming on Shares.—A, being in possession of land to which he had no title, but which he was authorized to rent out for his own benefit, made a written contract with B to let him the land for a year, upon the terms that A should find the tools to work the land, and the

it has been held that a legacy given to two or more persons will pass a joint tenancy unless the will contained words to show that the testator intended a severance of the interest, and to take away the right of survivorship;¹ but joint tenancy has been much reduced in extent in the *United States*, and the incident of survivorship almost entirely destroyed by statutes, except in case of trustees, executors and others, in whom such a tenancy is necessary for the execution of their trusts.²

(c) *Conveyances to Trustees*.—The laws limiting estates in joint tenancy to those expressly declared to be such in the instruments creating them, are usually held not to apply to conveyances to trustees,³ trust estates being usually considered joint.⁴ The courts inclining to hold trustees joint tenants rather than tenants in common, in order to avoid inconvenience in administering the trust.⁵

(d) *Disseisin*.—A joint tenancy may be created as well by disseisin as by deed or devise,⁶ and the right of one disseisor on his abandonment will not revert to the former owner, but will vest in the cotenant as if he had been sole disseisor.⁷

2. Tenancies in Common—(a) *By Purchase*.—Words in a deed or conveyance to two or more parties which direct or purport to direct a division, whether equal or otherwise, of the premises conveyed will be construed to pass a tenancy in common,⁸ and it

seed to sow it, and B should board himself and family, work the crop, and when it was gathered give one-half of it to A. *Held*, that this was not to be considered a lease, rendering rent in kind, but that the contract constituted the parties joint tenants of the crop raised. *Lowe v. Miller*, 3 Gratt. (Va.) 205.

1. *Campbell v. Campbell*, 4 Bro. C. C. (Eng.) 15, and see *Putnam v. Putnam*, 4 Bradf. (N. Y.) 308; *Morgan v. Britten*, L. R., 13 Eq. (Eng.) 28; *Mayn v. Mayn*, L. R., 5 Eq. 150; *Crooke v. De Vandes*, 9 Ves. (Eng.) 197; 2 Kent's Com. (13th ed.) 351.

2. See *Perry on Trusts*, § 136.

3. *Boston etc. Co. v. Condit*, 19 N. J. Eq. 394; and see 4 Kent's Com. (13th ed.) 361.

4. The assignment of a mortgage to two persons, as trustees of an unincorporated society, vests the title in them as joint tenants. *Webster v. Vandeventer*, 6 Gray (Mass.) 428.

Conveyance by deed to A, B and C in trust, for them "or other the trustees hereunder for the time being, to take charge and possession of said trust estate, and to hold the same for the sole use" of the *cestuis*, with power to them "or the survivors or survivor of them, or other the trustees or trus-

tee hereunder for the time being, at any time and from time to time, in their or his discretion, and as soon as reasonably and profitably may be, to sell, let or lease the same," and in further trust for them "or the survivors or survivor of them, or other the trustees or trustee hereunder for the time being, to receive the proceeds of all sales or leases," to pay taxes, etc., "and the surplus to pay whenever and so often as it can conveniently be done to" the *cestuis*. *Held*, that A, B and C took as joint tenants. *Franklin Inst. etc. v. The People's Savings Bank*, 14 R. I. 632.

Contra, a conveyance to three grantees for specified trusts made the grantees tenants in common, under Massachusetts Stat. 1785, ch. 62, and if the grantees had been joint tenants, the conveyance, by one of his shares to a third person, would have been a severance of the joint tenancy. *Robinson v. Codman*, 1 Sum. (U. S.) 121.

5. *Franklin Inst. etc. v. People's Savings Bank*, 14 R. I. 632.

6. *Putney v. Dresser*, 2 Met. (Mass.) 583, 586; *Ward v. Ward*, 6 Ch. (Eng.) 789; 3 Co. Lit. 180 b.

7. *Allen v. Holton*, 20 Pick. (Mass.) 458; *Bigelow v. Jones*, 10 Pick. (Mass.) 61.

8. *Briscoe v. McGee*, 2 J. J. Marsh.

may be generally stated that in the United States, under the statutes of the several States, whenever two or more persons acquire the same estate by the same act, deed or devise, and there is no indication therein of a contrary intention, they will acquire a tenancy in common.¹ When a mortgage is given to two or more persons to secure debts due to them severally, they take as ten-

(Ky.) 370; *Goodtitle d. Hood v. Stokes*, 1 Wils. (Eng.) 341.

A farm included in a testator's residuary devise to his wife and children to be divided among them according to law. *Held*, to pass to the wife and children as tenants in common of the fee, there being no indication of intent contrary to the grammatical construction. *Pruden v. Paxton*, 79 N. Car. 446.

Equal Division.—Under a devise to "Joseph and David of all the residue of testator's estate, to them and each of them, share and share alike, their heirs and assigns forever, and if they die without heirs, their shares are to be equally divided." etc., *held*, that Joseph and David were tenants in common tail, with a vested remainder to other legatees in case of their death. *Irwin v. Dunwoody*, 17 Serg. & R. (Pa.) 61.

A devise of land to several brothers, "according to quantity and quality, each to take possession of his part when he comes of age; but if one or more of them should die before they come of age, then their part to be equally divided among the survivors," was *held* to create an estate in common. *Harrison v. Botts*, 4 Bibb (Ky.) 420.

Unequal Division.—A devise of several tracts of land "to be equally divided in quantity, without having any regard to quality," was *held* to be a tenancy in common. *Partridge v. Colegate*, 3 Har. & M. (Md.) 339.

A testator devised all the residue of his estate "to be divided amongst all his children in equal shares and portions to them, their heirs and assignees forever," and died leaving several children. *Held*, that this gave to the devisees a tenancy in common, and that their estates not being the same in quality and quantity that they would have taken as heirs at law, they take by purchase under the will and not by descent. *Gilpin v. Hollingsworth*, 3 Md. 190.

Designation of Particular Part.—A devised to B and C, his sons, a tract of land lying easterly of a certain brook,

"to be equally divided between them, for quality and quantity, and B to have the part next the brook." *Held*, that such devise vested in the devisees a tenancy in common. *Griswold v. Johnson*, 5 Conn. 363; and see *Walker v. Dewing*, 8 Pick. (Mass.) 520; *Burghardt v. Turner*, 12 Pick. (Mass.) 534; *Elliot v. Carter*, 12 Pick. (Mass.) 436; *Emerson v. Cutler*, 14 Pick. (Mass.) 108.

Devise as Joint Stock.—A devise of land to "three children to be kept as joint stock until the youngest shall arrive at the age of twenty-one years, and then the whole property and its increase to be divided equally between them, to each one-third part," creates a tenancy in common, and not a joint tenancy. *Weir v. Humphries*, 4 Ired. (N. Car.) Eq. 264.

Gift per Stirpes.—Under a gift in a will to such of the nephews and nieces of A and the children of A's deceased niece B thereafter named (then followed the names of the nephews and nieces and children of the deceased niece) as should be living at the time of the decease of the testatrix, to be divided between and among them, the children of B taking between them only the equal share to which B would have been entitled if named in that bequest instead of her children, and living at the time of the decease of the testatrix: *Held*, that the children of B took as tenants in common. *Attorney General v. Fletcher*, 13 Eq. (Eng.) 128.

1. 1 Washb. Real Property (5th ed.); and see *Miller v. Miller*, 16 Mass. 59; *Bambaugh v. Bambaugh*, 11 Serg. & R. (Pa.) 191; *Evans v. Brittain*, 3 Serg. & R. (Pa.) 135; *Wiswill v. Wilkins*, 5 Vt. 87.

Under a deed to the grantees, or any of them, or any of their heirs and assigns, "*habendum* to them, their heirs and assigns forever," the grantees are tenants in common. *Galbraith v. Galbraith*, 3 Serg. & R. (Pa.) 392.

By a devise of the income of one third part of a farm, the devisee becomes a tenant in common of that por-

ants in common,¹ and would continue such if the estate should become absolute by foreclosure.² Where real estate is purchased

tion of the land itself. *Andrews v. Boyd*, 5 Me. (5 Greene) 199.

A devise of a tract of land to the two sons of the devisor, and their heirs and assigns, until a third son personally appears and demands the land, makes the two sons tenants in common. *McPherson v. McPherson*, Addis. (Pa.) 327.

Reservation of Dower Right.—P held an estate in right of his wife, subject to right of dower in his wife's mother, but which had never been demanded or assigned. P conveyed the estate to another, his wife signing the deed, which, after a general description, contained the following: "Meaning to convey all the right and interest which E. A. B, now my wife, E. A. P. has or ever had in said land, except the right to her mother's thirds, which I reserve a right to claim at the decease of the mother of said E." *Held*, that the exception must be construed to be of the reversion of the dower, and not of the dower itself, and that no dower having been assigned by metes and bounds, the grantee took by his deed two thirds of the estate in common and undivided. *Payne v. Parker*, 10 Me. (1 Fairf.) 178.

An admission in an answer, that two persons jointly purchased a slave, does not prove that they were joint tenants. The presumption is that each paid one half of the purchase money and that they are tenants in common, and in such case where one of the purchasers dies the other is not entitled to the whole survivorship, but the executor of the deceased must account for the moiety of his testator as of other portions of his personal estate. *Gibbons v. Riley*, 7 Gill (Md.) 81.

Right of Common Appurtenant.—Two tenants in common making partition of their lands, the one granted to the other "free liberty of carrying away gravel and sea weed of the beach belonging to his part of said farm, and also stones below high water mark and liberty to tip the sea weed on the bank of his part of said farm." *Held*, that this grant created a right of common appurtenant to the land of the grantee, and that said right was not unlimited, but a right in common with the grantor. *Hall v. Lawrence*, 2 R. I. 218.

Estate to Mother and Children.—By a

conveyance of land by deed to "M S in trust for herself and her children, their heirs and assigns," M S and her children become tenants in common in fee in the land in equal shares. *Shirlock v. Shirlock*, 5 Pa. St. 367.

Condition Subsequent.—A testator, after giving pecuniary legacies to right of his children in full of their portions of his estate devised to two others, C and R, all his real estate in fee, upon condition that neither of them should make any claim upon his estate upon a forfeiture of his right under the will. C made a claim upon the estate, which was paid by the executor. *Held*, that C and R took the real estate as tenants in common, upon a condition subsequent, by breach of which C forfeited his moiety thereof under the will and the same descended to the heirs at law. *Sackett v. Mallory*, 1 Metc. (Mass.) 355.

Grant by State.—An act of the *Illinois* legislature, granting to certain persons, their heirs and assigns the right to run a ferry, with certain other privileges, makes them tenants in common both of these franchises, and of boats, tackle, etc., owned by them. *Haven v. Muhlgarten*, 19 Ill. 91.

Evidence of Title.—A deed by C, a tenant in common of E, to A, of C's interest in an estate whereon were certain mine hills with the right to raise ore "for such time only as said furnace can be carried on by charcoal," *held* to convey a limited privilege and not the corporeal estate in the mine hills; and in an action of partition by the heirs of E against A, a recital in the deed that C held the land in common with E, *held* to be *prima facie* evidence of the title of E's heirs. *Grubb v. Grubb*, 74 Pa. St. 25.

A patent to two persons as tenants in common of a quarter section of land, clothes each with an undivided half of the entire quarter. It does not give to either an undivided half of any specific part of the entire quarter nor the right to have partition of any specific part, except in case of a sale of the residue by both tenants, or by some act of the parties, or by proceedings at law. *Markoe v. Wakeman et al.*, 107 Ill. 251.

1. *Brown v. Bates*, 55 Me. 520.

2. *Goodwin v. Richardson*, 11 Mass.

for partnership purposes by deeds conveying to the partners as tenants in common, the status of the property as to creditors is fixed by such deeds,¹ and a purchase by or a gift to several persons as ship owners creates a tenancy in common in the property so purchased or received, and not a partnership;² and the same rule applies where one claiming the whole of a parcel of land joins with other claimants in a trust deed providing that each shall have such interest in a stock company as they had in the property.³

The conveyance of a given number of acres to one person and another number to another, thus conveying the whole right to both, there being nothing to show that the land was intended to be conveyed in severalty, will create a tenancy in common, each party taking in common in proportion to the number of acres specified in his deed;⁴ so also where the whole is conveyed to each by simultaneous conveyance, each having knowledge of the other's conveyance.⁵

This rule is applicable also to personal property.⁶

A contract under seal to convey to husband and wife makes them tenants in common in Ohio;⁷ so devise of land to four persons giving a part of the profits to another for life vests a

1. Appeal of Second Natl. Bk. of Titusville, 83 Pa. St. 203.

2. French v. Price, 24 Pick. (Mass.) 13; Thorndike v. De Wolf, 6 Pick. (Mass.) 120.

Where several persons purchase a parcel of land they become tenants in common, and are not partners; and notice to one, in respect to the land, is not notice to the other. Wiswall v. McGown, 2 Barb. (N. Y.) 270.

3. Hungerford v. Cushing, 8 Wis. 332.

4. Preston v. Robinson, 24 Vt. 583.

A testator devised a small tract to one, and to another devised a larger tract, which includes the small one. The devisees are tenants in common of the small tract, and the first devisee cannot dispute the title of the second devisee. Seckel v. Engle, 2 Rawle (Pa.) 68.

A deed of land to two persons by one common boundary, but stating the particular interest conveyed to each, constitutes them tenants in common and not joint tenants. Craig v. Taylor, 6 B. Mon. (Ky.) 457.

Uncertainty of Description.—Conveyance of one certain parcel of land, viz., "the lots of A, B and twenty-eight acres off from the lot of C adjoining," does not create a tenancy in common of the grantee with C in his whole lot, for want of certainty of location. Clapp v. Beardsley, 1 Vt. 151.

5. Wright v. Searles, 59 How. (N. Y.) Pr. 176.

Where there are two several grants of the same land bearing the same date upon surveys recorded and certified the same day, and purporting to have been made upon warrants issued the same day, the grantees take as tenants in common. Young v. De Bruhl, 11 Rich. (S. Car.) L. 638.

Two or more taking out a warrant, paying in equal proportions and obtaining a survey, hold as tenants in common; and there is no right of survivorship. Caines v. Grant, 5 Binn. (Pa.) 119.

Where one of two tenants in common conveys to a third person a ditch crossing the land owned in common and the other subsequently conveys the same ditch to another third person, neither of the grantors can afterward question the act of the other; and the respective grantees become tenants in common of the ditch. Ried v. Spicer, 27 Cal. 57.

6. The simultaneous delivery of absolute bills of sale of the same property, one to each of two vendees, each vendee having knowledge of the transactions with the other, renders the vendees tenants in common of the property. Welch v. Sackett, 12 Wis. 243.

7. Wilson v. Fleming, 13 Ohio 68.

tenancy in common in the four,¹ and a gift of chattels to one, he covenanting to convey one half thereof to another on the happening of a certain contingency, vests a tenancy in common in them to take effect in the happening of the contingency.²

(b) *Conveyance of Undivided Part.*—A conveyance of an undivided part of a tract of land creates a tenancy in common between the grantor and the grantee,³ but if the part conveyed is so described that a surveyor could designate it, the grantees will take in severalty.⁴ A reservation in a deed of an undivided part will have a like effect,⁵ and one in possession under a tenant in dower holding over after her death, and purchasing the shares of some of the reversioners becomes a tenant in common with the other reversioners.⁶ When a *feme couverte* joined with her husband and other tenants in common in conveying the common estate by a deed which was ineffectual to convey more than a mere color of title, a tenancy in common was created between her and the grantee.⁷

(c) *Other Modes.*—Where several parties redeem land, they are tenants in common, the several interest being in proportion to the amount of redemption money paid by each,⁸ and where executions are levied upon land by two creditors at the same time, each acquires title to an undivided moiety of the land and a tenancy in common of the whole is created between them.⁹ Any act which destroys an estate in joint tenancy or coparcenary without destroying the unity of possession will create a tenancy in common,¹⁰ as a sale by

1. Allison v. Kurtz, 2 Watts. (Pa.) 185.

2. Parker v. Vick, 2 Dev. & B. (N. Car.) L. 195.

3. Adams v. Frothingham, 3 Mass. 352; Andrews v. Boyd, 5 Me. 199.

When a deed conveys a certain number of acres without describing the land conveyed, to be taken out of a larger tract described, the grantee becomes, by his deed, a tenant in common having a fractional interest represented by a fraction having for its denominator a number equal to the number of acres in the larger tract described, and for its numerator a number equal to the number of acres conveyed. The grantee acquires such fractional interest in every acre of the larger tract. Wallace v. Miller, 52 Cal. 655.

4. Wheeler v. Ladd, 40 Ark. 108.

5. Wheeler v. Carpenter, 107 Pa. St. 271.

6. Liscomb v. Root, 8 Pick. (Mass.) 376.

7. Cloud v. Webb, 3 Dev. (N. Car.) L. 317, 4 Dev. (N. Car.) L. 290.

8. Hoffman v. Lyons, 5 Lea (Tenn.) 377.

When land belonging equally to two tenants in common is bought under partition proceedings by one of them, on their joint account, no consideration passing, and the expenses of partition being made by both, the other has in equity an equal right with the purchaser in the land. Paul v. Fulton, 25 Mo. 156.

9. Shove v. Dow, 13 Mass. 529; Cutting v. Richwood, 2 Pick. (Mass.) 443; Wiswell v. Wilkin, 5 Vt. 87.

When a firm sued on notes given for property sold to two persons one of whom was adjudged bankrupt pending suit, and judgment was had against the other, and the proceeds of the property sold under a *f. fa.* were, by agreement, to be distributed just as the property would have been divided had the proper steps been taken to arrest the sale,—*held*, that the judgment creditors should take one half, and the assignee of the bankrupt the other. Jenkins v. Atwater, 61 Ga. 291.

10. See 1 Brown & Had. Com. (Wait's ed.) 651.

one of his share,¹ or an exchange of the subject of the tenancy.²

In cases of contracts between the owner and cultivator of the land for a division of the crops, a tenancy in common therein is created, at least until their shares are separated and severed,³ and a mortgage executed by one of them on his share of the crop creates a tenancy in common between the owner, the culti-

1. *Coleman v. Lane*, 26 Ga. 515.

2. Where joint owners of a mill sold the same, receiving a slave as the consideration,—*held*, that they became tenants in common of the slave, the community of interests being dissolved by the sale. *Cheek v. Wheatley*, 3 Sneed (Tenn.) 484.

A, B and C were interested as the principal *cestuis que trust* in a deed of trust of slaves, for the payment of debts in which A was the trustee; and, by an agreement between the three, B, at a public sale, bid off the slaves, for the benefit of the three. *Held*, that by this sale the legal title vested in all, as tenants in common. *Pitt v. Petway*, 12 Ired. (N. Car.) L. 69.

Dissolution of Partnership.—A and B were tenants in common of lands, carrying on the farming business in partnership, and A sold and transferred his moiety of the lands. *Held*, that the partnership was dissolved by such transfer, and that the grantee became a tenant in common with B, in the partnership property, taking the undivided share of his grantor, subject to all the rights of A, and to the account to be taken between the original parties. *Mumford v. McKay*, 8 Wend. (N. Y.) 442.

Parol Agreement.—A grant of land was made by the State of Virginia in 1782, to A and B, as joint tenants. A died before the patent issued. *Held*, that the whole estate is vested in B, but that the devisee of A was entitled to a division on proving a parol agreement between A and B to divide the land, and two surveys of each half of the land made in pursuance of the agreement, one of which was assigned to A, as such agreement was made before the passage of the statute of frauds. *Overton v. Lacy*, 6 T. B. Mon. (Ky.) 13.

3. *Williams v. Nolen*, 34 Ala. 167; *Strother v. Butler*, 17 Ala. 733; *Knox v. Marshall*, 19 Cal. 617; *Bernal v. Hovious*, 17 Cal. 541; *Walker v. Fitts*, 24 Pick. (Mass.) 191; *Carr v. Dodge*, 40 N. H. 403; *Putnam v. Wise*, 1 Hill (N. Y.) 234; *Hurd v. Darling*, 14 W. 214; *Beezley v. Crossen*, 14 Oreg. 473.

Where one who rents land on shares agrees with a third person that if the latter will help sow and harvest the grain he shall have one half of the tenant's portion, they thereby become tenants in common of the grain, and not partners. *Sims v. Dame*, (Ind.) 15 N. E. Rep. 217.

Defendant let a farm on shares to plaintiff, who was authorized to make sales of the crops for the benefit of both parties. *Held*, that they were tenants in common of the crops, and plaintiff could not recover from defendant, who had taken less than his share of a quantity of oats and appropriated it to his own use. *Connell v. Richmond* (Conn.), 11 Atl. Rep. 852.

T agreed to let a farm to H "to work on shares" for one year. T was to furnish three working teams, the farming utensils, etc., one half the seed and to stock the farm, and H was to cultivate the land. T also agreed to account to and to pay H "the value of the one half of all the grain, butter and net proceeds of the sheep, hogs and cattle that might be produced from the premises." *Held*, that the parties were tenants in common of a crop of corn raised by H under this agreement. *Tanner v. Hills*, 44 Barb. (N. Y.) 428.

But in *Minnesota*, the owner of a farm employed another to till and carry on his farm, and for compensation agreed to allow him one half of all the grain raised, deducting advances and other claims. *Held*, a contract of hiring, and that the employee was not a part owner of such grain. *Porter v. Chandler*, 27 Minn. 301; s. c., 38 Am. Rep. 293.

Assignment of Interest in Farming Contract.—A rented a farm from B upon the following terms: A was to give B one half of everything that was made; A was to carry all the crops to market and to pay B one half the proceeds after sale. Under this contract A made a crop of tobacco and assigned in writing all his interest therein to C, who was to have the crop prepared for market and sold, and to pay over to B one half of the net proceeds. The to-

vator and the mortgagee.¹ This rule applies also to agreements whereby one party furnishes money to another for any construction or manufacture upon the understanding that he is to have a share in the completed article.²

Where a steam engine is erected as a fixture upon the land of one at the joint expense of himself and others under an agreement to use the same as a common source of power without limitation as to time, the ownership is held to be in common.³

When goods of different owners become by accident or by agreement so mixed together as to be undistinguishable, a tenancy in common is created between the several owners, in the whole of the goods, each owning in proportion to the amount contributed by him;⁴ but where the commingling of the goods is caused by the fault of one the parties, as when a special agent mingles his own property with that of his principal, a tenancy in common will not result.⁵

III. WHAT MAY BE HELD IN COMMON.—Joint tenancies and tenancies in common are usually treated in the books as applicable to lands and tenements, but there may be such tenancies of chattels personal as well as real.⁶ And there may be a tenancy in common of an inchoate as well as of a perfect right.⁷ As to lands, there may be a joint tenancy whether the estate be in fee for life, for years, at will or in remainder;⁸ but while there may be a tenancy in common in a right or title to land, there can be none in a mere actual possession unless all the cotenants are actually occupying the land.⁹

All kinds of chattels of whatever nature may be held by two or more persons in joint tenancy.¹⁰ Thus there may be a joint

tenancy continues, although the identity of the entire mass in store may be changed by continued additions and subtractions. [ROTHROCK and BECK, JJ., dissenting]. *Sexton v. Graham*, 53 Iowa 181.

bacco was left in possession of B's agent, and A retained possession of no part thereof after the execution of his agreement with C. *Held*, that the contract between A and B created the relation of landlord and tenant; that it vested in each a joint interest in the crop; that the sale of C if effectual, could only constitute him a tenant in common with A, and that C could not maintain replevin against A. *Ferrall v. Kent*, 4 Gill (Md.) 209.

1. *Smith v. Rice*, 56 Ala. 417.

2. *White v. Brooks*, 43 N. H. 402; *Beaumont v. Crane*, 14 Mass. 400.

3. *Hill v. Hill*, 43 Pa. St. 521.

4. *Spence v. Union M. Ins. Co.*, 3 L. R., C. P. (Eng.) 427; 18 L. T. 632; 16 W. R. 1010.

Storing in Warehouses.—Where several parties store grain in a warehouse, with the understanding that it may be mixed with grain of like quality, they become tenants in common of the entire amount so mixed, though it may occupy a number of separate bins, and such

tenancy continues, although the identity of the entire mass in store may be changed by continued additions and subtractions. [ROTHROCK and BECK, JJ., dissenting]. *Sexton v. Graham*, 53 Iowa 181.

Where a warehouseman without special agreement, but according to custom, mixed the grain of several depositors in a common mass, *held*, that they became tenants in common of the entire amount of like quality, and for the negligent destruction of the same could each recover the value of his grain. *Arthur v. Chicago R. I. etc. R. Co.*, 61 Iowa 648.

5. *Hall v. Page*, 4 Ga. 428.

6. 4 Wait's Act. and Def. 173.

7. *Wilkins v. Burton*, 5 Vt. 76; and see *Lillianskyoldt v. Goss*, 2 Utah 292.

8. *Washb. Real Prop.* (5th ed.) 407.

9. *Lillianskyoldt v. Goss*, 2 Utah 292.

10. 2 Wait's Act. & Def. 246; Litt. § 281, 282; *Sessions v. Peay*, 19 Ark. 269; *Trammell v. Harrell*, 4 Ark. 602.

tenancy in stock,¹ in farm and other produce,² in patent rights,³ in a promissory note,⁴ in a lease for years,⁵ or in a legacy,⁶ and in general every species of chattels capable of being held in joint tenancy, may be owned in common.⁷ Whatever may be subject to undivided dominion by virtue of the law of sole ownership is likewise susceptible of being made subject to joint dominion.⁸

IV. WHO ARE JOINT TENANTS OR TENANTS IN COMMON—1. Joint Tenants.—The well known distinctive characteristic of joint tenancy is the right of survivorship, by which, though the estate is limited to the tenants and their heirs, the survivor or survivors take the entire estate to the exclusion of the heirs or representatives of a deceased cotenant.⁹ Two corporations, therefore, cannot hold lands or other property as joint tenants, for, being each perpetual, there can be no survivorship between them;¹⁰ nor can a corporation be a joint tenant with a natural person, since there is no reciprocity of survivorship between them,¹¹ but all natural persons may, of course, be joint tenants with each other.¹²

As a general rule, cotrustees are joint tenants,¹³ and are always so where their joint action is contemplated, or where such a tenancy is necessary for the execution of their trust.¹⁴

Where an estate vests in a husband and wife either by conveyance or descent, they do not stand as ordinary joint tenants to each other owing to their legal unity, but are seised of the estate by entireties and not by moieties,¹⁵ and, therefore, though the

1. 2 Kent's Com. (13th ed.) 350.

2. *Lowe v. Miller*, 3 Gratt. (Va.) 205.

3. *Pitts v. Hall*, 3 Blatchf. (U. S.) 201.

4. *People's Bank v. Keech*, 26 Md. 521.

5. *Taylor's L. & T.*, § 114. *Gilbert v. Richards*, 7 Vt. 203.

6. *Armstrong v. Armstrong*, L. R., 7 Eq. (Eng.) 518; *Campbell v. Campbell*, 4 Bro. C. C. (Eng.) 15. And see *Crocker v. Carson*, 33 Me. 436; *Ward v. Ward*, 6 Ch. (Eng.) 789; *Ive v. King*, 16 Beav. (Eng.) 46.

7. 2 Wait's Act. & Def. 247.

8. *Freem. Part.*, § 16.

9. *Washb. Real Prop.* (5th ed.) 407.

The interest of two joint tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint tenancy instantly ceases. But while it continues each of two joint tenants has a concurrent interest in the whole; and thereupon, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally

had is clearly not divested by the death of his companion; and no other person can now claim to have a joint estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can anyone claim a separate interest in any part of the tenements, for that would be to deprive the survivor of the right which he had in all and every part, as therefore, the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein, it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it may be) that was created by the original grant. 2 Black. Com. (Chase's ed.) 183.

10. *De Witt v. San Francisco*, 2 Cal. 289.

11. *De Witt v. San Francisco*, 2 Cal. 289; *Aug. & Ames on Corp.*, § 185.

12. 4 Wait's Act. and Def. 170.

13. *Franklin Savings Trust v. People's Savings Bank*, 14 R. I. 632.

14. *Perry on Trusts*, section 136.

15. *Gillan v. Dixon*, 65 Pa. St. 395.

husband is entitled to rents and profits during coverture, he cannot dispose of the inheritance or any part thereof without his wife's concurrence,¹ and, on the death of either, the whole goes to the survivor.² But a properly worded conveyance to a husband and wife made for that express purpose will vest in them a joint tenancy,³ and in *Connecticut*, where land is given to husband and wife, they take as joint tenants, and a conveyance by the husband of his interest alone is valid and effectual.⁴ It would seem that the statutes declaring all estate tenancies in common unless a different intention is expressly set forth in the deed creating the estate, does not apply to an estate granted to husband and wife,⁵ or to estates by the entirety.⁶ Nor does it apply to personal property.⁷

Infants may be joint tenants,⁸ and a child becomes at its birth a joint tenant with its mother of lands which the latter holds in special tail.⁹

2. Tenants in Common.—All natural persons capable of holding property may, of course, be tenants in common, and corporations may hold as such either with other corporations,¹⁰ or with natural persons,¹¹ while the officers or stockholders of a corporation may be construed to be tenants in common of lands which the corporation itself is not authorized by law to hold.¹² A deed to two

1. *Wales v. Coffin*, 13 Allen (Mass.) 213; *Hemingway v. Scales*, 42 Miss. 1; s. c., 2 Am. Rep. 586; *Thomas v. De Baum*, 1 McCart. (N. J.) 37; *Beach v. Hollister*, 5 Mt. S. (T. & C.) 568; s. c., 3 Hun 519; *Bates v. Seely*, 46 Pa. St. 248; *Stuckey v. Keefe's Exrs.*, 26 Pa. St. 397.

2. *Stuckey v. Keefe's Exrs.*, 26 Pa. St. 397.

3. A and wife conveyed to B, "for the purpose of creating a joint tenancy in A and his wife in all their property." B immediately reconveyed to A and wife "as joint tenants, and not as tenants in common, the survivor of them, and the heirs, personal representatives and assigns of such survivor." *Held*, that A and wife were joint tenants, and the husband's interest could be seized and sold on execution during the wife's life. *Fladung v. Rose*, 58 Md. 13.

4. *Benedict v. Gaylord*, 11 Conn. 332.

5. *Den. v. Hardenburgh*, 10 N. J. L. (5 Halst.) 42.

6. *Thomas v. De Baum*, 14 N. J. Eq. (1 McCart.) 37.

7. *Putnam v. Putnam*, 4 Bradf. (N. J.) 308.

8. *Bac. Abr.* (Joint Tenants, B.)

9. *Powell v. Powell*, 5 Bush (Ky.) 619.

Evidence of Joint Tenancy.—Upon an

issue whether the occupants of land are or are not joint tenants of the premises, conveyances of the same to them under which they claim, are competent evidence as having a tendency to show the character and extent of the occupation. *Tappan v. Tappan*, 31 N. H. (11 Frost) 41.

10. *DeWitt v. San Francisco*, 2 Cal. 289. And see *New York etc. Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412.

11. *Telfair v. Howe*, 3 Rich. (S. Car.) Eq. 235; *Aug. & Ames on Corp.*, § 185.

12. A deed of land to a voluntary unincorporated association, which is well known, and all the members of which may be ascertained, but which is not one of the class authorized by *Massachusetts Gen. Stat.*, ch. 30, § 24, to take and hold real estate, may be construed as a grant to those who are properly described by the title used in the deed; and such persons are tenants in common of the land conveyed. *Bamy v. Bickford*, 140 Mass. 31.

The stockholders in the *North River Steamboat Co.* are tenants in common, and not copartners. *Livingston v. Lynch*, 4 Johns. (N. Y.) 573.

In the case of the lands in Vermont, held under the *New Hampshire* charters, so called, the rights in such lands,

or more as tenants in common, of course, makes them such,¹ And under the statutes of most of the United States any conveyance to two or more persons will make them tenants in common unless a contrary intuition is expressed therein.²

Tenants in common of a mortgage term joining in the purchase of the equity of redemption in fee become tenants in common of the inheritance.³ So where several persons acquire rights in

reserved by the charters to the governor of New Hampshire, are holden in severalty, and not in common with the charter proprietors. *Wentworth v. Strong*, 1 Tyler (Vt.) 191.

1. See *Johnson v. Hart*, 6 Watts & S. (Pa.) 319; *Preston v. Robinson*, 24 Vt. 583.

Where a *feme couverte*, an infant, and a tenant in common, joined with her husband and the other tenants in common, in conveying the common estate, by a deed which was inefficient except to convey a color of title, she and the vendee became tenants in common. *Cloud v. Webb*, 3 Dev. (N. Car.) L. 317; 4 Dev. (N. Car.) L. 290.

One claiming the whole of certain land joined with other claimants in a trust deed, providing that each should have such interest in a stock company as they had in the property. *Held*, that at most this made them tenants in common, not partners. *Hungerford v. Cushing*, 8 Wis. 332.

A reservation in a deed of land of "all the pine timber fit for sawing" makes the grantor a tenant in common with the grantees, and gives him a right to select the timber and judge of its fitness for that purpose. *Wheeler v. Carpenter*, 107 Pa. St. 271.

A and B contracted in writing to purchase a piece of land and erect a steam saw mill thereon, to hold the property jointly, to share equally in the expense and profits, "whether by sale or leasing the same." *Held*, that they were tenants in common, and not partners. *Farrand v. Gleason*, 56 Vt. 633.

Bequest.—A bequest directing that the proceeds of the sale of lands, etc., should be equally divided between testator's brother A and his brother B's children. *Held*, that A took as tenant in common, and no more, with each of the children of B. *Maddox v. State*, 4 Har. & J. (Md.) 436.

Where a testator devised a portion of his land to each of two sons, and directed the residue to be sold and the proceeds divided between others. *Held*, that the two sons might be regarded as

tenants in common with those claiming the residue; and that the court might properly call to its aid commissioners to make partition of the testator's lands. *Harvey v. Harvey*, 72 N. Car. 570.

Right of Selection.—A clause added to a devise of a fractional part of a certain tract of land, that is to be taken by the devisee, when he shall choose or select, at its just or proportionate value, does not constitute a condition precedent to the vesting of the estate devised, but the devisee, on the death of the devisor, becomes tenant in common, with a right of selection, to be exercised or not at his will. *Brown v. Bailey*, 1 Metc. (Mass.) 254.

A testator, by his will, appointed A and B his executors and trustees, and after providing a fund for the payment of his debts and legacies, and all legacy duties, gave his residuary estate to his trustees for their absolute use and benefit. By a codicil he appointed C an additional executor and trustee of his will, and declared that the residuary bequest should be read as if the names of A, B and C were inserted instead of the names of A and B, "so that C should participate in such bequest, free from legacy duty, with A and B." A died before the testator. *Held* (affirming the decision of *STUART, V. C.*), that the effect of the codicil was to make A, B and C tenants in common of the residue, and that A's share lapsed to the next of kin. *Robertson v. Fraser*, 6 Ch. (Eng.) 696.

2. *Nicholson v. Caress*, 45 Ind. 479; *Stevenson v. Cofferin*, 20 N. H. 150; *Boston etc. Co. v. Condit*, 19 N. J. Eq. 394; *Thomas v. DeBaum*, 14 N. J. Eq. (1 McCart.) 37; *Den v. Hardenburg*, 10 N. J. L. (5 Halst.) 42.

3. *Aveling v. Knipe*, 19 Ves. (Eng.) 441.

Redemption of Lands.—Where several parties redeem land they are tenants in common, the interest of each being in proportion to the amount of purchase money paid by him. *Hoffman v. Lyons*, 5 Lea (Tenn.) 377.

Levy Under Execution.—Where exe-

a property from different sources they will likewise become tenants in common,¹ and where a stranger purchases the interest of one tenant he becomes a tenant in common with the rest,² but not so where his purchase was of the whole property.³ Likewise

cutions were levied upon land by two creditors at the same time, each acquired by levy, a title to an undivided moiety of the land, which they could hold as tenants in common. *Shove v. Dorr*, 13 Mass. 529; *Cutting v. Rockwood*, 2 Pick. (Mass.) 443.

Levy of extents, each on an undivided moiety, creates a tenancy in common of the whole. *Wiswell v. Wilkins*, 5 Vt. 87.

1. *Coleman v. Lane*, 26 Ga. 515.

A tenant of land claiming under a tenant in common, adversely to other tenants in common, will, in respect to rents and profits, be treated as a tenant in common with the latter. *Ruffners' v. Lewis*, 7 Leigh (Va.) 720.

Where a widow executed a mortgage upon the homestead and other property which was a lien upon the share inherited by her from a deceased child, and the mortgage was foreclosed, the purchaser at the mortgage sale thereby became a tenant in common with the other heirs, and could not thereafter acquire a tax title to the prejudice of his cotenants, and an intervenor who held such interests by a quit claim deed would have no greater rights, and could not complain of the order allowing the heirs to redeem from the tax title by paying the amount necessary therefor with six per cent. interest thereon. *Conn v. Conn*, 58 Iowa 747.

Where one was tenant for years of a spring under a lease not recorded, and another purchased one half of the land in which the spring was, with notice of the encumbrance, and subsequently purchased the other half with notice, they were *held* to be tenants in common of the spring while the term continued. *Herbert v. Odlin*, 40 N. H. 267.

2. G and S, tenants in common, made a perpetual lease to W. S conveyed his interest to A and W assigned his interest in one undivided moiety to A. *Held*, that A became a tenant in common with G, with all the right of property vested in him that was vested in S at the date of the lease. *Spencer v. Austin*, 38 Vt. 258.

Where a town was originally laid out in lots, all except eight of which were allotted to individual proprietors, who

owned the remainder in common, those who have succeeded to their rights are tenants in common of the lands which were unappropriated; and one of such owners cannot maintain trespass q. c. or trover against his cotenant for entering on and removing timber from such lands. *Kane's Admr. v. Garfield's Admr.* (Vt.), 13 Atl. Rep. 800.

P and W owned certain property as tenants in common. They jointly executed a mortgage thereon to N to secure the payment of eleven bonds of \$2,000 and one of \$4,000. N assigned nine of the \$2,000 bonds to C and guaranteed their payment. About the same time N borrowed money of D and gave the \$4,000 bond as collateral security. N failed to pay D and the latter transferred the \$4,000 bond to E. After the obligors had paid and taken up two of the \$2,000 bonds, W conveyed his undivided one half of the property to N. The deed contained a covenant of N by which he agreed to assume and pay the balance due on said mortgage and to save harmless W, his heirs, executors and administrators from the payment of the same or any part thereof. Afterwards N procured a reassignment of the seven bonds from C and transferred them to other parties. *Held*, that by the conveyance by W of his interest in the land to N, the latter became a tenant in common with P, and when N paid and took up the bonds secured by the mortgage, which he and P were jointly obligated to pay, he thereby acquired the right to collect one half thereof out of the estate of P, and was entitled to all the securities and all the remedies given by the mortgage, and that by the assignments of the bonds these remedies passed to his assignees. *Watson's Appeal*, 90 Pa. St. 426.

3. If one tenant in common sells and conveys to a stranger, without the knowledge and consent of his cotenant, the entirety or undivided moiety of a portion of the land defined by boundaries, such sale and conveyance does not make such stranger a cotenant in the lot purchased with the other cotenant in the entire tract, so as to give an absolute right to have a portion of it assigned to

any occupation of land by two or more persons as a general rule constitutes such persons tenants in common,¹ as well as any rights in or growing out of any lands or tenements be the same corporeal or incorporeal.²

Ship owners are tenants in common of the vessel,³ and they may also be such of the cargo;⁴ so two or more persons may

him. *Bogges v. Meredith*, 16 W. Va. 1.

1. Persons occupying vacant land in mixed possession prior to the *Delaware* act, 1843, become tenants in common under that act. *Tubbs v. Lynch*, 4 Harr. (Del.) 521.

The lease of a church pew in perpetuity makes the lessees tenants in common of realty. *St. Paul's Church v. Ford*, 34 Barb. (N. Y.) 16.

Evidence of Possession.—On the question of whether one is in fact a tenant in common of land, the fact that he cultivated it as long as it was fit for cultivation, and then grazed cattle on it and let it out for shooting purpose; *held*, evidence of possession. *Baum v. Currituck Shooting Club*, 96 N. Car. 310.

2. **Water Rights.**—Different persons appropriating waters of a stream for purposes of irrigation and domestic uses under certain general regulations prescribed by the water commissioners, as to the time and manner of appropriation, *held* tenants in common, so that each might maintain an action to enjoin a trespasser from diverting any of the water so appropriated. *Lytle Creek Water Co. v. Perdew*, 65 Cal. 447.

Mining Right.—Two persons owned together real estate, including certain coal banks. They chose parties to part and allot the real estate, agreeing that the ore banks should remain together and undivided as a tenancy in common for the reason that the extent and limit of the ore could not be ascertained, and partition could not be made without working injustice to some of the parties. In amicable actions to carry out the partition, the court adjudged that the "ore banks do still remain undivided, to be held by" the parties "as tenants in common, according to their respective shares." *Held*, that the parties and their successors were tenants in common of the ore banks; and that the plaintiffs were not concluded from asserting this because of a judgment in a county court on a plea of *non tenent insimul* in action of partition be-

tween the same parties for the same ore banks. *Coleman's Appeal*, 62 Pa. St. 252.

3. Ship owners are tenants in common of the vessel and not joint tenants or partners, and the share of one owner is not subject to a general balance of accounts between the owners. *Nicoll v. Mumford*, 4 Johns. (N. Y.) 522.

Where several signed a contract agreeing to take an interest in a voyage, and a vessel was purchased and fitted out by their agents, the associate signers of the contract were tenants in common, and not partners. *French v. Price*, 24 Pick. (Mass.) 13.

Part owners of a steamboat are generally to be considered as tenants in common, and not as joint owners or special partners; and an action on the case will lie against one owner, by the other, to recover his proportion of the damages assessed by a verdict, in an action of trespass brought by the owners against the sheriff for a tortious taking and detaining of the boat, where the judgment on the verdict has been arrested in consequence of one of the owners having executed a release of damages after verdict. *Knox v. Campbell*, 1 Pa. St. 366.

4. The firm of A and B owned one fourth of a ship; and the firm of C and D owned the remaining three fourths. The ship was sent with a cargo owned in like proportions, and instructions, signed by all the owners, were given to the master to sell the cargo, to remit the balance in the proportions owned by the parties on their several accounts. The sales fell short, and the master drew on C and D for the amount of the deficiency and consigned the return cargo to them; and, in compliance with their request, it was shipped to the port where C and D resided and received by them. The assignees of A and B brought a bill against C and D. *Held*, that the master had no right to consign the return cargo to C and D and that C and D had no lien thereon for other demands against A and B nor against a new firm formed between A, B and C. Nor could such debts be set off against the

be tenants in common of live stock and farming utensils,¹ of a slave,² or of a right to compensation for services.³

Where, however, the interests of several persons in the same piece of property are so distinct as to be distinguishable and separable, they are not tenants in common,⁴ and where one person owns or occupies or possesses a distinct right or privilege in the land of another, he is not a tenant in common of the land with that other, the title to the land remaining in the original owner.⁵ So where two applicants for surveys have their lands returned in a body without division lines, they are not tenants in common, as to each other, their rights are merely suspended until the division line is run,⁶ and parties whose title has proved

plaintiff's claim. *Jackson v. Robinson*, 3 Mass. 138.

Property given to two as owners of a ship, belongs to them as tenants in common, and not as partners. *Thorn-dike v. De Wolf*, 6 Pick. (Mass.) 120.

1. *Abernathy v. Smith*, 57 Ala. 359.

2. *Tibbons v. Riley*, 7 Gill (Md.) 81.

If two persons buy a horse, each paying one half of the purchase money, under an agreement that either of them having possession of the horse shall provide for his keeping without cost to the other, and that each shall offer the horse for sale and endeavor to procure a purchaser at a profit over his cost, but that neither shall sell the horse without the concurrence of the other, they are tenants in common of the horse, and not partners; and if a third person sells the horse by authority of one of them and without the knowledge or consent of the other, paying to the one who authorized the sale, and not accounting to the other, it is a conversion of the latter's interest, for which an action will lie against both wrongdoers. *Goell v. Morse*, 126 Mass. 480.

3. **Swampland commissioners**, appointed to locate the swamp land, to procure from the State patents for the same and to receive for their services twenty per cent. of the amount realized by the State on a subsequent sale of the lands, *held* not to be partners *inter se* in reference to their compensation, but rather tenants in common. *Powell v. Jones*, 72 Ala. 392.

4. Where land bounded on a river is willed in distinct tracts to three, and each takes a separate portion as described, they are not tenants in common. *Fleming v. Kerr*, 10 Watts (Pa.) 444.

A deed for one third of a tract of land, describing the part conveyed so that a surveyor could designate it, does

not make the grantee a tenant in common with the grantor. *Wheeler v. Ladd*, 40 Ark. 108.

Where the directors of the Fire Land Company in Ohio made separate and successive allotments of sections of lands to satisfy claims annexing to each to equalize their value, a certain number of acres, whose location was pointed out in a fraction supposed to contain a certain quantity equal to the sum of the annexations with the intention of giving claimants distinct rights, *held*, that they were not tenants in common so as to be entitled to claim a portion and share of a surplus on the fraction over the supposed quantity. *Lockwood v. Mills*, 3 Ohio 21.

5. If it is agreed that one of two persons shall furnish land upon which certain works shall be erected, to be owned by them in common, both do not thereby become tenants in common of the land. *Hurd v. Cushing*, 7 Pick. (Mass.) 169.

A privilege reserved to a person, in a dwelling house for a particular purpose, and for a limited time, does not constitute him tenant in common of the estate. *Abbott v. Wood*, 13 Me. 115.

House on Another's Land.—If the owner of land build a house partly on his own land and partly on land adjoining under an agreement between the owners that he shall repay himself the cost of the rent, they are not tenants in common of the house, but the title follows the title to the land. *McAdam v. Orr*, 4 Watts & S. (Pa.) 550.

Renting Rooms.—Where certain rooms in a house are assigned to a tenant for life, and the reversion in these belongs, with the rest of the house, to another, the parties are not tenants in common. *Wiggins v. Wiggins*, 43 N. H. 561.

6. *Ross v. M'Junkin*, 14 Serg. & R. (Pa.) 364.

worthless are not so far tenants in common as to prevent either from acquiring an outstanding title to the whole property.¹

A husband and wife may both together be one tenant in common;² but in *Maryland* children are not tenants in common, but coparceners.³

An agreement on the part of a person to cultivate land belonging to another for a specific portion of the crops thereof constitutes the owner and the cultivator tenants in common of the crops, and either party may sell or mortgage his portion thereof;⁴ and where the owner of sheep leases them, the lessee to deliver the wool to the lessor, who is to sell it, paying one half the proceeds to the lessee, they are tenants in common of the wool, and the lessee's interest is attachable.⁵ So the accidental mixture of goods in such manner as to be undistinguishable makes their owners tenants in common.⁶

A widow entitled to dower is not a tenant in common with the children of the deceased owner of the land until the assignment

1. *Roberts v. Thorn*, 25 Tex. 728.

2. *Johnson v. Hart*, 6 Watts & S. (Pa.) 319.

3. *Hoffer v. Dement*, 5 Gill (Md.) 132.

4. *Smith v. Rice*, 56 Ala. 417; *Williams v. Nolen*, 34 Ala. 167; *Gafford v. Stearns*, 51 Ala. 434; *Strother v. Butler*, 17 Ala. 733; *Knox v. Marshall*, 19 Cal. 617; *Hall v. Page*, 4 Ga. 428; *Walker v. Fitts*, 24 Pick. (Mass.) 191; *Carr v. Dodge*, 40 N. H. 403; *Putnam v. Wise*, 1 Hill (N. Y.) 234; *Hurd v. Darling*, 14 Vt. 214; *Bernal v. Hovious*, 17 Cal. 541. But see *Paimer v. Hills*, 48 N. Y. 662. Though in *North Carolina* they are held to be joint tenants. *Moore v. Spruill*, 13 Ired. (N. Car.) L. 55.

The *Alabama* code, §§ 3474, 3475, giving persons farming on shares each a lien on the share of the other in the crops jointly raised, held not to abolish the relation of tenants in common in such cases. *Collier v. Faulk*, 69 Ala. 58; *Holcombe v. State*, 69 Ala. 218; *McCall v. State*, 69 Ala. 227.

Two or more persons hiring land by an instrument under seal and agreeing to pay rent in a certain proportion of the crop are held to be tenants in common, not partners of the crop, until a division is made. *Putnam v. Wise*, 1 Hill (N. Y.) 234.

The defendant entered into a contract with A in writing, not under seal, by which he agreed "to let" to A, a certain farm, to commence on the 1st of April, 1842, and continue from year to year for the term of five years, or so long as the parties should agree and be

satisfied, reserving to either party the right to terminate the contract by giving one month's notice in writing, the produce of the farm "to be equally divided by weight and measure between the parties. Held, that, although this gave to A an interest in the land, and a right to occupy it without molestation from the defendant, while he continued in the performance of the contract, yet that it did not constitute a lease of the farm, but that A was *quasi* tenant at will while the contract continued in force, and that the defendant and A were tenants in common of the growing crops, and of the produce of the farm before severance. *Aiken v. Smith*, 21 Vt. 172.

But in *North Carolina* it was held that where A raised a certain quantity of tobacco on the land of B, and for his labor in relation to it he was to have one sixth, and A, as the agent of B, made a contract for the sale of the tobacco to C, A was not a tenant in common with B, as to one sixth of the tobacco, and had no property in it, or lien on it, and, therefore that C could not maintain an action against A, as principal, for a breach of the contract, even as to one sixth. *Cole v. Hester*, 9 Ired. (N. Car.) L. 23.

5. *Beezley v. Crossen*, 14 Oreg. 473.

6. *Arthur v. Chicago R. I. etc. R. Co.*, 61 Iowa 648; *Sexton v. Graham*, 53 Iowa 181; *Spruce v. Union Marine Ins. Co.*, 3 L. R., C. P. (Eng.) 427; 37 L. J., C. P. 169; 18 L. T. 632; 16 W. R. 1010.

to her;¹ but under the *Indiana* statute she would be tenant in common until objection was made by them;² and her possession as dowress and guardian in socage for the minor heirs makes her a tenant in common.³ Where she has by partition obtained her one fifth of her husband's estate in severalty, she still remains a tenant in common with the heirs of the remaining four fifths, subject to the husband's debts.⁴

V. NATURE AND INCIDENTS—1. Joint Tenancy.—In a joint tenancy there must be a unity of interest, of title, of time, and of possession, or, in other words, joint tenants have one and the same interest accruing by one and the same conveyance commencing at one and the same time and held by one and the same undivided possession.⁵

By unity of interest it is meant that one tenant cannot hold in fee while another holds for life, or that one cannot hold for years and another at will, etc., but that the estate of each must be alike.⁶ By unity of title is meant that the estate of each must have been created by the same act, be the same lawful, as by conveyance, or unlawful, as by disseisin.⁷ By unity of time it is meant that their estates must have vested at one and the same period,⁸ but in cases of uses and devises there is an exception to this rule, two or more joint tenants being permitted to take their shares at different times;⁹ and by unity of possession it is meant that each must be seised *per my et per tout*, by the half or moiety

1. *Grossman v. Lauber*, 29 Ind. 618; *Jackson v. O'Donaghy*, 7 Johns. (N. Y.) 249; *Ex parte Burgess*, 1 Del. Ch. 233.

2. *Cent. & Abing. Turnpike Co. v. Jarrett*, 4 Ind. 213.

3. *Knolls v. Barnhart*, 71 N. Y. 474. An intestate left a widow and eight children. The widow had possession of the farm as guardian of her minor children, and let it on shares to the plaintiff. Afterwards all the heirs' interest was conveyed to the defendant. *Held*, that he was a tenant in common of the crops with the plaintiff, and not liable in trespass to him for carrying them away. *Otis v. Thompson, Hill & D.* (N. Y.) Supp. 131.

One in possession under a tenant in dower, holding over after her death, and purchasing the shares of some of the reversioners, is a tenant in common and entitled to partition. *Liscomb v. Root*, 8 Pick. (Mass.) 376.

4. *Kidwell v. Kidwell*, 84 Ind. 224.

5. 2 Black. Com. (Chase's ed.) 180.

6. See 2 Black. Com. (Chase's ed.) 181.

If land be granted to A and B for their lives and to the heirs of A, here

A and B are joint tenants of the freehold during their respective lives and A has the remainder of the fee in severalty; and if land be given to A and B, and the heirs of the body of A, here both have a joint estate for life, and A hath a several remainder in tail. 2 Black. Com. (Chase's ed.) 181.

7. 2 Black. Com. (Chase's ed.) 181; and see *Sechel v. Engle*, 2 Rawle (Pa.) 68; *Craig v. Tavior*, 6 B. Mon. (Ky.) 457; *Young v. De Bruhl*, 11 Rich. (S. Car.) L. 638; *Reed v. Spicer*, 27 Cal. 57; *Welch v. Sackett*, 12 Wis. 243; *Adams v. Frothingham*, 3 Mass. 352.

8. 2 Black. Com. (Chase's ed.) 181.

9. 1 Washb. Real Prop. (5th ed.) 407.

Where a feoffment was made to the use of a man and such wife as he should afterwards marry, for the time of their lives, and he afterwards married; in this case it seems to have been *held* that the husband and wife had a joint estate, though vested at different times; because the use of the wife's estate was in abeyance and dormant until the intermarriage; and being then awakened had relation back and took effect from the original time of creation. 2 Black. Com. (Chase's ed.) 182.

and by all; that is, each of them has the entire possession, as well of every parcel as of the whole.¹

From these unities arises the doctrine of survivorship, and that the entry and possession of one is the entry and possession of all.

(a) *Survivorship*.—Where two or more persons have an estate in joint tenancy in any subject of property, each having a concurrent interest and title in and to the whole, and each being in possession of the whole, if one or more of them dies, the entire tenancy remains to the survivor or survivors, and he is, or they are, thereupon entitled to the whole estate.²

This right of survivorship is not, however, favored in equity,³ and the policy of American law is opposed to it, the rule of survivorship having been abolished except in cases of joint trustees in many of the States;⁴ though it would seem that even though

1. 2 Black. Com. (Chase's ed.) 182.

They have not one of them a seisin or moiety and the other of the other moiety; neither can one be exclusively seized of one acre and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. 2 Black. Com. (Chase's ed.) 182.

2. See Black. Com. (Chase's ed.) 183.

The survivor in a joint tenancy takes the whole, unless there was a severance, and a partition fence run through the middle of land held by joint tenant will not make a severance. *Haughbaugh v. Honald, Treadw.* (S. Car.) Const. 90.

In *South Carolina*, where, by the terms of a will, an estate in joint tenancy at common law is created, and one or more of the tenants die in the lifetime of the testator, the survivors take the whole estate, as at common law. *Bell v. Deas*, 2 Strobb. (S. Car.) Eq. 24.

Where a sale was made to three persons, and to the survivor of them, and two of the vendees living died, the survivor claimed the ownership. *Held*, that there being no forced heirs of the deceased owners, and no creditors having an adverse interest, the title is vested in the survivor. *Pope v. Anderson*, 13 La. Ann. 538.

Where the joint tenant died before the *jus accrescendi* was abolished in *Kentucky* in 1787, the other took by survivorship. *Barclay v. Hendrick*, 3 Dana (Ky.) 378.

Deeds to Each Other.—Tenants in common may vest each other with the right of survivorship by deed *inter par-*

tes; but they cannot convert their holding into a technical joint tenancy, so as to divest themselves of the right of partition as tenants in common. *Truesdell v. White*, 13 Bush (Ky.) 616.

Deed of Whole from One to the Other.

—A joint tenant's deed of his share of the estate to his cotenant in fee simple, reciting an intention to vest the whole of the fee in the grantee, will carry the grantor's title, subsequently acquired, by survivorship. *Apgar v. Christophers*, 33 Fla. 201.

3. See *Rigden v. Vallier*, 3 Aik. (Eng.) 734.

4. 1 Wash. Real Prop. (5th ed.) 408; see *Phelps v. Jepson*, 1 Root (Conn.) 48; *Lowe v. Brooks*, 23 Ga. 325; *Nichols v. Denny*, 37 Miss. 59; *Sergeant v. Steinberger*, 2 Ohio 305; *Miles v. Fisher*, 10 Ohio 1; *Jones v. Cable* (Va.), 7 A. 791.

Under a *North Carolina* Stat. 1784, abolishing the right of survivorship, and providing that the share of a joint tenant should go to his heirs, the heirs of a joint tenant take by inheritance, and the right of dower is incident to the estate. *Weir v. Tate*, 4 Ired. (N. Car.) Eq. 264.

Life Estate.—The act of 1874 does not abolish joint tenancies. It only takes away the right of survivorship from joint tenancies in fee, but has no application to joint tenancies for life. *Rowland v. Rowland*, 93 N. Car. 214.

Partnership Property.—When partners purchase lands jointly, for the purpose of trade, in *Virginia*, where the *jus accrescendi* is abolished, it is considered, both at law and in equity, as a tenancy in common; and in the case of

abolished, yet survivorship may be expressly given by will or deed.¹

(b) *Entry and Possession of One for Benefit of All.*—The entry and possession of one joint tenant enures to the benefit of all,² each holding in trust for all the others, and the possession of one being the possession of all,³ so the general principle that equity prohibits a purchase by trustees of the trust property has been applied to purchases of outstanding titles and encumbrances by

the death of one of the partners the surviving partner will have no superior or other right to claim the interest of the deceased partner in the land, as his creditor, than other creditors of the deceased partner have. *Deloney v. Hutcheson*, 2 Rand. (Va.) 183.

Husband and Wife.—The statute of *Kentucky* abolishing the *jus accrescendi* does not apply to the case of a conveyance of an estate to husband and wife; the whole estate belongs to the survivor, whose remedy for the recovery of the estate is complete at law. *Rogers v. Grider*, 1 Dana (Ky.) 242.

Trustees.—The statute of *Alabama* which abolishes the right of survivorship between joint tenants (Clay's Dig. 169), applies only to those who hold the absolute property in their own right, and not to those who hold as trustee merely, or in *autre droit*. *Parsons v. Boyd*, 20 Ala. 112.

Constitutionality.—In *California* it was held, that a state legislature has not competent authority to deprive joint tenants of one of the essential elements of their tenure,—the right of survivorship. *Green v. Blanchard*, 40 Cal. 194.

1. While the *Pennsylvania* act of March 31st, 1812 (Purd. Dig. 939) abolishes survivorship as incident to joint tenancy, yet survivorship may be expressly given by will or deed. *Jones v. Cable* (Pa.), 7 Atl. Rep. 791.

2. *Small v. Clifford*, 38 Me. 213; *Wiswell v. Wilkins*, 5 Vt. 87; *Terrell v. Martin*, 64 Tex. 121.

3. The possession of one joint tenant for 20 years is the possession of all. *Taylor v. Cox*, 2 B. Mon. (Ky.) 429.

The possession of one coheir or cotenant is the possession of the other coheirs, and is in trust for their benefit. But such possession may become adverse, and may be shown to be such by acts or declarations which repel the presumption that the possession is in the character of coheir. *Alexander v. Kennedy*, 19 Tex. 488.

Where a deed is made to run to two grantees jointly, and one only enters into actual possession, such possession is not to be deemed adverse to the other joint owner or his heirs, until an ouster or the assertion of some hostile claim denoting an intention to hold adversely. *Lindley v. Groff* (Minn.), 34 N. W. Rep. 26.

A and B purchased jointly at a sale under a deed of trust. Subsequently, in order to induce the grantor in the deed of trust to vacate, A paid her money, B refusing to join, and obtained exclusive possession. Held, that the possession thus granted enured to both A and B. *Davis v. Givens*, 71 Mo. 94.

Where a father puts one of his children into possession of land, and he holds it as the tenant of his father and by his possession, his subsequent possession after the death of his father must be regarded as having been for the benefit of himself and his coheirs, as joint owners, unless it is proven that he held adversely; and the statute of limitations will not commence running in his favor as against them until he does some act amounting to an ouster or disseisin of his cotenant. *Blakeney v. Ferguson*, 20 Ark. 547.

Entry Under Licence of One.—An entry upon common land under a licence from one of the cotenants will be presumed not to be unlawful or adverse to the other tenants. *Berthold v. Fox*, 13 Minn. 501.

Husband and Wife.—Where a wife is entitled to a large tract of land, and the husband enters thereon in the right of his wife, his possession enures to the benefit of his cotenants, and is not adverse unless there is an actual ouster or something equivalent thereto. *Young v. Adams*, 14 B. Mon. (Ky.) 127.

The purchase by the husband of a coparcener of an encumbrance on the joint estate, enures to the benefit of the

joint tenants,¹ and one acquiring such title will be deemed to have taken it for the benefit of the rest.²

The payment of taxes by one joint tenant enures to the benefit of both,³ and where one cotenant buys in a tax title to the whole property, the purchase will be for the benefit of all.⁴

2. Tenancy in Common.—Tenants in common take by distinct moieties, and have no entirety of interest; therefore, there is no

others, on their electing to pay their proportion of the purchase money. *Lee v. Fox*, 6 Dana (Ky.) 171.

Coparceners.—The possession of one coparcener *eo nomine* as coparceners, is the possession of the others. *Manchester v. Doddridge*, 3 Ind. 360.

1. *Brittin v. Handy*, 20 Ark. 381.

2. *Thurston v. Masterson*, 7 Dana (Ky.) 228; *Lloyd v. Lynch*, 28 Pa. St. 419; *Page v. Webster*, 8 Mich. 263; *Goosom v. Donaldson*, 18 B. Mon. (Ky.) 230.

Where one of several cotenants acquires an outstanding title before he has claimed to hold adversely to his cotenants, he will take for the benefit of all the cotenants, subject to their liability to contribute to the cost. *Burgett v. Taliaferro* (Ill.), 9 N. E. 334.

Where one joint tenant, tenant in common, joint devisee, etc., purchases in an adverse title, such title will enure to all the joint owners, etc., they bearing the expense and cost according to their respective shares. *Picot v. Page*, 26 Mo. 398.

The purchaser at a sheriff's sale of the interest of one of two joint tenants cannot secure a title superior to that of the other. *Wilson v. Peelle*, 78 Ind. 384.

But where part of the land held in joint tenancy is lost by paramount claim, and one of the joint tenants buys the lost land, the purchase does not enure to the benefit of the other. *Coleman v. Coleman*, 3 Dana (Ky.) 398.

Where two or more persons have a joint interest in property, they are under mutual obligations not to injure one another; but where one party denies a joint interest, and is in possession under color of title in fee in himself, he can quiet his title by procuring an adverse claim of title, without abandoning his own, even from one who claims to be a joint tenant with the purchaser. *Burhaus v. Van Zandt*, 7 Barb. (N. Y.) 91.

And a recovery of an undivided portion of a tract of land against one who has long been in possession under a re-

corded deed, of the whole, and an entry under the judgment, give the demandant a rightful seisin of such share in his own right, and does not enure to the benefit of one having a similar claim to the remainder of the tract, or prevent its being barred by the statute of limitations. *Gilman v. Stetson*, 18 Me. 428.

Joint Purchase Made by Mistake.—Plaintiff, a joint owner of lands with defendant, claimed an interest in a portion which defendant alleged he had purchased on his own account prior to the agreement with plaintiff to purchase jointly. Defendant pleaded a general denial of plaintiff's interest and the court admitted evidence thereunder, but on finding that plaintiff had by mistake purchased the land in question for the joint account, and for a larger sum than that given by defendant, divided the interest in the land between them in proportion to the sums paid. *Held*, that though the court might have excluded the question, yet plaintiff having received the larger sum, could not complain. *Anderson v. Clanch* (Tex.), 6 S. W. Rep. 760.

3. *Chickering v. Faile*, 38 Ill. 342; *Williams v. Gray*, 3 Me. (Greenl.) 207; *Halsey v. Blood*, 29 Pa. St. 319.

4. *Smith v. Smith*, 68 Iowa 608; *Handy v. Gregg* (Miss.), 2 So. Rep. 358.

If one cotenant redeems the property from a tax sale, the redemption enures to the benefit of all. *Minter v. Durham*, 13 Ore. 470.

So, also, where, instead of redeeming directly from a tax sale, he agrees with the holder of the tax certificate that the latter shall take out a tax deed and then convey to him. *Lomax v. Gindele*, 117 Ill. 527.

Presumption.—The purchase at tax sale of land held in joint tenancy, by one of the holders, is presumed to have been made in trust for his cotenants, until the presumption is repelled by their refusal to contribute *pro rata* to reimburse him for the money advanced. *Weare v. Van Meter*, 42 Iowa 128.

survivorship between them.¹ A unity of possession, however, is an essential attribute of a tenancy in common,² and the incidents of a tenancy in common are only such as arise from this unity.³ Thus the entry and possession of one tenant in common is ordinarily deemed the entry and possession of all, and such entry and possession will enure to the benefit of all and is coextensive with their common right.⁴ Such entry and possession of one tenant in

1. 2 Black. Com. (Chase's ed.) 194.

Lands may be held in common, though one tenant holds by a feudal tenure, and the other in pure *allodium*. Putnam v. Ritchie, 6 Paige (N. Y.) 390.

A grant of land by the state of Kentucky to two persons as tenants in common, issued after the death of one of them, passed the moiety only to the survivor; and the other moiety remained in the state till the act of 1792, when it was vested in the heirs of the deceased grantee. Currie v. Tibbs, 5 T. B. Mon. (Ky.) 440.

2. Blessing v. House, 3 Gill & J. (Md.) 290; Brown v. Graham, 24 Ill. 628; Knox v. Silloway, 10 Me. (1 Fairf.) 201; Bernecker v. Miller, 40 Mo. 473; Story v. Saunders, 8 Humph. (Tenn.) 663; Wiswell v. Wilkins, 5 Vt. 87.

3. See 2 Black. Com. (Chase's ed.) 194.

4. Clymer v. Dawkins, 3 How. (U. S.) 674; Coleman v. Clements, 23 Cal. 245; Abercombie v. Baldwin, 15 Ala. 363; Bowen v. Preston, 48 Ind. 367; Gill v. Fauntleroy, 8 B. Mon. (Ky.) 177; Poage v. Chunn, 4 Dana (Ky.) 50; Brown v. Wood, 17 Mass. 68; Barnard v. Pope, 14 Mass. 434; Shumway v. Holbrook, 1 Pick. (Mass.) 114; Strong v. Cotter, 13 Minn. 82; Long v. McDow, 87 Mo. 197; German v. Matchin, 6 Paige (N. Y.) 288; Zamhill Bridge Co. v. Newby, 1 Oreg. 173; Baily v. Trammell, 27 Tex. 317; Buckmaster v. Needham, 22 Vt. 617; Thomas v. Hatch, 3 Sumn. (U. S.) 170.

A tenant in common has the right to assume that the possession of his cotenant is his possession, until informed to the contrary, either by express notice, or by acts and declarations, which may be equivalent to notice. Aguirre v. Alexander, 58 Cal. 21.

As a grantee is entitled to possession of the whole property in common with the tenant to whom his grantor has conveyed, *held*, that a demand for the whole would not be too large. Whiting v. Dewey, 15 Pick. (Mass.) 428; Shumway v. Holbrook, 1 Pick. (Mass.) 114.

The relinquishment and yielding up to one of several tenants by the disseisor, after a disseisin of five years, all of the right, seisin, possession and betterments which the disseisor had in and to the proportion of that tenant in common in the premises, has the effect to put all the tenants in common in the seisin and possession of their shares respectively, and to prevent the operation of the statute of limitations against any of them prior to that time. Vaughan v. Bacon, 15 Me. 455.

Where one of several *cestuis que trust* entitled to a beneficial interest in certain land, as tenants in common, takes possession, such possession will not be held to be adverse to the trustee or the common title. Marr v. Gilliam, 1 Coldw. (Tenn.) 488.

A person entered upon land owned by tenants in common, by licence of one of them, and erecting and occupying a building therein, must be considered as holding in submission to their title until the contrary is shown. Buckman v. Buckman, 30 Me. 494.

One of three tenants in common sold his share on condition that in the division of the land he should have the northern end, and upon that end the purchaser settled, without designated boundary, other than that of the whole tract. Upon the division, he failed to obtain that end, by consent, as he expected. Another portion was allotted to him, and the purchaser, dissatisfied, left it. *Held*, as to the possession taken by the purchaser, that its effect was the same as though it had been taken by the vendor himself; and an entry by him, though upon one end of the tract, in the expectation that that end would be allotted to him, would have given him possession of the whole, enuring to the common benefit of himself and cotenants, which would have had the effect of preventing any acquisition of possession by an entry under a junior grant, beyond the actual enclosure of the party who made it. Chiles v. Jones, 7 Dana (Ky.) 528.

Where the owner of a mortgage on

common will not, *prima facie*, be presumed adverse to his cotenants,¹ and will become so only when some notorious act of ouster or adverse possession by him is brought to the knowledge or notice of the others;² so the payment of taxes by one tenant will operate as payment by all and will be for the benefit of all.³ Payment of an encumbrance on or a redemption of property by one enures to all,⁴ and a tender by one on behalf of all is good in a subsequent bill to enforce the equity of redemption,⁵ the relation between them being in principle very similar to that between lessor and lessee, the possession of one being the posses-

an undivided interest in land is at the same time the owner in fee of another undivided interest in the same land, a possession of the land wholly consistent with his right as a tenant in common cannot, in an action of ejectment, be considered the possession of the mortgagee, unless the fact be shown that the possession had been previously acquired, and was afterwards retained as such. *Mellon v. Reed* (Pa.), 8 Atl. Rep. 227.

1. *Long v. McDow*, 87 Mo. 197.

2. *Clymer v. Dawkins*, 3 How. (U. S.) 674; *Abercombie v. Baldwin*, 15 Ala. 363.

The entry of one tenant in common, or parcener, will enure to the benefit of his cotenant or parcener, unless it be adverse, or by claiming the whole, in which latter case it will be presumed adverse. *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177.

The possession of one of several cotenants in common is in law the possession of all, and the statute of limitations does not run in favor of the tenant in actual possession; but the rule is otherwise when the latter disclaims the tenancy in common, and asserts a different claim and an exclusive right. *Bowen v. Preston*, 48 Ind. 367.

The possession of a cotenant, or tenant in common, will be presumed to be in right of the common title, and he cannot claim the protection of the statute of limitations unless it clearly appears that he repudiated the title of his cotenant and is holding adversely to it, and his acts and declarations will be construed much more strongly against him than when there is no privity of title. *Baily v. Trammell*, 27 Tex. 317.

A tenant in common in possession of the common estate cannot acquire title to the whole of the estate by adverse possession, unless there be such an ouster of his cotenants as to entitle them to bring ejectment against him. *Day v. Davis*, 64 Miss. 253.

What Notice Is Sufficient.—Notice to one cotenant is not binding upon all the other cotenants under the same purchase. *Parker v. Kane*, 4 Wis. 1.

3. *McConnel v. Konepel*, 46 Ill. 519.

Each cotenant is equally bound to keep the taxes paid, and one who pays all the taxes can only claim to be reimbursed with interest. *Morgan v. Her- rick*, 21 Ill. 481.

One who as cotenant would avail himself of the possession of and payment of taxes by his cotenant, need not show, to establish the fact of cotenancy, that the conveyance under which he claims passed the absolute title. *West Chicago Park Commrs. v. Coleman*, 108 Ill. 591.

4. Where a tenant in common redeems a mortgage after foreclosure the cotenants are restored to their former title, and the tenant redeeming has an equitable lien on the share of his cotenants. *Calkins v. Steinbach*, 66 Cal. 117.

Where a widow occupied lands held by her husband at his decease under a contract of sale, received the rents and profits, and paid up the amount due on the contract, or where she has paid a mortgage thereon, the payment is presumed to have been made from the rents and profits. Such mortgage is presumed thereby to have become extinguished, and to be only available to her upon an accounting. *Knolls v. Barnhart*, 71 N. Y. 474.

Where, in such case, the widow paid a mortgage, had it assigned to herself, foreclosed it, bid in the premises in her own name and then conveyed them to one of the heirs, who occupied them with her, *held*, that the interests of the other heirs were not thereby cut off, and that the title acquired by her was not strengthened by the transfer. *Knoll v. Barnhart*, 71 N. Y. 274.

5. *Gentry v. Gentry*, 1 Sneed (Tenn.) 87.

sion of the others, but if one ousts the other or denies his tenure, his possession becomes adverse; so of a trustee or a mortgagee.¹ But tenants in common of a vessel may deal with each other like owners of separate property,² and a tenant in common who is a tenant for years may set up a claim against his cotenant.³

(a) *Purchase of Outstanding Title*.—The general rule is that a cotenant's purchase of an outstanding title enures to the benefit of all, whether the several interests of the different tenants accrue under the same instrument, under different instruments, or by act of law,⁴ and in some States this rule seems to apply, however the tenancy may have been formed, whatever the relation of the cotenants with each other may have been, and from whatever source the outstanding title may have been acquired.⁵ But in

1. *Willison v. Watkins*, 3 Pet. (U. S.) 44.

2. If tenants in common of a vessel are not engaged jointly in purchasing or building ships for sale, they do not stand in such relation of mutual trust and confidence toward each other in respect to the sale of such vessel, that each is bound to communicate all his knowledge to the other which may affect the price or value, but they may deal with each other like owners of separate property. *Matthews v. Bliss*, 22 Pick. (Mass.) 48.

3. *Longwell v. Bentley*, 3 Grant (Pa.) Cas. 177.

4. *Clement v. Cates* (Ark.), 4 S. W. Rep. 776; *Brittin v. Handy*, 20 Ark. 381; *Olney v. Sawyer*, 54 Cal. 379; *Montague v. Selb*, 106 Ill. 49; *Bracken v. Cooper*, 80 Ill. 221; *Wilson v. Peelle*, 78 Ind. 384; *Rothwell v. Dewees*, 2 Blackf. (Ind.) 613; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230; *Jones v. Stanton*, 11 Mo. 433; *Brown v. Homan*, 1 Neb. 448; *Van Horn v. Fonda*, 5 Johns. (N. Y.) Ch. 386; *Boskowitz v. Davis*, 12 Nev. 446; *Grimm v. Wicker*, 80 N. C. 343; *Threadgill v. Redwine*, 97 N. Car. 241; *Page v. Branch* (N. Car.), 1 S. E. 625; *Leslie v. Northington*, *Wright* (Ohio) 628; *Weaver v. Wible*, 25 Pa. St. 270; *Lloyd v. Lynch*, 28 Pa. St. 419; *Gibson v. Winslow*, 46 Pa. St. 380; *Tisdell v. Tisdell*, 2 Sneed (Tenn.) 596; *Braintree v. Battles*, 6 Vt. 395; *Rountree v. Deuson*, 59 Wis. 522.

5. Any title which a tenant in common purchases from any other than one of his cotenants enures to the benefit of all. *Lloyd v. Lynch*, 28 Pa. St. 419; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230.

The widow's possession, as dowress and as guardian in socage of minor

heirs, is as tenant in common with all the heirs; and her fiduciary relation to them prevents her purchasing an outstanding title or mortgage for her individual benefit. *Knolls v. Barnhart*, 71 N. Y. 474.

One of two tenants in common cannot, by the purchase of an outstanding title, or of an encumbrance, acquire title to the whole against his cotenant; but such purchase will operate to the benefit of both, and the purchaser is entitled to claim contribution from his cotenant. *Montague v. Selb*, 106 Ill. 49; *Jones v. Stanton*, 11 Mo. 433; *Van Horne v. Fonda*, 5 Johns. (N. Y.) Ch. 388; *Weaver v. Wible*, 25 Pa. St. 270; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596; *Brown v. Homan*, 1 Neb. 448; *Rothwell v. Dewees*, 2 Blackf. (Ind.) 613.

The rule that a cotenant's purchase of an outstanding title enures to all, applies whether the several interests accrue under the same instrument or act of the law or not. *Montague v. Selb*, 106 Ill. 49.

In an action by one tenant in common against others, to be let into possession, *held*, that the defendants could not justify an ouster of the plaintiff by setting up an outstanding title purchased by them while in possession under the common title; and this although the title so purchased was the true one. They might, however, assert their new title in an appropriate action, after letting the plaintiff into possession. *Olney v. Sawyer*, 54 Cal. 379.

Applied to Title by Descent.—Where one of several tenants in common by descent purchases an outstanding title, the fact that the common ancestor of all the cotenants had no title, or a de-

other States this rule applies only when the tenants stand in some confidential relation in regard to one another's interest, so that it would be inequitable to permit one to acquire a title solely for his own benefit, in which case he will be treated as a trustee for the share of his cotenant, but persons acquiring unconnected interests in the same subject are not, it appears, bound to any greater protection of one another's interests than would be required of strangers;¹ so the tenants desiring to participate in the benefits of a purchase of an outstanding title by their cotenant must ex-

fective title, will not shield him from liability to account to his cotenants as trustees of the property purchased, and the rule that where a person who occupies such a relation to another, by the act or consent of that other, or the act of a third person, or of the law, becomes interested for him in a subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated, and if he does so, he holds as trustee for the benefit of that person to the extent of the prohibition, applies to tenants in common by descent with the same force and reason as to persons standing in a direct fiduciary relation to others. *Clement v. Cates* (Ark.), 4 S. W. Rep. 776.

Personal Property.—Where a tenant in common of personalty has assigned his share, and after such assignment the sheriff, under an execution against the assignor, sells the common property and delivers the same to the other original tenant, who had become the purchaser at such sale, the assignee cannot sue the sheriff for a conversion. *Grim v. Wicker*, 80 N. C. 343.

1. *Roberts v. Thorn*, 25 Tex. 728; *Brittin v. Handy*, 20 Ark. 381; *King v. Rowan*, 10 Heisk. (Tenn.) 675; *Frentz v. Klotzsch*, 28 Wis. 312; *Buchanan v. King*, 22 Gratt. (Va.) 414.

One tenant in common of a defective title, whose cotenant's interest is derived from him by quit claim deed, is under no such obligation to his cotenant as will constitute him a trustee for the latter of a superior outstanding title purchased by him. *Smith v. Washington*, 11 Mo. App. 519.

An executor of the will of one tenant in common may purchase the estate of another tenant in common and hold it for his own benefit. Toward such an interest he does not stand in that relation of trust and confidence which would bring him within the well known

doctrine of equity jurisprudence. *Alexander v. Kennedy*, 3 Grant (Pa.) Cas. 379.

Tenants in common, or partners, may well acquire their cotenant's or co-partner's interest at an execution sale by a third party. *Gunter v. Laffan*, 7 Cal. 588.

Title Acquired by Different Means.—One who has acquired his title to parts of a tract of land through other instruments, at other times and independently of his cotenants, is not prevented from buying in an outstanding encumbrance thereon. *Rippetor v. Dwyer*, 49 Tex. 498.

F purchases of S an undivided half of a tract of vacant land, and afterwards R purchased the other undivided half of S. *Held*, that as there was no privity between F and R the acquisition of a superior outstanding title to the whole tract by R did not enure to the benefit of F. *Roberts v. Thorn*, 25 Tex. 728.

Purchase to Protect Possession.—A person in possession of land claiming title may purchase in an outstanding title to protect that possession. *Jackson v. Smith*, 13 Johns. (N. Y.) 406.

Purchase Under Judicial Sale.—A, who was one of several heirs and tenants in common of certain premises, became the purchaser of the premises at a master's sale, and before she received her deed a house on the premises, upon which there was insurance, was burned down. *Held*, that A was the legal owner of the house and must bear the loss, but that she was entitled to the benefit of the policy. *Gates v. Smith*, 4 Edw. (N. Y.) 702.

Where two tenants in common owned certain lands, subject to a mortgage, and after long litigation the joint interest of the tenants was sold to a stranger, and one of the joint tenants purchased the existing mortgage at a great discount. *Held*, that he could hold it exclusively and enforce it to the full amount. *Wells*.

ercise reasonable diligence in making their election to do so, or they will be deemed to have repudiated the transaction and abandoned its benefits.¹

The general rule that the purchase of an outstanding title enures to the benefit of all applies to the purchase of the premises at a judicial sale,² and also to a case where the cotenants join in a sale or other disposition of the common property, and one of them either directly or indirectly becomes the purchaser,³ as well as when the outstanding title is obtained from an outside source.⁴

v. Chapman, 4 Sandf. (N. Y.) Ch. 312.

Acquisition Under United States Laws.

—The rule that a cotenant acquiring an outstanding title holds it in trust for his cotenant does not apply where a cotenant of land, the fee of which is in the United States, acquires title under *Colorado Rev. Stat. 619, et seq.* Thus, where one of two cotenants of land subject to entry as a town site dies before the entry, leaving heirs, and the survivor conveys an undivided half of the land to another, who with him acquires title from the government, the heirs of the decedent having taken no steps therefor, have no claim on the purchaser's moiety. *Gillett v. Gaffney*, 3 Col. 351.

The fact that a party in possession of land is a tenant in common does not estop him from buying in and setting up a distinct and adverse title under an entry, survey or patent, and in such case he may avail himself of the limitation of the *Kentucky* act of 1809 to sustain his possession. *Larman v. Huey*, 13 Mon. (Ky.) 436.

Question for Jury.—Two brothers purchased two adjoining tracts of land together, but occupied them separately, each making improvements upon the tract upon which he resided. One of them purchased the interest of the other in the tract occupied by himself at a sheriff's sale and made a lease of the mining privileges, stipulating for a royalty and collecting it. *Held*, that whether the brother purchasing at the sheriff's sale paid a portion of the royalties to the other and his heirs within the period of limitations, and, if he did so, whether it was as a charity or in recognition of a right in them as owners, was properly submitted to the jury. *McCloskey v. McCloskey* (Pa.), 16 Atl. Rep. 30.

1. *Mandeville v. Solomon*, 39 Cal. 125, 133.

2. Two claimants of the same land

agreed to become tenants in common, and to sell it and divide the proceeds. One of them purchased the other's interest at an execution sale. *Held*, that this did not affect the execution debtor's rights under the agreement. *Threadgill v. Redwine*, 97 N. C. 241.

Where land owned jointly by three is purchased by one, at a sheriff's sale on an execution against them, he cannot set up his purchase adversely to them; at most he can only hold the former interest of his cotenants as their trustee. *Gibson v. Winslow*, 46 Pa. St. 380.

Where a deed was made to C and H, and the interest of C was sold and conveyed by the sheriff, the purchaser did not thereby acquire a title superior to that of H, nor could C's title by lapse of time have become superior to that of his co-owner. *Wilson v. Peele*, 78 Ind. 384.

3. *Austin v. Barrett*, 44 Iowa 488.

Where a tenant in common has sold the land held by him, with authority from his cotenant, and the latter afterwards acquires the legal title and conveys to a third party with notice, such third party takes in trust for the former vendee. *Leslie v. Worthington*, *Wright* (Ohio) 628.

A tenant in common who, after conveying his interest to a third person, makes partition with his cotenant as though he still retained such interest by the execution of mutual conveyances with covenants of warranty, is estopped to set up against such cotenant a title to the part conveyed to him acquired by a subsequent reconveyance from such third person. The title acquired by such reconveyance enures to the benefit of the cotenant. *Rountree v. Denson*, 59 Wis. 522.

4. The possessory title to land was purchased by five tenants in common, and afterwards one of the cotenants purchased the title in fee, and it was sought by four of the cotenants to ex-

neither can an outstanding title be set up in a stranger.¹

The same rule applies with equal or greater force to the purchase of land at a tax sale, and if one of several tenants in common purchase the land at such sale, either by himself or through a third person, the title thus acquired enures to the benefit of his cotenants.² The reason for the rule seems to be that as a part of the taxes for which the land is sold is a claim upon the purchaser's share, the sale is based in part upon his own default and it would be inequitable to permit him to profit by his own

clue R, the other cotenant, who owned one sixth of the possessory title from the proceeds derived from the sale of lands. *Held*, that the law raised a resulting trust in favor of R to the extent of a one-sixth interest, independent of the intention of the parties, and forced it upon the conscience of his associates by operation of law. *Boskowitz v. Davis*, 12 Nev. 446.

A tenant in possession cannot make his possession adverse to his cotenant by taking a deed from a stranger, and thus reducing the period of limitation to the seven years prescribed in Code Civil Proc., *North Carolina*, § 141, in cases of adverse possession under color of title; but by common law if the possession has continued twenty years, the presumption of his sole title arises. *Page v. Branch* (N. Car.), 1 S. E. Rep. 625.

1. *Braintree v. Battles*, 6 Vt. 395.

2. *Moore v. Woodall*, 40 Ark. 42; *Conn v. Conn*, 58 Iowa 747; *Austin v. Barrett*, 44 Iowa 488; *Flinn v. McKinley*, 44 Iowa 68; *Muthersbaugh v. Burke*, 33 Kan. 260; *Butler v. Porter*, 13 Mich. 292; *Page v. Webster*, 8 Mich. 263; *Allen v. Poole*, 54 Miss. 323; *Dubois v. Campau*, 24 Mich. 360; *Davis v. King*, 87 Pa. St. 261; *Battin v. Woods*, 27 W. Va. 58.

When a tenant in common takes a deed of the whole property from a purchaser at a tax sale, by paying the exact amount required to redeem, he must be presumed, in the absence of rebutting evidence, to have done so in the exercise of a legal right, and the whole property will be redeemed from the sale. *Hurley v. Hurley et al.*, (Mass.) 19 N. E. Rep. 545.

One tenant in common applied the rents and profits in his hands to the purchase of an outstanding tax certificate, and took a deed to himself thereunder. *Held*, that as against his cotenant and those claiming under him he could not invoke the protection of

the statute of limitations applicable to tax sales. *Bender v. Stewart*, 75 Ind. 88.

One seeking as tenant in common to avail himself of the possession and payment of taxes by his cotenant, under the *Illinois* Limitation act of 1839, is not required to first show that the conveyance or conveyances under which they claim passed the absolute title. The transfer of the paramount title is not essential to a cotenancy or tenancy in common. *West Chicago Park Commrs. v. Coleman*, 108 Ill. 591.

A tax deed acquired by a tenant in common is not sufficient in equity to divest the interest of a cotenant, notwithstanding the holder of the deed may have acquired the tax certificate before he became tenant in common. Following *Flinn v. McKinley*, 44 Iowa 68; *Tice v. Derby*, 59 Iowa 312.

After a partition between J and R, tenants in common, the whole land was sold for taxes assessed upon it before partition and the tax title was assigned to R. *Held*, that he could acquire no title under the tax deed against J. *Maul v. Rider*, 51 Pa. St. 377.

Purchase, How Treated.—A tenant in common cannot acquire the interest of his co-tenant in land by allowing the taxes thereon to become delinquent and purchasing at tax sale, and a tax deed thus obtained is void and the purchase is treated as a payment of the taxes only which stand as a charge against the common property. *Delashmutt v. Parrent* (Kan.), 18 Pac. Rep. 712; *Brown v. Hogle*, 30 Ill. 119.

Tenancy Subject to Life Estate.—If one of several cotenants of land subject to the life estate of a dowress buys in a tax title to the land he will obtain an absolute title to the life estate, but will hold the fee in trust for his cotenants. *Fox v. Coon* (Miss.), 1 So. Rep. 629.

The tax title of a cotenant enures to the common benefit of himself and his

wrong.¹ But this rule does not apply to a purchase by one tenant in common after the period of redemption has fully passed:² and in *Iowa* it is held that where one tenant in common is not in possession, and his title, therefore, does not of itself amount to an ouster and eviction, his cotenant may strengthen his title by purchase at a tax sale and it will not enure to the benefit of his cotenant.³

But a tenant in common purchasing an outstanding or tax title to the common property is entitled to contribution from his cotenants for the amount paid therefor,⁴ and in cases of the payment of taxes, will have a lien on his cotenant's interest for the amount so paid.⁵

(b) *Equality of Shares*.—Ordinarily, there is no presumption that the interests of tenants in common are equal,⁶ but where they have acquired their interests under the same instrument, as by a deed, which does not state their respective interests,⁷ or by

cotenants; but the common property is chargeable with the purchase money expended by him at the tax sale; and this, though the sale occurred in the lifetime of the tenant of the particular estate. *Harrison v. Harrison*, 56 Miss. 174.

Evidence of Purchase.—A tenant in common of real estate cannot, by a tax deed, acquire title to the interest of a cotenant. Where such cotenancy is alleged to set aside the deed, the evidence, if only indirect, must be clear and satisfactory. *Sheean v. Shaw*, 47 Iowa 411; *Shell v. Walker*, 54 Iowa 386.

Acquisition Through Third Party.—If a tenant in common in possession of and using the whole estate fails to pay the taxes and a stranger purchases the property at a tax sale in such a manner as to be himself entitled to assert his tax title against all the owners, he cannot by the purchase of the stranger's tax title entitle himself to set it up against his cotenants. The purchase by him only operates as a payment of the tax and corrects the wrong he had before committed. *Dubois v. Campau*, 24 Mich. 360. See also *Battin v. Woods*, 27 W. Va. 58; *Lomax v. Gindele*, 47 Ill. 527.

1. *Dubois v. Campau*, 24 Mich. 360.

2. *Kirkpatrick v. Mathiot*, 4 Watts & S. (Pa.) 251; *Lewis v. Robinson*, 10 Watts (Pa.) 354; *Reinboth v. Zerbe R. I. Co.*, 29 Pa. St. 139.

3. *Alexander v. Sully*, 50 Iowa 92; and see *Jackson v. Smith*, 13 Johns. (N. Y.) 406.

4. *Moore v. Woodall*, 40 Ark. 42;

Mandeville v. Solomon, 39 Cal. 125, 133; *Montague v. Selt*, 106 Ill. 49; *Lomax v. Gindele*, 117 Ill. 527; *Morgan v. Herrick*, 21 Ill. 481; *Rothwell v. Dewees*, 2 Blackf. (Ind.) 613; *Flinn v. McKinley*, 44 Iowa 68; *Austin v. Barrett*, 44 Iowa 488; *Delashmutt v. Parrent* (Kan.), 18 Pac. Rep. 712; *Dubois v. Campau*, 24 Mich. 360; *Jones v. Stanton*, 11 Mo. 433; *Brown v. Homan*, 1 Neb. 448; *Van Horne v. Fonda*, 5 Johns. (N. Y.) Ch. 388; *Weaver v. Wible*, 25 Pa. St. 270; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596.

5. *Moore v. Woodall*, 40 Ark. 42.

While the purchase of a tax title discharges the lien in the sense that it cannot ripen into a legal title as against the other tenants, yet it remains a lien for the benefit of the tenant who made the payment to compel contribution; and, in the meantime, the other tenants are not entitled to possession of any part of the land. Pub. Stat. *Massachusetts*, ch. 12, §§ 63-65, providing that a tenant "who pays the whole amount of taxes assessed" against the land shall have a lien as against the other tenants by filing with the register of deeds a certificate showing the facts, etc., apply only to the payment in the first instance, and it is not necessary to file such certificate in case of redemption after sale. *Hurley v. Hurley et al.* (Mass.), 19 N. E. Rep. 545.

6. *Campau v. Campau*, 44 Mich. 31.

7. *Campau v. Campau*, 44 Mich. 31.

A sale to two persons is presumed to enure to them equally in the absence of a contrary showing, and anyone who knows of such an interest must know

a patent as tenants in common,¹ they will each take title to an equal undivided share.

3. Dower in Joint and Common Property.—Owing to the principle of survivorship in joint tenancies, the survivor taking the whole, no right of dower attaches in favor of either of the tenants which his wife can enforce unless her husband survives the others, in which case she would be entitled to dower in the whole. But in those States in which survivorship has been abolished by statute, the wife of each tenant would be entitled to dower in his share of the joint property.²

The estate of a tenant in common is subject to dower as if held in severalty,³ but it will be set off in common unless partition be made during the life of the husband between the tenants, in which case the dower of the wife of each tenant is limited to the portion set apart to him.⁴

VI. RIGHTS AND POWERS—1. To Occupy and Enjoy.—Where property belongs to several joint tenants,⁵ or tenants in common,⁶ each has an equal right to its possession. But the possession of one being the possession of all, one tenant cannot eject another whose possession is not inconsistent with his own,⁷ and while

that it can only be transferred by its owner or by some one acting by the owner's authority. *Keates v. Christie*, 47 Mich. 594.

1. *Markoe v. Wakeman*, 107 Ill. 251.

2. See 1 Washb. Real Prop. (5th ed.) 157.

3. 1 Washb. Real Prop. (5th ed.) 158.

Under the Code of *Tennessee*, §§ 3244, 3249, providing that a widow shall be endowed of one third of the land whereof her husband died seised, and that dower need not be assigned in each tract when there are more than one, but the assignment shall be according to quality and quantity, so as to give the widow one third of the estate in value. A widow is entitled to dower in land whereof her husband was tenant in common, and in a decree appointing commissioners to assign dower it is proper to direct that dower be assigned in other lands, having regard to the value of lands held in common. So a widow is entitled to one third of the profits in lands on which her husband executed a lease for mining purposes for 99 years at a certain royalty per ton of the product, and which were being mined at the time of his death for her lifetime or until the mineral is exhausted, after which time she should have the use of one third of her husband's interest in the land itself, and this right begins at the husband's death. *Clift v. Clift* (Tenn.) 9 S. W. Rep. 360.

4. Washb. Real Prop. (5th ed.) 158.

5. See *Jamison v. Graham*, 57 Ill. 94.

6. *Bulger v. Woods*, 3 Pinn. (Wis.) 460; *Richardson v. Richardson*, 72 Me. 403; *Southworth v. Smith*, 27 Conn. 355; and see *Osborn v. Schenck*, 83 N. Y. 201; *Volentine v. Johnson*, 1 Hill (S. Car.) Ch. 49.

Where the possession of land has descended to the possessor's heirs as tenants in common, one of them, who is also executor of the will, cannot hold the land against his cotenants, although he has bought it from a third person claiming to hold a perfect title. *Keller v. Auble*, 58 Pa. St. 410.

A purchase made by two jointly from a father having no title, it being in his minor children, on the purchase being confirmed by the children to one of the purchasers, the other will be entitled to one half of the land and one half of the rents and profits. *Owings v. McClain*, 1 A. K. Marsh. (Ky.) 230.

Where a lot with a dwelling house thereon is owned by two persons as tenants in common and one dies in possession of the whole, leaving a widow residing therein, she will not be entitled, under *Missouri* Dower act of 1845, as against the surviving tenant in common to remain in possession of the whole lot until dower is assigned her. *Collins v. Warren*, 29 Mo. 236.

7. *Erwin v. Olmsted*, 7 Cow. (N. Y.) 229; *Gower v. Quinlan*, 40 Mich. 572;

thus in possession the tenant may, as a general rule, manage the common property in any way he pleases, provided he does not injure his cotenants.¹ But one who is debarred by his cotenants from enjoying the common property has a right to take peaceable possession thereof, even though such possession is acquired by

Warren v. Henshaw, 2 Aik. (Vt.) 141.

When personal property is owned by several persons in common, one of them in the actual possession has a right to maintain that possession against the others. In an ordinary case the only remedy of an owner out of possession is to take possession when a fit opportunity presents itself. Southworth v. Smith, 27 Conn. 355.

One joint tenant cannot recover the exclusive possession of the premises against his cotenant. Jamison v. Graham, 57 Ill. 94.

One tenant in common cannot seize to his own use ores mined by a lessee of his cotenant. Blewett v. Coleman, 40 Pa. St. 45.

It is trespass for a tenant in common to eject a person who is on the premises by the permission of the cotenant. McGarrell v. Murphy, 1 Hilt. (N. Y.) 132.

But a tenant in common, at the request of his adult cotenants and with the acquiescence of the mother of minor cotenants who had no legal guardian, made necessary and valuable repairs on a mill. Held, that he was not, therefore, entitled to possession of the mill until he should be reimbursed for his expenditures. Young v. Gammel, 4 Greene (Iowa) 207.

The objection that a tenant in common of lands cannot recover possession without showing an actual ouster, can only be taken by the cotenant or by one claiming under him. Arnot v. Beadle, Hill & D. Supp. (N. Y.) 181.

1. Peabody v. Minot, 24 Pick. (Mass.) 329.

One of two joint lessors has the right, as against the lessee, to collect the entire rent and receipt therefor, and also to apply the same to the payment of the joint mortgage of such lessors on the leased property; but he has no right without authority to apply rent so collected to the payment of an indebtedness of his joint lessor to the lessee, a company in which both are stockholders; and such application having been made by a charge on the books of the company and the entire rent receipted for, he must account for the same as actually received. Miner v.

Lorman (Mich.), 38 N. W. Rep. 18.

Insurance of One's Interest.—A joint owner of property in common may separately insure his interest against fire, and in case of loss, recover and retain the insurance. The rule against taking title or advantage to the prejudice of one's cotenants does not apply. Harvey v. Cherry, 76 N. Y. 436.

A tenant out of possession has no interest in the proceeds of a policy of fire insurance taken out by the tenant in possession to cover improvements made by him, although the fire which ensued destroyed improvements on the property at the time the insuring tenant went in. This is especially so where the insurance money, when received, was used in restoring the improvements. Anneby v. DeSaussure (S. Car.), 2 S. E. 490.

Flowing Land.—One tenant in common has no right, by means of a dam erected on other lands of which he is solely seized to flow land owned in common without consent of his cotenants; nor can he, by grant of land of which he is solely seized, convey such right of flowage to his grantee. Hutchinson v. Chase, 39 Me. 508; Great Falls Co. v. Worcester, 15 N. H. 412.

Improving Property.—A tenant in common of a well has a right to send his servant down into it for the purpose of cleaning it out, if he has reason to believe that the bottom is filthy. Newton v. Newton, 17 Pick. (Mass.) 201.

Where one of two tenants in common of a ledge of rocks which bounds a water flume, carrying water in which both are interested, improves the flume and enlarges it on the ledge at his own expense, thereby putting the ledge to its only beneficial use, he is not liable to the other for trespass. Johnson v. Conant (N. H.), 7 Atl. Rep. 116.

Acquiring Right of Way.—A cotenant acquires no prescriptive right by use of a private way over the property, so long as all the tenants had an undisputed use of the premises. And where they all unite in conveying the fee without reserving the way, he cannot tack such use pending his joint ownership to his use since the sale to com-

stealth, but without tumult, breach of peace, or force,¹ and where one cotenant excludes another under a claim of exclusive right, the cotenant excluded is entitled to his *pro rata* share of the rents and profits received by the other.²

A joint tenant or tenant in common is, however, entitled to the possession of the entire premises as against all persons other than his cotenants, and can maintain suit for its recovery,³ but if a stranger claim under one of the tenants, a cotenant can recover only his undivided interest.⁴

In some of the States a homestead right may attach to an estate in cotenancy,⁵ while in others it is thought that such a

plete his prescriptive right. *Boyd v. Hand*, 65 Ga. 468.

A unity of possession or right that extinguishes a prescriptive right must be such that the party should have an estate in the land *a qua* and in the land *in qua*, equal in duration, quality and all other circumstances of right. Thus a title to one undivided third part of a lot as tenant in common does not authorize the holder thereof to set apart any portion of the lot for a private way for himself as if he were sole owner. *Reed v. West*, 82 Mass. (16 Gray) 283.

A chattel cannot, as a general rule, be replevied by one part owner from another part owner. But if it is attached as the property of one of them it may be delivered to the owner by the officer, after an appraisal had and bond given, as prescribed by *Maine Rev. Stat.*, ch. 114, §§ 65, 66. And after such delivery to him he may replevy it even from his cotenant if it is taken or detained by him. *Hardy v. Sprowle*, 32 Me. 322.

Removal of Timber.—*Pennsylvania* act of March 29th, 1824, provided treble damages for the cutting and conversion of "timber trees growing on the lands of another," and *Pennsylvania* act of May 4th, 1869, provided that if a tenant in common cut or removed any timber without the written consent of his cotenant the injured person should have every remedy that he would have against an entire stranger. *Held*, that the penalty under the first act was not extended by the second to an action by a cotenant. *Wheeler v. Carpenter*, 107 Pa. St. 271.

If a minor occupying land in common with his mother and sister, without their knowledge or consent, permits a third person to remove wood the mother and sister may maintain trespass against such third person. *Richey v. Brown*, 58 Mich. 435.

Married Women.—Code *Mississippi*, 1880, § 1167, removing the common law disabilities of women does not affect the limitation to their power over estates held in joint tenancy. *Gresham v. King* (Miss.), 4 So. Rep. 120.

1. *Wood v. Phillips*, 43 N. Y. 152; *Southworth v. Smith*, 27 Conn. 355.

2. *Richardson v. Richardson*, 72 Me. 403; *Osborn v. Osborn*, 62 Tex. 495.

Where an adventure in the purchase of real estate is joint, each is entitled to participate equally in profit or loss, irrespective of equality of payment; but equity will hold the common property bound for an excess in the sum paid by one over that paid by another. *Rankin v. Black*, 1 Head (Tenn.) 650.

The *Alabama* act of February 9th, which is now partially embraced in §§ 3474 and 3475 of the Code, did not totally abrogate or abolish the relation of tenants in common in the cases coming within the purview of the act, but only modified it so as to give to each tenant in common a lien on the share of the other in crops jointly raised, with the remedy of enforcing it by attachment (*BRICKELL, C. J.*, dissenting). *Collier v. Faulk*, 69 Ala. 58; and see *Holcombe v. State*, 69 Ala. 218; *McCall v. State*, 59 Ala. 227.

3. *Touchard v. Crow*, 20 Cal. 150; *Knox v. Marshall*, 19 Cal. 617; *Hart v. Robertson*, 21 Cal. 346.

4. *Carpenter v. Small*, 35 Cal. 346.

5. *Snedecor v. Freeman*, 71 Ala. 140; *McGuire v. Van Pelt*, 55 Ala. 344; *Greenwood v. Maddox*, 27 Ark. 648; *Ward v. Mayfield*, 41 Ark. 94; *Thorn v. Thorn*, 14 Iowa 49; *Hewitt v. Rankin*, 41 Iowa 35; *Tarrant v. Swain*, 15 Kan. 146; *Sherrid v. Southwick*, 43 Mich. 515; *Lozo v. Sutherland*, 38 Mich. 168; *Kaser v. Haas*, 27 Minn. 406; *McGrath v. Sinclair*, 55 Miss. 89; *Horn v. Tufts*, 39 N. H. 478; *Jenkins v.*

right can exist only where the property is susceptible of several and exclusive enjoyment.¹

Tenants in common, being severally seised of distinct freeholds, neither can bind the estate or person of the other.²

2. Disposition of the Common Property.—(a) *Conveyance of the Whole.*—Joint tenants or tenants in common may, of course, join in a conveyance of the common property,³ but one cotenant not being permitted to do any act which will prejudice the rights of another, a sale made by one will not divest another of his interest in the common property,⁴ unless he has been duly authorized to

Volz, 54 Tex. 636; Brown v. McLennan, 60 Tex. 43; Clements v. Lacy, 51 Tex. 150; Danforth v. Beattie, 43 Vt. 138; McClary v. Bixby, 36 Vt. 254.

1. First Nat'l Bank v. De LaGuerra, 61 Cal. 109; Bishop v. Hubbard, 23 Cal. 514; Elias v. Verdugo, 27 Cal. 418; Wolf v. Fleischacker, 5 Cal. 244; s. c., 63 Am. Dec. 121; Borron v. Sollibellos, 28 La. Ann. 355; Bemis v. Driscoll, 101 Mass. 418, Bates v. Bates, 97 Mass. 392; Silloway v. Brown, 12 Allen (Mass.) 30; Terry v. Berry, 13 Nev. 514; Avans v. Everett, 3 Lea (Tenn.) 76; West v. Ward, 26 Wis. 579.

2. St. Paul's Church v. Ford, 34 Barb. (N. Y.) 16.

One part owner of a steamboat has not the power to charge another part owner by contracting debts in his name. Brooks v. Harris, 12 Ala. 555.

3. Massie v. Long, 2 Ohio 287; Doe v. Fleming, 2 Ohio 301.

4. People v. Marshall, 8 Cal. 51; Carlyle v. Patterson, 3 Bibb (Ky.) 93; Sneed v. Warning, 2 B. Mon. (Ky.) 522; White v. Brooks, 43 N. H. 402; Bigelow v. Topliff, 25 Vt. 273.

Conveyance by Deed.—Where a will gave a certain fund "for the benefit of J and her children," and the same was invested in land which was conveyed to "J and her children," held, that J could convey nothing more than her undivided share. Allen v. Claybrook, 58 Mo 124.

One cotenant cannot grant such possession to a third person as to bar or postpone the other's right to maintain a bill to assign dower and set off a homestead to such grantee. Stookey v. Carter, 92 Ill. 129.

Where A and B, having an interest in common with three others, executed a deed of lands in their own names, professing in said deed to act as well for themselves as their cotenants, acknowledging the payment of the purchase money, transferring the title and

warranting it "as attorneys aforesaid," held, that neither the title of the cotenants nor that of A and B passed by the deed. Locke v. Alexander, 2 Hawks (N. Car.) 155.

Where one of two tenants in common, by will, devised her interest to the other for life, remainder to his heirs, and the other, remaining in possession after her decease, undertook to convey the whole of the estate to one of his heirs only, held, that such heir, or those claiming under him, could not, in equity, be allowed to hold adversely to the other heirs. Hicks v. Bullock (N. Car.), 1 S. E. Rep. 629.

Dedication of Common Property.—The acts of one tenant in common cannot amount to the dedication of part of the common property as a public highway against the other cotenant. Scott v. State, 1 Sneed (Tenn.) 629; St. Louis v. Laclade Gas Light Co. (Mo.), 9 S. W. Rep. 581.

An agreement made between one of several cotenants and the county commissioners in regard to the location of a way over the land held in common for the assessment of damages is not binding on the cotenants. Merrill v. Berkshire, 11 Pick. (Mass.) 269.

Acts Not Binding on Cotenants.—Tehants in common of land are not bound by the acts of a cotenant in accepting the balance of the purchase money and promising a deed after the right thereto had become forfeited. Pearis v. Covilland, 6 Cal. 617.

A minor son occupying land as tenant in common with his mother and sister, has no right in himself without their authority, to give, sell or otherwise transfer the timber on the land to a stranger, or assent to his entry on the land to remove it, and for such entry the tenants in common can maintain trespass. Richey et al. v. Brown, 58 Mich. 435.

Employment of Agent.—One of sev-

make such sale,¹ or unless the sale was duly ratified by the other tenants. But such a sale is not, as a general rule, void; the purchaser's title attaching to such interest, and only such, as the tenant of whom he purchased was possessed.²

In cases of a common ownership of personal property, where the seller is in possession, a different rule perhaps applies,³ but a sale by one joint owner to himself is open to suspicion of fraud.⁴

eral heirs has no authority to employ an agent to locate a land certificate belonging to all the heirs, and to bind the heirs to give him a certain portion of the land. *Keen v. Casey*, 22 Tex. 412.

Representations.—The representation of one tenant in common as to the extent of the subject of a joint conveyance by him and his cotenants, cannot estop his cotenants from claiming according to their rights; nor can the representation estop him, unless acted upon by the purchaser. *The Dexter Co. v. Dexter*, 6 R. I. 353.

1. *Sewell v. Holland*, 61 Ga. 608.

The acts of one tenant in common in locating land under a deed, will not affect his cotenants, unless it appears that they sanctioned his acts. *Jackson v. Moore*, 6 Cow. (N. Y.) 706.

But where lands were devised to five children, three sons to have an absolute estate, and two daughters a life interest, and a power of sale as to all the lands was given to the executors, who were the widow and the three sons, and the widow and two sons joined in an absolute conveyance, with individual covenants of warranty, the daughters cannot sue for possession, where defendants do not claim the whole title under their deed, and deny ouster, and there is no proof of defendants' possession outside the pleadings, since it becomes a case of tenancy in common, and under Code New York, § 1515, one tenant cannot recover possession without proof of ouster by the other. *Earnshaw v. Myers*, 1 N. Y. S. 901.

Ratification of Sale.—Where a tenant in common of an equitable title authorizes his cotenant, by parol, to sell his interest in the land, and the cotenant makes the sale, and the former ratifies it, and the purchaser receives the legal title from the vendor, enters into possession, and continues for ten years, making improvements on the land, the tenant in common cannot disaffirm the sale. *Workman v. Guthrie*, 29 Pa. St. 495.

Deeds executed by tenants in common, and placed in the hands of a third

person for delivery, ratify a previous contract made by one of them, on the terms and to the parties named in the deed, and are not a mere offer of sale which may be revoked before acceptance. *Johnston v. Jones* (Ala.), So. Rep. 748.

2. *Sewell v. Holland*, 61 Ga. 608.

One who assumes to purchase from one of two tenants in common the entire interest of both, the other, not sanctioning the sale, acquires only the interest of the one from whom he purchased, and becomes himself a tenant in common with the other, to whom he is liable, if he converts the whole to his exclusive use. *Sims v. Dame* (Ind.), 15 N. E. Rep. 217.

C conveyed land to S and B as joint tenants, and took a mortgage upon it from S, without notice that it was the property of the firm of S and B, which in fact it was. *Held*, that the mortgage bound an undivided half of the land. *Vandike's Appeal*, 57 Pa. St. 9.

Where two owned a tract of land in undivided moieties, and a conveyance of an undivided two thirds of the tract was made by one in his own name and as the attorney in fact for his cotenant, *held*, that as the authority to act as attorney in fact did not exist, the deed would be regarded only as the sole deed of, and as passing the undivided half interest held by, the party executing the conveyance. *Hager v. Spect*, 52 Cal. 579.

3. See Benj. Sales (4th Am. ed.), § 19.

A and B agreed that one should furnish materials, the other labor; that A should fix the price of the product, and that either might sell it. *Held*, that the death of B did not prevent A from selling and giving a good title. *Jackson v. Paxson*, 25 Ga. 35.

If one of two tenants in common of chattel sells them, and the other approves and adopts the sale when notified of it by the purchaser, he ratifies it. *Musser v. Hill*, 17 Mo. App. 169.

4. *Smith v. Robinson*, 16 N. Y. Sup. Ct. Rep. 418.

(b) *Conveyance of Undivided Share.*—One of several joint tenants or tenants in common may convey his undivided interest in the common property either to a cotenant or to a stranger and either in the whole property or a distinct and separate parcel,¹ and this even though he is not actually in possession, the property being in possession of a cotenant; as in law, the possession of one being the possession of all, the statutory rule making void conveyances by persons against whom adverse possession is held does not apply.²

A tenant in common cannot, however, by a reservation in a deed conveying his undivided interest, create an easement or servitude on the common property as against his cotenants.³

In conveying his interest to a stranger, a joint tenant or tenant in common must do so by deed of grant with words of inheritance, if it is intended to pass an estate in fee; whereas, in conveying to his cotenant, a release by a joint tenant is not only sufficient, but proper, though such conveyance by a tenant in common should be by deed,⁴ but there can be no valid parol sale of land amongst tenants in common in possession.⁵

A conveyance by devise by one joint tenant of his share in those States in which survivorship has not been abolished will be inoperative, the right of survivorship taking precedence.⁶

(c) *Conveyance by One of Specific Part.*—The general rule is that a conveyance by one joint tenant or tenant in common of a

1. See *Rector v. Waugh*, 17 Mo. 13; *Shepardson v. Rowland*, 28 Wis. 108; *Elliot v. Frakes*, 90 Ind. 389.

Although one tenant in common cannot convey by metes and bounds a distinct portion of the whole tract held in common with others, so as to prejudice his cotenants or assignees; yet where several persons are tenants in common of separate or distinct parcels of land, one of them may convey all his undivided interest in the whole of any one of the distinct parcels, and his deed will be valid and effectual against his cotenants. *Primm v. Walker*, 38 Mo. 94.

Where a cotenant conveyed his undivided interest to secure his note, he to remain in possession until the note was overdue and unpaid, when he was to surrender possession to his grantee to dispose of the property in satisfaction of the note, and upon the note's becoming due he conveyed to his cotenant, who refused possession to said grantee. *Held*, that the grantee was entitled to immediate possession upon the expiration of the limitation. *Walker v. Teale*, 7 Sawyer (U. S.) 39.

One purchasing the interest of coparceners before partition takes only

an inchoate title to the lot afterwards acquired by partition; he takes subject to equities existing at the time between the heirs whose interest he has purchased and third parties. *Flynn v. Herye*, 4 Mo. App. 360.

2. *Elliot v. Frakes*, 90 Ind. 389.

3. *Pfeiffer v. University of California* (Cal.), 15 Pac. Rep. 622.

In a conveyance by one tenant in common of his estate in the land held in common, a reservation of his interests in the mines in and upon the land granted is void. *Adams v. Briggs Iron Co.*, 7 Cush. (Mass.) 361.

A and B were tenants in common of a piece of land; A conveyed his interest to a stranger, reserving to himself the right to pass and repass over the land to a wood house standing upon an adjoining lot owned by him. *Held*, that aside from the question whether such a use of the land would be proper, the reservation was void, as an attempt to create a several limited interest in the land held in common. *Marshall v. Trumbull*, 28 Conn. 183.

4. Washb. Real Prop. (5th ed.) 412.

5. *Spencer's Appeal*, 80 Pa. St. 317.

6. Wash. Real Prop. (5th ed.) 412.

specific part of the property by metes and bounds to a stranger can have no legal effect or operation to the prejudice of a cotenant,¹ but such a conveyance is valid as between the parties to it, although it will not bind the cotenants not joining in it to whose interests it is prejudicial,² and it will be sufficient to pass all the title of the person making such conveyance to the common property within the boundaries described in the deed,³ the

1. Bartlet v. Harlow, 12 Mass. 348; Varnum v. Abbott, 12 Mass. 474; Porter v. Hill, 9 Mass. 34; Perkins v. Pitts, 11 Mass. 125; Baldwin v. Whitting, 13 Mass. 57; Rising v. Stannard, 17 Mass. 282; Griswold v. Johnson, 5 Conn. 363; Duncan v. Sylvester, 24 Me. 482; Blossom v. Brightman, 21 Pick. (Mass.) 285; Peabody v. Minot, 24 Pick. (Mass.) 329; Jeffers v. Radcliff, 10 N. H. 242; Jewett v. Stockton, 3 Yerg. (Tenn.) 492; Whitton v. Whitton, 38 N. H. 127; Ballow v. Hale, 47 N. H. 347; Holcomb v. Coryell, 11 N. J. Eq. (3 Stockt.) 548; Boston etc. Co. v. Condit, 19 N. J. Eq. 394; Gates v. Salmon, 35 Cal. 576; McKey v. Welch, 22 Tex. 390; Dorn v. Dunham, 24 Tex. 366; Good v. Coombs, 28 Tex. 34; Hartford etc. Co. v. Miller, 41 Conn. 112; Marsh v. Holly, 42 Conn. 453.

One joint tenant cannot convey a part of the land held in joint tenancy by metes and bounds to a stranger; nor can one entering under such a conveyance be disseisor of the other joint tenants. Porter v. Hill, 9 Mass. 34.

One tenant in common, owning an undivided interest in real estate, cannot convey to a stranger a certain portion of the tract in common, and put the purchaser in possession of the portion conveyed. Mattox v. Hightshire, 39 Ind. 95; Shepardson v. Rowland, 28 Wis. 108.

The purchaser from a tenant in common of his share, defined by metes and bounds, cannot require cotenants, whose title was acquired after such purchase, to take their share in the remainder of the land. Dennison v. Foster, 9 Ohio 126.

An undivided interest in a specific part of a single tract of land, held by cotenants as an integer, cannot be granted by the mere deed of one cotenant so as to entitle the grantee to partition of that specific part against the other cotenant. Markoe v. Wake-
man, 107 Ill. 251.

No Presumption of Separation.—Where one tenant in common sold a

portion of the common land, of which he had never been in possession, and over which he had exercised no act of ownership prior to the sale, the court refused, in the absence of evidence of a partition, to presume that the land sold had been allotted to him as his share. Holt v. Robertson, 1 McMull. (S. Car.) Ch. 475.

Purchaser Not a Tenant in Common.—The conveyance by a tenant in common of a portion of the common estate by metes and bounds cannot operate, contrary to the expressed declarations and intentions of the parties, to convey an estate in common, instead of an estate in severalty; and a creditor of the grantee, who levies his execution upon an undivided share of the whole common estate, acquires no title as tenant in common by virtue of such levy. Soutter v. Porter, 27 Me. 405.

2. Crocker v. Tiffany, 9 R. I. 505.
The deed of one tenant in common to a specific portion of the common property is not void, and the grantee thereunder is, upon partition, entitled to the portion conveyed, if the interests of the other cotenants are not thereby prejudiced. Camron v. Thurmond, 56 Tex. 22.

Although a tenant in common cannot impair or vary the rights of his cotenants, yet if he convey a specific portion of the land held in common, or make a contract in regard to it, and on subsequent partition such portion falls to him in severalty, he will be bound by his act. Cox v. McMullin, 14 Gratt. (Va.) 82.

In *Maryland*, a tenant in common may dispose of his interest in any particular separate portion of real estate which has descended to him in common under the act to direct descents. Reinicker v. Smith, 2 Har. & J. (Md.) 421.

3. Crook v. Vandevoort, 13 Neb. 505.
A conveyance by one cotenant give the grantee no greater rights than those held by the grantor. Markoe v. Wake-
man, 107 Ill. 251.

grantee taking subject to the contingency of loss of the premises if, on partition, the parcel in question should not be allotted to his grantor.¹

It is held in *Missouri*, however, that such a conveyance is valid even as to the cotenants not joining.²

Such conveyance by one tenant of a portion of the common property by metes and bounds is, however, valid if co-operated in or confirmed by the other cotenants,³ and such co-operation or confirmation may be inferred from any act which shows an acquiescence in the title of the purchaser.⁴ So where the property consists of several distinct freeholds, a tenant in common may convey his undivided interest in one or more of them and it may be sold on execution, without reference to any of the other parcels.⁵

The above general rule has no application to a common right to the use of water,⁶ nor to a proceeding *in rem* for the acquisition of property for public use.⁷

(d) *Leasing Common Property*.—The same rule applies to the leasing of premises owned in common, and one tenant in common not being empowered by his cotenant cannot execute a lease that will bind them,⁸ but a party who is in possession of an estate by the consent of the joint owners is liable to the survivors of them for rent, although he entered under a lease signed by only one of

1. *Stark v. Barrett*, 15 Cal. 361.

2. *Barnhart v. Campbell*, 50 Mo. 597.

3. *Hartford etc. Co. v. Miller*, 41 Conn. 112.

If all the tenants in common of a tract of land give conveyances at different times, by metes and bounds, to the same person, of the same part of the land, the conveyances taken together pass the title. And the same principle where the several interests of tenants in common in a part of the land held in common are taken, at different times, by compulsory proceedings, for public use. *Stevens v. Norfolk*, 46 Conn. 227.

The conveyance, by a tenant in common, of his interest by metes and bounds, is good with the assent of the other cotenants. *Goodwin v. Keney*, 49 Conn. 563.

4. Doubtless such an assent would be inferred from a silence of thirty years, during which the interests of the original cotenants had been conveyed. Certainly in case of a mortgage by a cotenant, one acquiring his title from the mortgagor could not deny the validity thereof. *Goodwin v. Keney*, 49 Conn. 563.

5. *Butler v. Roys*, 25 Mich. 53.

Where a property consists of sepa-

rate city lots which have been platted, each lot is presumed in the absence of any showing to the contrary, to be a separate holding. *Butler v. Roys*, 25 Mich. 53.

6. *Adams v. Manning*, 51 Conn. 5.

7. Where a town took proceedings to condemn land for a burying ground, but, through mistake, against only one of two tenants in common, held, that the principle that the interest of a tenant in common cannot be acquired by metes and bounds did not apply to such a proceeding *in rem*, and that, if the town took possession, supposing it had a full title, it was not liable for trespass. *Stevens v. Battell*, 49 Conn. 156.

8. *Mussey v. Holt*, 24 N. H. (4 Frost) 248.

A lease by some tenants in common is invalid as to the others who do not join therein. *Painter v. Cole*, 120 Mass. 162.

Where a tenant in common, without any authority from his cotenant, either written or verbal, enters into an agreement with another to lease the coal under their land, which agreement is never ratified by the cotenant, and the party with whom the agreement is made enters upon the land and makes

them,¹ and one tenant in common before distress and avowry may receive the whole rent and discharge the lessee.² Tenants in common who make a joint lease may join in a distress for rent,³ but they cannot recover in ejectment on a joint demise.⁴

(e) *Licencing Acts Upon the Common Property*.—One joint tenant or tenant in common cannot give a licence to perform any act upon or about the common property which will be detrimental to the interests of his cotenants;⁵ but when the relations of the tenant are such that one may be presumed to have acted upon authority conferred by the other, or when the co-operation and consent of that other may be inferred, the licence will be lawful and binding.⁶

3. Agreements Concerning the Common Property.—Tenants in common may contract with each other concerning the use of the property so held, and the violation of such an agreement gives a good cause of action at law to the persons injured,⁷ and it would

permanent improvements on it, and is afterwards forcibly dispossessed by the party with whom he made the agreement, he cannot recover in an action against both tenants for damages for his improvements.

One tenant in common has no power to bind his cotenant by an agreement with another to lease their land. *McKinley v. Peters et al.*, 111 Pa. St. 283.

On the several demise of one tenant in common, the plaintiff in ejectment may recover his term in the undivided share of that tenant, but the lessors of the plaintiff must at their peril take out a writ of possession only for land to which they have title. *Godfrey v. Cartwright*, 4 Dev. (N. Car.) L. 487.

1. *Codman v. Hall*, 9 Allen (Mass.) 335.

2. *Decker v. Livingston*, 15 Johns. (N. Y.) 479.

3. *Jones v. Gundrim*, 3 Watts & S. (Pa.) 531; *Nixon v. Potts*, 1 Hawks (N. Car.) L. 469; *Hoyle v. Stowe*, 2 Dev. (N. Car.) L. 318.

4. *Harrison v. Botts*, 4 Bibb (Ky.) 420; *Taylor v. Perkins*, 1 A. K. Marsh. (Ky.) 253; *Innis v. Crawford*, 4 Bibb (Ky.) 241.

5. In trespass by several tenants in common of land, a plea that the defendants entered, etc., under the licence of the plaintiffs is not sustained by proof of a licence from but one of the tenants in common. Tenants in common are seised of each and every part of the estate, but it is not in the power of one to convey the whole of the estate, or the whole of a distinct portion, or to give a valid release for injuries done

thereto, or to give a licence to do any act which will work a permanent injury to the inheritance, or lessen the value of the estate. *Murray v. Haverty*, 70 Ill. 318.

A licence to mine upon lands given by one tenant in common will not bind the other tenants. *Tipping v. Robins*, 64 Wis. 546.

6. A licence by one of two tenants in common, who are also partners in the lumber business, to a third person, to cut timber on the lands held in common, from which they procure lumber to carry on their business, is good, and confers title to timber cut by such persons; especially where the licence is in satisfaction of a demand due from both tenants in common. *Baker v. Wheeler*, 8 Wend. (N. Y.) 505.

7. *Bond v. Hilton*, *Busb* (N. Car.) L. 308.

Joint tenants may make a subdivision of time for the exclusive occupancy of the whole of a tract of land. *Curtis v. Swearingen*, 1 Ill. (Breese) 160.

Under an agreement that tenants in common of a mill should occupy in severalty, successive periods of time proportioned to their respective interests in the mill, and that each should make all repairs necessary during his term, not exceeding \$3 in amount, and that all repairs upon the mill exceeding \$3 in amount should be made at their joint charge. *Held*, that all repairs at any one time, not exceeding \$3 in amount, were at the sole charge of the tenant then occupying; and that when the repairs made at one time exceeded \$3, the

seem that any contracts or agreements which may be made between strangers will be valid as between tenants in common concerning the common property;¹ but an oral agreement between

whole expense, and not simply the excess, must be considered as made at their joint charge. *Kidder v. Rixford*, 16 Vt. 169.

An agreement by one tenant in common to pay the other for the use of the common property for his own benefit is valid and enforceable at law. *Davies v. Skinner*, 58 Wis. 638; s. c., 46 Am. Rep. 665.

One employed as an agent concerning lands is not prevented from enforcing his claim for compensation under his agreement by the fact that he was himself an owner in the land. *Thompson v. Salmon*, 18 Cal. 632.

One tenant in common, who has leased to his cotenant may distrain for the rent. *Luther v. Arnold*, 8 Rich. (S. Car.) 24.

As to Possession.—Where one tenant agrees that if the others will furnish supplies for a manufacture, they shall have the exclusive control of the sale of the manufactured article, the right to exclusive possession will follow as an incident of the power to sell. *Corbett v. Lewis*, 53 Pa. St. 322.

As to Sales.—Where tenants in common agree in writing to sell their land and divide the proceeds equally, and one dies before the sale, the proceeds are considered real estate. *Halfenstine v. Waggoner*, 13 Serg. & R. (Pa.) 307.

A contract provides that one of several joint owners of land should have a commission on sales which he "effected," means sales of which he was the procuring cause, since he could not complete a sale without the concurrence of the others. *McCreery v. Green*, 38 Mich. 172.

Mere authority given by one tenant in common to another to sell the joint property, does not divest the former of the right to its possession, nor exempt it from levy and sale under execution against him. *Thompson v. Mawhinney*, 17 Ala. 262.

Assignment of Agreement.—In an action to recover real estate upon which was a hotel, it appeared that the premises were sold to P, who sold to C and W as tenants in common; that W transferred his interest and a half interest in the hotel furniture to defendant, who agreed to perform the original contract; that W assigned to C his

interest in his assignment to defendant and in the original contract, but had failed to pay for the furniture assigned by W to him. *Held*, that he was rightfully in possession under the original contract, by virtue of W's assignment, and that he had never forfeited his right. *Woods v. Burke* (Mich.), 35 N. W. Rep. 798.

As to Separate Possession.—If there be two tenants in common of a dwelling house, severally furnishing and occupying different apartments, one cotenant has no right to disturb the other's occupation by removing his furniture. *Keay v. Goodwin*, 16 Mass. 1.

And if one cotenant lease his share in the common property, the lessee, on entry, will have the same right in relation to the other cotenant which the lessor had. *Proctor v. Newhall*, 17 Mass. 81.

1. J and D were tenants in common of premises held by them under a lease in fee, subject to a rent reserved, the landlord having a right of forfeiture and re-entry for nonpayment. D, by parol, sold his interest to J, who thereupon took possession, claiming to own the whole. A contract was afterwards made between the landlord and J, in the ordinary form of an executory contract for the sale of lands, by which the former agreed to sell and the latter to purchase the premises at a price specified, to be paid in instalments, and, upon payment, a deed to be executed. In case of default of payment, it was provided that the vendor might re-enter, and that the purchaser should become a tenant in sufferance. The consideration expressed was not the value of the premises, but was made up of rent in arrear and the estimated value of the future rent reserved; the contract was not made with intent to disturb the title under the lease, which was not surrendered or agreed to be surrendered. *Held*, that such contract did not affect the prior relations between the parties, or change the legal title of J to an equitable one; that there was no surrender of the lease in law, as such a surrender could only be made to a reversioner or remainder man, neither of which positions was held by the landlord; nor was there a merger

tenants in common of mortgaged land that the interest of one should be relieved from, and that of the other changed with the entire mortgage debt, is invalid.¹

4. Other Rights and Powers.—One tenant in common of land has authority to settle with a trespasser upon the common property and release him from liability.² And one tenant can mortgage his interest in the common real estate to secure his individual indebtedness, unless it is partnership property.³ Likewise one may redeem the common property sold for the nonpayment of taxes,⁴ or from a mortgage upon the whole,⁵ but in such case he must pay the whole mortgage debt.⁶

of the prior estate, as a greater could not be merged into a lesser estate; nor did the doctrine of estoppel apply to prevent J from claiming under the lease. *Millard v. McMullin*, 68 N. Y. 345.

An advertisement for the sale of a joint estate, although signed by all the joint tenants, will not operate to bind one of the joint tenants upon a contract for the sale of the land, who does not also sign the contract. *Hanks v. Enloe*, 33 Tex. 624.

Where one of two joint grantees of land consents that the joint deed may be surrendered, and that the grantor may convey the premises to the other party alone, the party so assenting must abide by what may be done in the way of changing the title, and can have no equitable right to the interposition of a court of equity to enable him to retract, no matter whether the arrangement was because the land before really belonged to the party receiving the new deed, or the interest of the other party yielding up the title was disposed of to him, or it was done in order to shield the land from apprehended pecuniary liability. *Dinwiddie v. Bell*, 95 Ill. 360.

1. *Porter v. Muller*, 65 Cal. 512.

2. *Hodges v. Healy* (Me.), 14 A. 11.

One tenant in common of land has authority to release a trespasser upon the lands from his liability, and the settlement and release will be binding upon his cotenants. And, as a settlement and release of a trespass necessarily operates as a transfer of the property severed from the freehold to the trespasser, they will have the same effect when made by one tenant in common, as it discharges the cause of action. *Bradley v. Boynton*, 22 Me. 287.

But in New Hampshire, where one tenant in common commences an action to recover damages for a trespass, and

another gives a release, it is no bar to the maintenance of a suit, but the plaintiff is entitled to damages only to the extent of his interest. *Wilson v. Gamble*, 9 N. H. 74.

3. *Rupps v. Steinbach*, 48 Mich. 465.

C and B, tenants in common in fee, in equal shares, of a message and premises, entered into partnership and it was agreed by the articles that this property should be partnership assets; and it became the place where the business of the firm was carried on. After this B made a legal mortgage in fee of one moiety to secure his private debt to a person who knew that the property was the place of business of the firm. Some years afterwards B absconded, and C was obliged to pay the debt of the firm, all of which had been contracted since the mortgage, and a large balance thus became due to him. *Held*, that as the mortgagee, when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, and that his claim must be postponed to that of C; and that the circumstances of the debts paid by C having been incurred since the mortgage did not affect the case. *Cavendar v. Bulteel*, 9 Ch. (Eng.) 79.

4. *Watkins v. Eaton*, 30 Me. 529.

5. *Crafts v. Crafts*, 13 Gray (Mass. 360.

6. One tenant in common, of real estate conveyed to two, paid his half of the purchase money, and joined with his cotenant in a note and mortgage to secure the payment of the other half, and afterwards released his interest in the land to the mortgagee. *Held*, that his cotenant, or one claiming under him with notice of the facts, could not redeem the estate without paying the whole amount of the mortgage. *Crafts v. Crafts*, 13 Gray (Mass.) 360.

One tenant in common can compel another who withholds the deed under which they claim to have it recorded,¹ and one who claims to be the sole owner under a conveyance from a hostile source and who denies his cotenant possession in common is not entitled to notice to quit.²

VII. DUTIES AND LIABILITIES—1. As to Rents and Profits.—A joint tenant or tenant in common is liable to account to his cotenant for rents actually received,³ but he is chargeable only with what

1. *Smith v. Cole*, 39 Hun (N. Y.) 248.

2. *Clark v. Crego*, 47 Barb. (N. Y.) 599.

3. *Gayle v. Johnston*, 80 Ala. 395; *Pope v. Harkins*, 16 Ala. 321; *Goodenow v. Ewer*, 16 Cal. 461; *Muller v. Boggs*, 25 Cal. 175; *Austin v. Barrett*, 44 Iowa 488; *Burch v. Burch*, 82 Ky. 622; *Cutter v. Currier*, 54 Me. 81; *Majew v. Durfee*, 138 Mass. 584; *Dyer v. Wilbur*, 48 Me. 287; *Buck v. Spofford*, 31 Me. 34; *Medford v. Frazier*, 58 Miss. 241; *Hannan v. Osborn*, 4 Paige (N. Y.) 336; *Irvine v. Hanlin*, 10 Serg. & R. (Pa.) 219; *Jones v. Massey*, 14 S. Car. 292; *Pearson v. Carlton*, 18 S. Car. 47; *Holmes v. Best*, 58 Vt. 547.

One who is tenant in common with minors is equally liable to them for the proportion of the rents derived from the common property as if they were of age. *Linch v. Broad* (Tex.), 6 S. W. Rep. 751.

Where pending a suit for partition, brought by several heirs, one of them had collected all the rent, *held*, that he was liable therefor, and an assignee for the benefit of his creditors was in no better position. *Bridgford v. Barbour*, 80 Ky. 529.

M and L, owners of certain premises, leased the same, and thereafter M conveyed a portion of his interest to S. *Held*, that until agreement between M and L, the lessee and S, as to what share of the rent shall be paid the latter, M and L may collect the whole amount; and when L has received the rent he must account to M for half, it not appearing that S has laid claim to his portion. *Miner v. Lorman* (Mich.), 38 N. W. Rep. 18.

A and B were tenants in common of a tract of grazing land. A took possession of the land—not, however, excluding B—and erected small houses, corrals and dairy appointments, and permitted owners of herds to bring and graze their herds upon the land, and to use the corrals, etc., A exercising no

care over the herds except that he employed a man to keep them separated. The owners of the herds paid to A a certain proportion of the number of their cattle by way of compensation. *Held*, in an action brought by B against A for an accounting, that A was bound to account and was liable for one half the value of the cattle so received by A and that A was not entitled to anything by way of allowance for his services. *Howard v. Throckmorton*, 59 Cal. 79.

The complainant and his brother and sister were tenants of certain lands and were each entitled to an equal third part of the same. The lands having been in possession of tenants had run to waste. In this state of the premises the brother (the defendant) went into possession of the lands and improved them; the sister then conveyed her interest to the complainant; a division was made between the complainant and defendant and mutual releases given. *Held*, that the complainant was entitled to one third of the rents and profits from the time the defendant entered into possession till the sister made the conveyance, and from that time till the defendant delivered up possession, to two thirds of the rent, and that the defendant should be allowed a proper amount for his improvements. *Cooper v. Cooper*, 9 N. J. Eq. (1 Stockt.) 566.

Where one tenant in common applied the rents and profits of the common property to the purchase of an outstanding tax certificate, and on such certificate procured a deed to himself, and by such deed claimed to be the owner of the interest of his cotenant, or to have such color of title that he could invoke the protection of the statute of limitations applicable to tax sales, a demurrer to a paragraph of answer pleading such statute was correctly sustained. *Bender v. Stewart*, 75 Ind. 88.

Under *Vermont Rev. Laws*, § 1202, one tenant in common must account to

he has received in excess of his just share.¹ This applies only to such moneys as he has actually received, and not, as in the case of a bailiff at common law, to what he might have made;² and this is subject to proper deductions for sums paid for taxes, necessary repairs, and other necessary expenses incurred for the preservation of the premises.³ This liability to account for rents received in excess of his share is a personal charge upon the tenant who receives them,⁴ and gives the other no lien upon his share of the common property.⁵ Though in *New York* it would seem that the contrary rule has been adopted.⁶

Many of the United States have adopted the English and common law rule that one joint tenant or tenant in common is not liable to his cotenants for the use and occupation of the common property where he has received no rent from third persons, in the absence of an ouster, an agreement with them to pay rent, or a demand from them to surrender possession;⁷ but if he exclude

the other for one half of the rent received from a lessee of the whole property, although the lessee did not use it to exceed one half of its capacity. *Holmes v. Best*, 58 Vt. 547.

1. *Irvine v. Hanlin*, 10 Serg. & R. (Pa.) 219; *Jones v. Massey*, 14 S. Car. 292.

Where one tenant in common takes more than his share of the income, without the consent of his cotenant, he will be liable to the latter in assumpsit for the excess. *Dyer v. Wilbur*, 48 Me. 287.

A bill for partition may claim an account for rents received by a cotenant in possession of the common property; but only where he has occupied more than his rightful share of the estate and then only for the rent of the excess. *Mcdford v. Frazier*, 58 Miss. 241.

2. *Irvine v. Hanlin*, 10 Serg. & R. (Pa.) 219.

A and B owned a building on C's land. A took a lease in his own name and compromised with C for the rent due by paying ten cents on the dollar. *Held*, that for one half of the amount due him B was liable to A. *Mayhew v. Durfee*, 138 Mass. 584.

3. *Goodenow v. Ewer*, 16 Cal. 461.

For rents actually received, one tenant in common is liable to account to his cotenant; but, if the rents were received from a tenant to whom necessary advances to make a crop were supplied, such advances and other necessary costs and expenses incurred, must be deducted from the gross amount received. *Gayle v. Johnston*, 80 Ala. 395.

4. *Hannan v. Osborn*, 4 Paige (N.Y.) 336; *Burch v. Burch*, 82 Ky. 622.

5. *Burch v. Burch*, 82 Ky. 662.

6. *Scott v. Guernsey*, 60 Barb. (N.Y.) 163; *Hannan v. Osborn*, 4 Paige (N.Y.) 336.

7. *Wilkinson v. Stuart*, 74 Ala. 198; *Hamby v. Wall* (Ark.), 2 S. W. Rep. 705; *Carver v. Coffman* (Ind.), 10 N. E. Rep. 567; *Reynolds v. Wilmeth*, 45 Iowa 693; *Israel v. Israel*, 30 Md. 120; *Kites v. Church*, 142 Mass. 586; *Sargent v. Parsons*, 12 Mass. 149; *Hause v. Hause*, 29 Minn. 252; *Kean v. Connelly*, 25 Minn. 222; *Webster v. Calef*, 47 N. H. 289; *Edsall v. Merrill*, 37 N. J. Eq. 114; *Woolever v. Knapp*, 18 Barb. (N. Y.) 265; *Tyner v. Fenner*, 4 Lea (Tenn.) 469; *Kline v. Jacobs*, 68 Pa. St. 57; *Keisel v. Earnest*, 21 Pa. St. 90; *Neil v. Shackelford*, 45 Tex. 119; *Osborn v. Osborn*, 62 Tex. 495; *Graham v. Pierce*, 19 Gratt. (Va.) 28; *McCrillis v. Banks*, 19 Vt. 442; *Dodson v. Hays* (W. Va.), 2 S. E. Rep. 415.

Tenants in common are seized *per my et per tout*, and each has an equal right to occupy the premises, and unless the one in actual possession denies the other the right to enter or agree to pay rent, nothing can be claimed for such occupation. *Newbold v. Smart*, 67 Ala. 326.

New York Code Civil Proc., § 1589, providing for the settlement in an action for partition of the rights of cotenants where one has received more than his proportion of the rents, and § 1666, allowing one tenant to recover his just proportion from his cotenant, do not render a tenant in common liable to account for the rent of the joint prop-

his cotenant under a claim of exclusive right or otherwise, the

erty occupied by himself. *Rich v. Rich*, 2 N. Y. S. 770.

One who occupies a farm in right of his wife, she being a tenant in common with the other devisees under a will, is not liable to account to the other tenant in common, either for rent or for a share of the profits, unless there be an express agreement that he shall do so. *Wilcox v. Wilcox*, 48 Barb. (N. Y.) 327.

A tenant in common having hired the share of his cotenant and continuing in possession after the term, and having offered possession of his half to his cotenant, and done nothing at variance with that offer, is not liable to pay double rent under *New York Rev. Laws* 440, § 21, though notice to quit was given. *Mumford v. Brown*, 1 Wend. (N. Y.) 53.

A tenant in common who uses his estate only to an extent less than his share, and not to the extent of an ouster or denial of the right of his cotenant, is not liable to account to his cotenant; and such use cannot be offset against the excessive use by said cotenant. *Almy v. Daniels* (R. I.), 10 Atl. Rep. 654.

The joint proprietor of a plantation who cultivates half of it for his own account without preventing his coproprietor from occupying and cultivating the other half is not liable to the latter for rent of the common property. *Balfour v. Balfour*, 33 La. An. 297.

Leased Premises.—The lessee of the interest of one tenant in common does not, by occupying the whole estate, render himself liable for use and occupation to another tenant in common, to whom he has not attorned, and to whose occupation of his share of the estate he has never objected. *Badger v. Holmes*, 6 Gray (Mass.) 118.

A tenant in common who takes possession of the common property which has been leased by his cotenant is not liable to the lessee for such possession. *Hoopes v. Meyer*, 1 Nev. 433.

Where one tenant in common takes a lease from his cotenant of the premises held in common for a term and continues in possession after the expiration of the term, without any new express agreement between the parties or any claim by the defendant to be exclusively entitled to the possession, the lessor cannot recover for use and occupation after the expiration of the

term. *Dresser v. Dresser*, 40 Barb. (N. Y.) 300.

A tenant in common of realty who merely occupies the common property without obstructing the rights of other tenants, and who sets up no claim for repairs or other claim for disbursements is not chargeable upon a bill for partition with an occupation rent. *Schneider v. Taylor*, 16 Lea (Tenn.) 304.

Where a widow as guardian of her children received rents from a lease of property held in common with a cotenant and applied them to the use of herself and children. *Held*, that the latter could not be made jointly liable to the cotenant for half the money so received if the heirs are liable to such cotenant, they are only liable separately, each for such part of the cotenant's money as was expended for his own benefit. *Crocker v. Tiffany*, 9 R. I. 505.

Refusal to Occupy.—A father voluntarily conveyed to a daughter a half interest in a house, reserving for himself the possession and control, and providing that she might live in the house. On his remarriage she refused to live there. *Held*, that she could not charge him rent for one half the house while he lived there and she would not. *Crockett v. Crockett*, 75 Ga. 202.

But if one tenant in common in working a gold mine receives all the proceeds in gold, he is liable as bailiff for such portion as belongs to his cotenant, together with the actual profit on it. *Huff v. McDonald*, 22 Ga. 131.

Waste.—One tenant in common of a mine who does not exclude his cotenants may work the mine in the usual way, and cannot be made to account in an action for damages as for waste, nor will he be enjoined at the instance of his cotenants. *McCord v. Oakland etc. Co.*, 64 Cal. 134; s. c., 49 Am. Rep. 686.

Mistake as to Extent of Interest.—

That a tenant in common was mistaken as to the extent of his interest when he took possession of the premises, and during his subsequent occupation, is not sufficient to require him to account to his cotenants for his use thereof, where it does not appear that he ever excluded any of them, or that they ever made any claim or demand upon him in the assertion of their rights. *Sallie v. Sailer*, 41 N. J. Eq. 398.

cotenant is entitled to compensation to the extent of the use of which he has been improperly deprived,¹ and if a tenant occupies the whole estate under an agreement, oral or written, to pay his cotenants for the occupation, the latter may recover for the same.² Where one tenant uses what another cannot use, the consent to such use will be presumed.³

Where one tenant uses the common property or occupies and uses more than his just proportion, to the exclusion of his cotenants, as a general rule the measure of his accountability to them is their share of a fair rent of the property so occupied and used by him. But there may be peculiar circumstances in a case making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between them.⁴

In many of the other States this rule has been rejected, and one tenant in the possession and sole enjoyment of the common property is held bound to account to his cotenant for the income of so much of the property as was productive at the time he

1. *Crane v. Waggoner*, 27 Ind. 52; *Osborn v. Osborn*, 62 Tex. 495; *Barrell v. Barrell*, 25 N. J. Eq. 173.

A tenant in common who prevents his cotenants from obtaining from the premises held in common their just shares of the income the premises are capable of yielding, or who takes possession of the whole and uses them as his own and thereby makes a profit is bound to account to his cotenants, either for the rental value of the premises or the profit he has made. *Edsall v. Merrill*, 37 N. J. Eq. 114.

Ordinarily one cotenant is not liable for rent while he remains in possession of the common property, all the time denying the title and right of his cotenant and keeping such cotenant from making an entry or receiving any part of the annual income or rents; he is bound to account for what he has received over and above his proportionate share of the annual income or rents and profits. *Carver v. Coffman* (Ind.), 10 N. E. Rep. 567.

A tenant in common who has the entire and exclusive occupation of the whole or any part of the estate is liable to account therefor; and one who has the income or profit of more than his share is liable to account for the excess to his cotenant. *Almy v. Daniels* (R. I.), 10 Atl. Rep. 654.

A mortgage made by a tenant in common is not chargeable to his cotenant for the latter's share of the rental value of the premises which are equally open to, and may be occupied by both. But where he cultivates the land and re-

ceives the entire proceeds he is chargeable to his cotenant for his share of the profits. *Buckelew v. Snedeker*, 27 N. J. Eq. 82.

A tenant in common who has occupied and taken the profits of the joint estate is not liable to his cotenant for a share thereof unless he has received money for the proceeds of the crops beyond the amount of his own share. *Peck v. Carpenter*, 7 Gray (Mass.) 283.

2. *Kites v. Church*, 142 Mass. 586.

An express agreement by one tenant in common or partner to pay his cotenants or copartners for the use of the joint property for his own individual benefit is valid and may be enforced in an action at law. *Davies v. Skinner*, 58 Wis. 638; s. c., 46 Am. Rep. 665.

A tenant in common of land who makes an agreement with the wife of his cotenant that the cotenant shall have the sole occupation of the land and pay him a certain sum therefor, cannot maintain an action for such occupation if he does not prove that the cotenant had actual knowledge of such agreement or that he authorized his wife to make it. *Wilbur v. Wilbur*, 13 Metc. (Mass.) 404.

3. *Howe Scale Co. v. Terry*, 47 Vt. 109.

4. *Graham v. Pierce*, 19 Gratt. (Va.) 28.

In estimating the value of that portion of the joint property occupied by one of the cotenants with a view to the assessment of rent it is immaterial what the element may be which contributes

went into possession ;¹ but he will not be charged for the occupation of such land as was rendered productive by the application of his skill, labor or capital,² except, perhaps, from the time

to increase the value. *Shiels v. Stark*, 14 Ga. 429.

In the case of a tenancy in common, in lead mines, in settling the accounts of the operating tenants, they should not be charged a certain sum per ton for the ore raised from the mine, or credited with an estimated sum per ton for raising the ore and manufacturing; but each so operating should be charged with all his receipts and credited with an estimated sum per ton for raising the ore and manufacturing, and each so operating should be charged with all his receipts and credited with all his expenses on account of the operation of the mine. *Graham v. Pierce*, 19 Gratt. (Va.) 28.

1. *Sconce v. Sconce*, 15 Ill. App. 169; *Hancock v. Day*, 1 McMull. (S. Car.) Ch. 298; *Thompson v. Bostick*, 1 McMull. (S. Car.) Ch. 75; *Jones v. Massey*, 14 S. Car. 292; *Holt v. Robertson*, 1 McMull. (S. Car.) Ch. 475; *Jolly v. Bryan*, 86 N. Car. 457; *White v. Stuart*, 76 Va. 546.

Under the statute of this State, which is materially different from the English statute, one of several tenants in common, who has taken the "use" and "benefits" of the interests of his cotenants, is required to account to them for their just proportion of the same, or for their share of the reasonable rental value of the premises. *Woolley v. Schrader*, 116 Ill. 29.

A tenant in common may recover *mesne* profits of his cotenant only for a reasonable time after judgment. *Hare v. Fury*, 3 Yeates (Pa.) 13.

Rev. Stat., ch. 95, § 16, of *Maine*, which modifies the common law as to the remedy of one tenant in common against his cotenant, applies both to cases of personal occupancy and to cases where a tenant receives rent from a subtenant. *Cutler v. Currier*, 54 Me. 81.

Under Rev. Stat. *Ohio*, § 5774, providing that one tenant in common may recover from another his share of the rents and profits secured from the estate, according to the justice and equity of the case; a tenant in common who uses the estate simply to pasture his cattle is liable to account to his cotenants for their share of the value of such use as for rents and profits received. *West*

v. Weyer (Ohio), 18 N. E. Rep. 537.

Where two tenants in common recovered land in ejectment against a third tenant in common, *held*, that they were also entitled to their joint action for *mesne* profits. *Camp v. Homesley*, 11 Ired. (N. Car.) L. 211.

Where one of two tenants in common receives from the other a lease of the latter's share of the common estate, agreeing to pay rent, and so take possession of the estate under the lease, and then holds over after its expiration, he will not be presumed, as in other cases, to be continuing his possession under the lease, but to be holding by virtue of his original right as tenant in common, subject to his liability to account to his cotenant in the manner prescribed by law; but if, after the expiration, he permits his cotenant to retain and apply on the lease moneys which, being due to them both, have been collected by such cotenant, this is evidence that he still holds under the lease, and is bound to pay rent according to its terms. *Rockwell v. Luck*, 32 Wis. 70.

2. *Hancock v. Day*, 1 McMull. (S. Car.) Ch. 298; *Holt v. Robertson*, 1 McMull. (S. Car.) Ch. 475; *Thompson v. Bostick*, 1 McMull. (S. Car.) Ch. 75; *White v. Stuart*, 76 Va. 546.

When one tenant in common occupies and uses more than his share of the common property, he is liable to account to his cotenant for the rents and profits of so much of the common property as he has occupied and used in excess of his share. *Pearson v. Carlton*, 18 S. Car. 47.

But even if he is in exclusive possession of the land, he is not liable to account if he has actually used no more than his share of the land, and there has been no ouster of the common owner. *Lyles v. Lyles*, 1 Hill (S. Car.) Ch. 76.

Where a wife's name was signed to a conveyance of her husband's land without her consent, and pending an action by her after her husband's death, in which a decree establishing her title and right of possession to an undivided third was rendered, one holding in good faith a part of the land, under the conveyance, and denying the wife's right to any interest in it, made valuable improvements; the wife, though entitled to her proportion of the rents of such part,

of a demand and refusal to give up possession,¹ and he can be charged only with what he has actually received, not what he could have realized by prudent management.²

He is also chargeable with interest from the date of demand or suit brought,³ and being regarded as the agent of his cotenants, the statute of limitations will begin to run against him only from demand and refusal to account.⁴ The measure of damages is a reasonable amount based upon the condition of the property at the time of taking possession and a destruction of the property without fault ends the liability.⁵ A debt from one cotenant to another for unequal use and occupation of the property is a simple contract debt and creates no lien therein.⁶

Crops grown upon the common estate by one tenant become the property of the occupying tenant, and where there is a liability to account it is only for what he has received of the proceeds in excess of his share.⁷

So in case of any dealing or transaction with or concerning the common property whereby a profit accrues to one of the tenants, he will, as a general rule, be held accountable to his cotenants for their just share of such profits.⁸

under Rev. Stat. *Indiana*, 1881, § 288, declaring that a tenant in common may sue a cotenant for receiving more than his proportion, is not entitled to share in the enhanced rental value resulting from the improvements. *Carver v. Fenimore* (Ind.), 19 N. E. Rep. 103.

A died intestate, leaving a widow and eleven children him surviving. At the time of his death he was seized of a contract of land containing about 500 acres, in which the widow was entitled to dower, which was assigned to her; several of the children, before the death of their father, built cabins, cleared and occupied small pieces of the tract, and continued to occupy them after his death, no one occupying more than his proportion of the whole. A few years after the death of the intestate a son returned from abroad and called on his brothers to account for the rents and profits of the cabins and land they had occupied. Held, that he was not entitled to recover. *Roberts v. Roberts*, 2 Jones (N. Car.) Eq. 128.

1. *Holt v. Robertson*, 1 McMull. (S. Car.) Ch. 475.

2. *Sconce v. Sconce*, 15 Ill. App. 169.

A tenant in common, in possession of all of the land, but who has not ousted his cotenants, is liable only for rents actually received, and for the profits in excess of his share upon lands actually cultivated. *Jones v. Massey*, 14 S. Car. 292.

3. *Jolly v. Bryan*, 86 N. Car. 457; *Tarlton v. Goldwaite*, 23 Ala. 346; *Scott v. Guernsey*, 60 Barb. (N. Y.) 163.

Where no demand has been made upon a tenant in possession, either for possession of the premises or for the value of their use, he is not liable to his cotenants for interest upon the amount found due for such use. *West v. Weyer* (Ohio), 18 N. E. Rep. 537.

4. *Jolly v. Bryan*, 86 N. Car. 457.

5. *White v. Stewart*, 76 Va. 546.

6. *Newbold v. Smart*, 67 Ala. 326; *Bird v. Bird*, 15 Fla. 424.

7. *Bird v. Bird*, 15 Fla. 424; *Roseboom v. Roseboom*, 15 Hun (N. Y.) 309; *Alney v. Daniels* (R.I.), 10 Atl. Rep. 654; *Peck v. Carpenter*, 7 Gray (Mass.) 283; *Pearson v. Carlton*, 18 S. Car. 47; *Lyles v. Lyles*, 1 Hill (S. Car.) Ch. 76.

A tenant in common who has received in money more than his share of the profits of the estate is liable to his cotenant in an action at law for the surplus. But in order to support such an action, it must appear that the defendant has received more than his share, not merely of a single article of produce, but of the entire profits of the estate, after deducting all reasonable charges; and that the balance is due to the plaintiff, and not to the other cotenant. *Shepard v. Richards*, 2 Gray (Mass.) 424.

8. *Sales*.—If a tenant in common takes money for the common property

2. As to Repairs and Improvements.—Where one joint tenant or tenant in common has made necessary repairs upon the common property, he can recover of his cotenants their share of the expense.¹

In some States this rule is confined to cases in which the repairs are absolutely necessary to the enjoyment of the property, or to prevent it from going to ruin,² and in others such contribution cannot be enforced by action at law unless such repairs were made at the request or with the consent of the cotenants, neither cotenant being more in default than the other for failure to repair.³

One tenant in common of a chattel, in *Massachusetts*, may recover from another any money expended on it beyond his due

whether by design or mistake, he is answerable in assumpsit to his cotenant. *Miller v. Miller*, 9 Pick. (Mass.) 34.

If a tenant in common sells trees growing on the land, and receives payment in money goods or real estate, he will be liable to his cotenant in an action for money had and received, provided no question is made as to title to the land. *Miller v. Miller*, 7 Pick. (Mass.) 133.

Plaintiff and defendant agreed to purchase the shares of heirs in lands, each to hold in proportion to the number of shares he purchased, at the value of the property as appraised in the inventory. Plaintiff purchased a share at less than the appraised value. *Held*, in a suit for an accounting, that defendant was entitled to half the profit so made. *Anderson v. Clanch* (Tex.), 6 S. W. Rep. 760.

Buying at Foreclosure Sale.—If one cotenant of mortgaged property arranges with the mortgagee to foreclose, to bid in the property, and, after the expiration of the time for redemption, to convey it to such cotenant for the amount of the mortgage and the expense of foreclosure, the other cotenants are entitled to share in the profits of the transaction. *Oliver v. Hedderly*, 32 Minn. 455.

A and B, being cotenants of real estate subject to sundry mechanics' and other liens, agreed that B should purchase A's interest in the property in the following manner, namely, that they should allow the property to be sold under a judicial decree for the enforcement of said liens, and that B should be entitled as a credit to "one half of the full amount of the principal, interest and costs." *Held*, that B had no right to purchase said liens for his own benefit at a reduced rate, and that, if he

did so purchase them, he was accountable to A for half the abatement so obtained. *Phelps v. Reeder*, 39 Ill. 172.

1. *Fowler v. Fowler*, 50 Com. 256; *Davis v. Chapman* (Md.), 36 F. 42; *Alexander v. Ellison*, 79 Ky. 148; *Swinneth v. Thompson*, 9 Pick. (Mass.) 31; *Peyton v. Smith*, 2 Dev. & B. (N. Car.) Eq. 325; *Dech's Appeal*, 57 Pa. St. 467; *Farrand v. Gleason*, 56 Vt. 633; *Galusha v. Sinclear*, 3 Vt. 394.

A tenant in common is liable to his cotenant for repairs that are absolutely necessary to houses and mills already erected and in being which fall into decay, but the rule does not apply to woodland or arable land. *Beaty v. Boedwell*, 91 Pa. St. 438.

A and B were tenants in common of a mill property, which was run down and nearly useless for want of repairs. A owned a one-half interest and was in possession. B's interest was sold on a judgment and bid in by A, who then made necessary repairs and improvements, restoring the usefulness of the property. A judgment creditor of B redeemed, and brought an action for partition, and the property was sold. *Held*, that A was entitled, from the proceeds, to be reimbursed for the repairs and improvements made by him. [Reversing s. c., 31 Hun (N. Y.) 522.] *Ford v. Knapp*, 102 N. Y. 135; s. c., 55 Am. Rep. 782.

2. *Dech's Appeal*, 57 Pa. St. 467; *Lehigh v. Dickerson*, 12 Q. B. D. (Eng.) 194.

3. *Calvert v. Aldrich*, 99 Mass. 74.

Certain houses were the joint property of deceased and claimant's husband. No express authority was shown from deceased to claimant's husband to repair, or to request claimant to repair, these buildings. *Held*, that she could not recover from the estate

proportion.¹ But there must be a previous request to join in making the repairs, unless there is some prescription or agreement binding either party exclusively to make them.²

This right to contribution for repairs may be enforced by a lien upon the share of the tenant failing or refusing to contribute,³ and a claim for repairs and one for use and occupation may be set off against each other, even where neither the claim for contribution for repairs nor the one for use and occupation is, in the absence of an agreement, the subject of an action between cotenants.⁴

One coproprietor of property held jointly or in common cannot, however, be judicially compelled to incur a debt for improvements in accordance with the views and wishes of the other on the common property,⁵ and the one is not ordinarily entitled to contribution from the other for permanent improvements.⁶

of deceased for these payments. *Stackpole v. Stackpole* (Mich.), 32 N. W. Rep. 808.

One tenant in common is not liable in assumption to his cotenant for the expense of repairs on joint estate, incurred by the latter without the request of the former. *Wiggins v. Wiggins*, 43 N. H. 561.

1. *Gardner v. Cleveland*, 9 Pick. (Mass.) 334; *Loring v. Bacon*, 4 Mass. 575; *Doane v. Badger*, 12 Mass. 65; *Converse v. Ferre*, 11 Mass. 325.

2. *Doane v. Badger*, 12 Mass. 65; *Carver v. Miller*, 4 Mass. 559; *Converse v. Ferre*, 11 Mass. 325.

3. Where houses upon land held in joint tenancy are falling to decay, the joint tenant repairing is entitled to contribution to be enforced by lien, and especially is this the case if his cotenants are unable or refuse to contribute to the cost of the repairs. *Alexander v. Ellison*, 79 Ky. 148.

A levy against a tenant in common should be upon such an undivided part of the whole premises as the amount of the execution bore to the whole. A tenant in common has no lien for repairs on the common property, as against the levy of the creditor of the other tenant. *Galusha v. Sinclair*, 3 Vt. 394.

4. *Davis v. Chapman*, 36 Fed. Rep. 42; and see *Austin v. Barrett*, 44 Iowa 488.

5. *Morgan v. Morgan*, 23 La. Ann. 502.

6. *Bazemore v. Davis*, 55 Ga. 504; *Austin v. Barrett*, 44 Iowa 488; *Stevens v. Thompson*, 17 N. H. 103; *Ford v. Knapp*, 31 Hun (N. Y.) 522; *Coakley v. Mahar*, 36 Hun (N. Y.) 157; *Taylor*

v. Baldwin, 10 Barb. (N. Y.) 582; *Crest v. Jack*, 3 Watts. (Pa.) 238; *Dech's Appeal*, 57 Pa. St. 467; *Thurston v. Dickinson*, 2 Rich. (S. Car.) Eq. 317; *Farrand v. Gleason*, 56 Vt. 633.

Where one tenant in common cleared a portion of the common land, and it did not appear that it was done with the assent or knowledge of the other tenant, or that the common land had been substantially benefited thereby, it was held that the other tenant was not liable for any portion of the expenses of such clearing. *Kidder v. Rixford*, 16 Vt. 169.

Improvements by Lessee.—A and B were tenants in common of land. A leased the land without authority from B, and the lessee made permanent improvements. A dispossessed the lessee. Held, that the lessee had no claim against B. *McKinley v. Peters*, 111 Pa. St. 283.

A tenant in common of land applied for a decree, and that his cotenants should render an account of the profits of the property, etc. The decree was granted in accordance with the prayer. Held, erroneous, because the court did not direct that an account of the permanent improvements made and paid for should not be included. *Nelson v. Leake*, 25 Miss. 199.

Plaintiff occupied, under a void lease, land owned by defendant and others in common. He contracted with defendant alone to make certain improvements, for which he was paid in the product of the land used for mining purposes. Afterwards, he was allowed to dig in a certain pit which the defendant had opened, but went on with-

But if the improvements are made at the instance or upon the request or with the consent of the cotenant, he will be liable to contribute his just share,¹ with interest,² but he will not be liable for a further sum as damages,³ and where the cotenant makes different improvements from those intended and agreed upon, he cannot recover for them.⁴

A claim for contribution for improvements gives no lien upon the share of the cotenant failing or refusing to contribute, but a special agreement for a lien may be made,⁵ though in *Texas* it would seem that the lien would exist independent of an agree-

out authority and against the defendant's wishes, and did the work in another place, for which he now claimed compensation. *Held*, that the contract, whatever it was, was only binding on the defendant, and not on his cotenants. *Vaughan v. Cravens*, 1 Head (Tenn.) 108.

Life Estate with Remainder in Common.—The sole owner of a life estate, who is also tenant in common in remainder of the fee, will be allowed, on partition with his cotenants, compensation for improvements made during the continuance of the life estate. It is otherwise where the life tenant has no interest in the remainder. *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32.

Division Among Heirs.—Land devised by will was sold at judicial sale, and the interest of the purchaser was subsequently acquired by H, who disposed of a part of the tract by making leases for ninety-nine years, and by special warranty deeds. The part disposed of was improved by the lessees and purchasers, and the unimproved portion was retained by H, which upon his death, he devised by will. Upon action brought by certain heirs of the original owner and devisor, they were adjudged to be owners of seven thirty-sixths of the whole tract, and, in a suit for partition, it was *held* that the entire tract should contribute to make up the value of the portion taken from the unimproved tract of H's devisees, and that, to make up this contribution, the value of the land must be estimated without regard to the improvements, and that every portion of the tract must be charged with a sum proportioned to its value. *Glittings v. Worthington* (Md.), 9 Atl. Rep. 228.

Doctrine of Accountability.—Neither the statutory doctrine of "betterments," nor the act of *Leg. South Carolina* 1885, relating to actions for the recovery of land, authorizing defendants

to set up claims for betterments or improvements by answer, applies to an action for partition between tenants in common, which is governed by the equitable doctrine of the accountability of one tenant in common with his cotenants when he has increased the value of the common property by improvements, and 'is at the same time liable for rents and profits. *McGee v. Hall* (S. Car.), 6 S. E. Rep. 566.

1. *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582; *Sears v. Munson*, 23 Iowa 380; *Houston v. McCluney*, 8 W. Va. 135; and see *Bazemore v. Davis*, 55 Ga. 504; *Young v. Polack*, 3 Cal. 208; *Bayley v. Denny*, 26 La. Ann. 255; *Walter v. Greenwood*, 29 Minn. 87; *Stevens v. Thompson*, 17 N. H. 103; *Coakley v. Mahar*, 36 Hun (N. Y.) 157; *Ford v. Knapp*, 31 Hun (N. Y.) 522; *Dech's Appeal*, 57 Pa. St. 467.

2. *Sears v. Munson*, 23 Iowa 280; *Young v. Polack*, 3 Cal. 208.

3. *Young v. Polack*, 3 Cal. 208.

4. *Conrad v. Starr*, 50 Iowa 470.

5. If advances are made by one tenant in common, at the request of his cotenant, and upon the promise of repayment, for the purpose of making permanent improvements upon the premises held in common, he has only the personal security of his cotenant for repayment, and no lien upon the property thereof unless by special agreement. *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582.

When two joint tenants of real estate agree with each other that one shall, with his own money, erect improvements on the real estate jointly held, and have a lien on the interest of the other, for the money so expended, the agreement with the actual erection of the improvements by one, and the acquiescence of the other constitutes such a lien as will be recognized and enforced in a court of equity. *Houston v. McCluney*, 8 W. Va. 135.

ment therefor,¹ but such lien will not take precedence over a levy or attachment by a creditor of the tenant failing to contribute, whether such creditor had notice of it or not.²

A joint tenant or tenant in common who has made improvements upon the common property is entitled to an equitable partition thereof, the only good faith required being that they must have been made honestly for the purpose of improving the property,³ and, as a general rule, the improvements made by a tenant will be offset against the rents and profits which have accrued to him in excess of his share.⁴

Such claim for contribution for improvements is assignable, but will not pass by a quit claim deed of the premises.⁵

3. Sharing Burdens and Losses.—It is a general rule that a joint tenant or tenant in common claiming an equality of benefit must submit to an equality of burden,⁶ and even where the loss is

1. The appellee and one L leased land contiguous to certain tracts owned by them and enclosed and used in common all said lands. Appellee, at the request of L, paid all the rent of the leased land and expense of fencing. With the consent of the appellee, L sold his interest to T, who contracted to pay to the appellee such sum as was due him from L on account of the matters aforesaid and gave his note for an amount which included said sum. T subsequently conveyed his interest to his wife. *Held*, that appellee is entitled to a lien on said leased lands for the money expended in making improvements thereon at the request of his cotenant, and that such lien binds the land in the hands of Mrs. T, because she had notice of the terms of the contract between her husband and L. *Torrey v. Martin* (Tex.). 4 S. W. Rep. 642.

2. *Houston v. McCluney*, 8 W. Va. 135.

3. *Pall v. Piddock*, 21 N. J. Eq. 311; *Allen v. Hall*, 50 Me. 253.

It is no bar to equitable partition that the tenant who made the improvements knew, at the time, that an undivided share in the land was held by another. *Hall v. Piddock*, 21 N. J. Eq. 311.

4. See *Gayle v. Johnston*, 80 Ala. 395.

Where a tenant in common improves the property while in possession and claiming to be sole owner, without permission or request from the cotenant, the latter is not chargeable with the value of the improvements, beyond her share of the rents chargeable to the former. *Bazemore v. Davis*, 55 Ga. 504.

A joint tenant or tenant in common, who has made improvements on land before partition, cannot be compelled by his cotenant to pay rent for such improvements which fall to his share on partition being made. *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 138.

Effect of Dissolain.—The rule that a tenant in common is not liable to his cotenants for rents and profits of the land received by him, unless he has received more than his share, does not apply where he disseises his cotenants; nor in such case is he entitled to contribution from his cotenants for any improvements he may have put upon the land. *Austin v. Barrett*, 44 Iowa 488.

Improvements Capable of Removal.—

One could not be allowed for double boarding the mill or putting in tank, inspirator, platform, or new boiler; but for such additions as could not be removed without substantial injury to the common property the other should be charged at the sum they enhance the value of the common property. No allowance can be made for insurance. Neither could he be charged for the use of the property when unoccupied without the fault of the other. *Farrand v. Gleason*, 56 Vt. 633.

But in *Alabama* a tenant in common asking for equitable partition and an allowance for his improvements is not bound to pay for his use and occupation. *Wilkinson v. Stuart*, 74 Ala. 198.

5. *Curtis v. Poland*, 66 Tex. 511.

6. *Wilton v. Tazewell*, 86 Ill. 29.

Where two own a tract of land as tenants in common, and a third person

caused by the errors in judgment, carelessness or inattention of the tenant in charge of the property, it will still fall upon them equally.¹ But when the act by which the loss is caused amounts to more than mere negligence or error in judgment and consists of a positive wrong or a nuisance, the loss must remain with the party whose act causes it,² whether the injury thus inflicted falls on a cotenant or on a third party.³

acquires title to a portion thereof by adverse possession under the statute of limitations, the portion thus lost will be the common loss of the two estates held in common, and will be distributed between them according to their respective interests. *Pipkin v. Allen*, 29 Mo. 229.

A and B were tenants in common of a tract of land. A, with the assent of B, employed a surveyor to run the boundaries of their land, and in doing so A, accompanied by the surveying party, committed a trespass on an adjoining tract. *Held*, that B was equally liable for such trespass. *Elliott v. McCay*, 4 Jones (N. Car.) L. 59.

Land held in common by heirs was ordered sold to pay the ancestor's debts, and all but one of the tenants joined in making up the sum necessary to avoid a sale. *Held*, that the share of the tenant not contributing was chargeable with a *pro rata* part of the amount so paid. *Griffith v. Robinson*, 14 Ill. App. 377.

Where a tenant in common procures at a reasonable price a widow's right of dower and homestead in the land, his cotenant must contribute to the cost. *Wilton v. Tazewell*, 86 Ill. 29.

But a co-owner of a ram is not liable to one injured by the ram which has escaped from the other co-owner, who alone has possession of him. *Marsh v. Hand*, 40 Hun (N. Y.) 339.

Two out of three tenants in common executed a lease for years of the whole estate, by which the lessee covenanted to insure for the benefit of the lessors. A policy was obtained accordingly, and assigned to one of the two cotenants, who recovered the whole amount of a loss from the insurers. *Held*, that he was liable to an action by the third cotenant for his proportion of the amount, and that the admission in evidence of a conversation between the defendant and a third person before the assignment of the policy, for the purpose of showing that the assignment was to be for the benefit of all the owners of the property, was no ground for a new

trial. *Starks v. Sikes*, 8 Gray (Mass.), 609.

1. Where one of two joint owners of a vessel took upon himself the management, direction and control of the whole vessel, and, by his carelessness, inattention, and negligent and improper conduct, the vessel took fire and was consumed, *held*, that he was not liable to the other joint owner, even though he assumed the management, etc., without the licence or consent of the other. *Moody v. Buck*, 1 Sandf. (N. Y.) 304.

If one tenant in common, authorized to improve the property, act prudently and in good faith, he is not to be held responsible to the other for errors of judgment, either as to the character or construction of the improvements, but will be entitled to contribution from his cotenant. *Reed v. Jones*, 8 Wis. 421.

2. If one of two tenants in common of a mill use it to the nuisance of a stranger, the other owner, not actually participating in the wrong, is not liable. *Simpson v. Seavey*, 8 Me. (Greenl.) 138.

3. Where certain hay belonging to A and B was deposited in the barn of B, with the consent of A, *held*, that A had no right to break and enter the barn for the purpose of carrying away the hay or any part of it, and that such breaking and entering was a trespass. *Crocker v. Carson*, 33 Me. 436.

But one making bricks on land, with permission from one of the joint owners, is not liable to the other for a trespass. *Shepherd v. Young*, 2 La. Ann. 238.

A tenant in common, who removes a structure from the land without injuring it unnecessarily, is not liable in trespass nor for waste to his cotenant, the structure having been placed there by plaintiff without defendant's assent, and its maintenance excluding defendant from that portion of the land. *Byam v. Bickford*, 140 Mass. 31.

Under certain acts of the State, and of the United States, payment was to be made by a city to those claimants of certain lands who should file plats and

So damages recovered by one of two or more cotenants for injuries to the common property will enure to the benefit of all.¹

4. Taxes and Encumbrances.—A joint tenant or tenant in common who has paid the taxes upon the whole of the common property, or who has purchased at a tax sale is entitled to be reimbursed for his advances with interest from the date of payment,² and he will have a lien upon the common property to secure such reimbursement.³ The interest of one tenant may be sold to meet his taxes, even though those of the other have been paid.⁴

pay taxes. A was a claimant, and, having done that which was required, he paid accordingly. Before the legislation aforesaid, A had conveyed to B an undivided interest in a parcel of the land so claimed. B sued A for a part of the money received by A from the city. B had neither filed a plat nor paid taxes, and could have recovered nothing from the city. *Held*, that his action against A could not be maintained. *Howard v. Donahue*, 60 Cal. 264.

Conversion.—A tenant of personal property who, without the consent of his cotenant, sells the property as his own, is liable for conversion of his cotenant's share. Trees cut by one cotenant of land without the consent of the other belong, after the severance, to the cotenants of the land; and if the wrongdoer sells the logs as his own without the consent of his cotenant, he is liable to him for converting his share. *Shepard v. Pettit*, 30 Minn. 119; *Sullivan v. Lawler*, 72 Ala. 74.

The cotenant who has wrongfully sold timber from the land cannot set up as a defence that the other had previously done so. That the present defendant took his proportion of the price of the previous sale does not tend to show that such sale was authorized by him. *Dwinell v. Larrabee*, 38 Me. 464.

Assault and Battery.—If two persons agree to cultivate land on shares, each has a right to go upon the premises, by himself, and his authorized agents, to remove his share of the crops; and if the agent of one of them goes upon the premises for this purpose, and is endeavoring to take the share of his principal from a cart in which the other has deposited crops gathered by him, a servant of the latter, who forcibly removes such agent from the land by his master's orders, is guilty of an assault and battery. *Com. v. Rigney*, 4 Allen (Mass.) 316.

1. *Becuel v. Wagnespach* (La.), 3 S. 536.

2. *Oliver v. Montgomery*, 39 Iowa 601; *Paine v. Slocum*, 56 Vt. 504; *Kites v. Church*, 142 Mass. 586.

Where one of two tenants in common of land paid all the taxes thereon, *held*, that he could not recover the amount paid in excess of his own share from a purchaser of his cotenant's interest without notice of the claim, nor make it a charge upon the land. *Stover v. Cory*, 53 Iowa 708.

Life Estate and Remainder.—The fact that a remainder man paying taxes to prevent a sale of the property resided with the tenant thereof does not deprive the former of the right of contribution from his cotenants. *Harrison v. Harrison*, 56 Miss. 174.

A tenant in common for life of one-third part of real estate is bound by law to pay one third of the taxes assessed thereon and one third of the expenses of the necessary repairs of the premises, made for the common benefit. *Anderson v. Greble*, 1 Ashm. (Pa.) 136.

Offsetting Against Rents.—Where one cotenant recovers from another for receiving more than his just proportion of rents and profits of the common property, the latter is entitled to be allowed to offset, in reduction of the amount recovered, all sums paid by him, within six years, for taxes upon the former's share of the estate. *Kean v. Connelly*, 25 Minn. 222.

Naming Owners.—Land was listed for taxation in the name of "B E's heirs." *Held* that the taxes were not invalidated by this method of naming the owners, so as to prevent a cotenant, who has paid such taxes, from recovering a proportionate share from the other cotenants. *Eads v. Retherford* (Ind.), 16 N. E. Rep. 587.

3. *Oliver v. Montgomery*, 42 Iowa 36.

4. *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349.

So one joint tenant or tenant in common having advanced money to pay off an encumbrance, the others should be required to pay to him their proportionate shares.¹ One of several mortgagors of land owned by all in common cannot, after payment of his proportionate share of the mortgage, compel the mortgagee upon foreclosure first to resort to the interest of his cotenants,² but one tenant who has removed an encumbrance from the common estate has an equitable lien upon the shares of his cotenants for the repayment to him of their proportionate shares,³ and a

1. *Carter v. Penn*, 99 Ill. 390; *Furman v. McMillan*, 2 Lea (Tenn.) 121; *Newbold v. Smart*, 67 Ala. 326; *Titsworth v. Stout*, 49 Ill. 78.

Where one of six tenants in common, it not being shown which, is estopped to dispute an encumbrance, it is good as to one sixth of the title, against subsequent purchasers, after possession under the encumbrance by one claiming the benefit of it. *Bryan v. Ramirez*, 8 Cal. 461.

C, the widow, and T and H, the adult sons of J, who died intestate, borrowed of B \$2,000 to pay the debts of the estate, securing the loan on land of which J died seized, by trust deed to E. A bill for partition was filed, in which F, a minor son, and E, the trustee, were made parties, but B was not joined. The court decreed that the land be divided into five lots; that lot 1 be sold to pay the encumbrance, lot 2 be assigned to H, lot 3 to F, lot 4 to C, and lot 5 to T. T conveyed lot 5 to H, who conveyed separate parts thereof to S, M and V. H paid to E his portion of the incumbrance, and receiving a release of lot 2, and the widow paid \$450 as her portion of the encumbrance due. Lot 1 had been sold by the master, and a balance of \$930 left due on the encumbrance, and E, as trustee, sold the part of lot 5 which had been conveyed to S, and it was bid in by S for the balance due on the trust deed, which was paid to E, who executed a release of the trust deed. *Held*, that B, not being a party to the partition suit, was not bound thereby, and could not be compelled to refund the money, but that S was entitled to contribution, and that the encumbrance should be apportioned upon the several interests, so that each should pay its ratable share. *Vogel v. Brown* (Ill.), 11 N. E. Rep. 327.

A and B being tenants in common, B mortgaged his interest to A for a sum certain, and also for future ad-

vances, and subsequently they both brought suit for a trespass to the common property. During the suit, B conveyed his title to the defendant wife, but not his interest in the action. On a bill to foreclose, and for accounting between tenants in common, *held*, that after the conveyance only the taxes and reasonable expenses in paying them could be allowed, and nothing for the litigation. But one half the disbursements on account of the litigation incurred before the conveyance should be allowed under the accruing clause in the mortgage. *Paine v. Slocum*, 56 Vt. 504.

Where two bought a mill jointly, and not as partners, and gave joint notes for the purchase money, the funds of the firm afterwards received were held not to be applicable to the share each one was bound to pay; and the court below was right in refusing to charge that the possession of the notes by one of the partners created no liability for contribution. *Wall v. Fife*, 37 Pa. St. 394.

2. *Schoenewald v. Dreden*, 8 Ill. App. 389.

Where one of two tenants in common has paid his share of a joint mortgage, and the other has mortgaged his portion a second time, the former is entitled to a discharge, and the later mortgage cannot have the first mortgage satisfied from the joint property, or postponed to his own on the ground that the release is in fraud of his rights. *Southworth v. Parker*, 41 Mich. 108.

Mortgage of Undivided Interest.—

Where an owner of an undivided interest in goods mortgages them, an agreement by the other owner to pay the mortgage, or an actual part payment, will not of itself bring his own interest within the mortgage. *Keatles v. Christie*, 47 Mich. 594.

3. Where, under *Alabama Code*, § 2191, A and B, purchasers, having taken the title in their joint names, are cotenants, and jointly mortgage the land

homestead right cannot be set up by one of his cotenants against such lien.¹

5. As to Purchase Money, Care and Management.—Where a joint tenant or tenant in common has paid all or more than his share of the purchase price of the common property, his cotenants must contribute their proportionate share of the expense,² and the cotenant paying more than his share has a lien upon the common property for its repayment.³

Joint or common owners are not entitled to charge each other for services rendered in the care and management of the common property unless there is a special agreement or a mutual understanding to that effect,⁴ and such agreement will not be extended beyond its terms.⁵

to indemnify their surety on the purchase money note, A paying more than his proportion of the debt, has an equitable lien on B's interest for the excess. *Newbold v. Smart*, 67 Ala. 326.

The rule that a tenant in common who has removed an encumbrance from the common estate has an equitable lien for contributing to the extent of his cotenant's respective interests, enforced under the provisions of the *Illinois* Partition act of 1861 for the apportionment of encumbrances; although after foreclosure of the encumbering mortgage the cotenant had demanded and received all (instead of half) the redemption money from the master, and instead of cancelling had treated the certificate as in force against the cotenant. *Titsworth v. Stout*, 49 Ill. 78.

One of two joint purchasers of land, who pays more than his share, has a right to be reimbursed out of the land, and to have debts which were created by money jointly borrowed to pay on the land, paid before an attaching creditor of the other can take any proceeds. *Furman v. McMillan*, 2 Lea (Tenn.) 121.

1. *Newbold v. Smart*, 67 Ala. 326.

2. See *Leitch v. Little*, 14 Pa. St. 250.

A tenant in common who has paid the entire purchase price, and is in possession, collecting the rents and profits and not accounting therefor, is under no obligations to pay the taxes assessed to his cotenant. *Oglesby v. Hollister* (Cal.), 18 Pac. Rep. 146.

3. *Newbold v. Smart*, 67 Ala. 326; *Millard v. McMullin*, 18 N. Y. 345.

A and B were tenants in common of an estate, for which B had paid his share of the purchase money, and which they divided by partition. A died and

his heirs agreed that his widow should retain possession of A's part, which B afterward leased from her. The former owner brought ejectment against B to recover A's part of the purchase money, which B paid. *Held*, that he could hold the land as security for the repayment to him of the purchase money, but for no other debt against the heirs of his cotenants. *Leitch v. Little*, 14 Pa. St. 250.

Title in One Cotenant.—If two persons are the joint owners of lands, but the legal title is in one of them, and the other, who has a mere equity in the land, is indebted to the one who has the legal title, the latter will not be forced to part with the legal title until the discharge of his indebtedness to him, and until he is freed from liability for him, and his representatives, heirs and devisees have the same rights. *Williams v. Love*, 2 Head (Tenn.) 80.

4. *Fuller v. Fuller* (Fla.), 2 So. Rep. 426; *Hamilton v. Conine*, 28 Md. 635; *Franklyn v. Robinson*, 1 Johns. Ch. (N. Y.) 157; and see *Anderson v. Clanch* (Tex.), 6 S. W. Rep. 760.

A and B were the owners of three-fourths of a certain oil lease, and C was the owner of the remaining fourth. A and B agreed that B was to work the well in place of a former employe hired by C, but C would not assent to this arrangement. B, however, did work the well, and then brought an action against C to recover his one fourth of the expenses of working the well. C had received his share of the product of the well. *Held*, that C was not liable to B, whom he had not employed. *Thompson v. Newton* (Pa.), 7 Atl. Rep. 64.

5. Plaintiff and defendant agreed that the latter should manage lands jointly purchased, and deduct reasonable com-

VIII. ADVERSE POSSESSION AND THE STATUTE OF LIMITATIONS—

1. **What Constitutes Adverse Possession.**—The entry and possession of one joint tenant or tenant in common being, *prima facie*, in support of his cotenant's title, to constitute an adverse possession there must be some notorious and unequivocal act indicating an intention to hold adversely,¹ or an actual disseisin or ouster.² The silent and peaceable possession of one tenant, with *no* act which can amount to an ouster of his cotenants, is not adverse,³ so either actual notice of the adverse claim must be brought home to the latter, or there must have been unequivocal acts, open and public, making the possession so visible, hostile, exclusive and notorious that notice may fairly be presumed,⁴ and the

pendent and expenses from the rents. Defendant did not agree to contribute any sum for rent. *Held*, in accounting, that plaintiff could not charge defendant with use and occupation. *Anderson v. Clanch* (Tex.), 6 S. W. Rep. 760.

1. *Warfield v. Lindell*, 30 Mo. 272; *Peeler v. Guilkey*, 27 Tex. 355; *Purcell v. Wilson*, 4 Gratt. (Va.) 16; *Allen v. Hall*, 1 McCord (S. Car.) 131.

2. *Purcell v. Wilson*, 4 Gratt. (Va.) 16; *Holley v. Hawley*, 39 Vt. 525; *Gray v. Givens*, 2 Hill (S. Car.) Ch. 511.

Possession by one tenant in common will not *per se* constitute an adverse possession against his cotenant. But where, by some notorious act, he claims an exclusive right, though it be under a title which is void, the statute of limitations shall run from the time of such claim. *Jackson v. Tibbets*, 9 Cow. (N. Y.) 241; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530.

Although a tenant in common of land has been in the sole reception of the profits for more than seven years, yet, if there is not evidence to the contrary, it will be presumed that his original entry was permissive, and, under an assertion of both his own claim and that of his cotenant, a subsequent claim cannot make his possession adverse without proof of actual ouster. *Linker v. Benson*, 67 N. Car. 150.

One of a number of heirs to realty cannot obtain title by adverse possession, as against the others, without rebutting the presumption that he holds for the benefit of all, and without showing that he has done some notorious, hostile act inconsistent with their rights. *Berg v. McLafferty* (Pa.), 12 Atl. Rep. 460.

Possession of a tenant in common is *prima facie* not adverse to his cotenant; and prerenancy of profits, especially for a time short of the statute of limi-

tations, does not make it otherwise. Tenant of a tenant in common may well purchase the title of a cotenant. *Catlin v. Kidder*, 7 Vt. 12.

3. *Challefoux v. Ducharme*, 8 Wis. 287; s. c., 4 Wis. 554.

A tenant in common in possession of the common estate cannot acquire title to the whole of the estate by adverse possession, unless there be such an ouster of his cotenants as to entitle them to bring ejectment against him. *Day v. Davis*, 64 Miss. 253.

If one tenant in common sues a writ of entry against his cotenant, who pleads *nul disseisin*, proof of the defendant's title as tenant in common will not now entitle him to judgment, *Maine Stat.* 1826, ch. 344, having rendered it necessary that he should also prove an actual ouster. *Cutts v. King*, 5 Me. (5 Greenl.) 482.

It appeared from the plaintiff's testimony that the defendant entered upon the land in controversy some years before he acquired his title, and continued ever afterwards to occupy it for a residence and for cultivation; but there was no evidence of any adverse claim on his part. *Held*, that the evidence did not show an adverse possession. *Greer v. Tripp*, 56 Cal. 209.

Though, in *South Carolina*, a purchaser from one of several cotenants of a part of a tract of land, without reference to the title of the others, does not necessarily become a tenant in common, so as to prevent him from perfecting his title by adverse possession, under the statute of limitations, it being only necessary in order to constitute adverse possession, that the land should be held as one's own. *Gray v. Bates*, 3 Strobb. (S. Car.) 498.

4. *Culow v. Rhodes*, 87 N. Y. 348; *Gray v. Givens*, 2 Hill (S. Car.) Ch.

statute of limitations will begin to run only from the time of such notice.¹

Exclusive possession is not necessarily adverse;² it must appear that the common property has been used in some manner otherwise than in the usual and legitimate exercise of the right of enjoyment.³

An infant is not chargeable with notice,⁴ and a husband and wife cannot hold adversely to each other.⁵

2. Ouster and Disseisin.—One joint tenant or tenant in common may oust or disseise his cotenant,⁶ and such ouster is of the same

511; *Northrop v. Marquam* (Oreg.), 18 Pac. Rep. 449.

The adverse possession of a tenant in common may be demonstrated by circumstances; actual notice need not be given. *Lodge v. Patterson*, 3 Watts (Pa.) 74.

One tenant in common can oust his cotenant and hold in severalty; but a silent possession, accompanied by no act which can amount to an ouster, or give notice to his cotenant that his possession is adverse, is not an adverse possession. *McClung v. Ross*, 5 Wheat. (U. S.) 116.

A father who is a tenant in common with his children of slaves, for a part of whom he is guardian, will be presumed to hold the slaves under the joint title, and to make out a case of adverse holding, he must show clearly that he held solely for himself, adversely to the others, and that they had knowledge of such claim and holding. *Gannaway v. Tarp-ley*, 1 Coldw. (Tenn.) 572.

A declaration of an intention to hold adversely made to a stranger is not sufficient unless brought to the knowledge of the cotenant. *Warfield v. Lindell*, 30 Mo. 272.

The lessee of one tenant in common told the son of the other, while the father was living, that he (the lessee) had more right on the premises than the son had. *Held*, that this had no tendency to prove that the tenant in common, under whom he occupied the premises, held adversely to the other. *Campau v. Campau*, 45 Mich. 367.

1. *Northrop v. Marquam* (Oreg.), 18 Pac. Rep. 449.

2. *Owen v. Morton*, 24 Cal. 373.

3. *Dodd v. Watson*, 4 Jones (N. Car.) Eq. 48.

A purchaser from a tenant in common, who takes possession and occupies the land without acknowledging the title of the other tenants in com-

mon, holds adversely, and may protect his possession by the statute of limitations. *Elliot v. Morriss*, 1 Harp. (S. Car.) Ch. 281.

Evidence that the land was forest, and the occupation consisted of an occasional cutting of a few trees for shingles, or peeling a few loads of bark, is not enough, as to acts of possession, nor is proof of notice to a former agent of the cotenant enough as respects knowledge. *Chandler v. Ricker*, 49 Vt. 128; *Squires v. Clark*, 17 Kan. 84; *Ball v. Palmer*, 81 Ill. 370.

Where a tenant in common holds over, after a partition, his possession will not be considered adverse until a demand is made by the other tenants, unless he does some act amounting to an actual exclusive possession, which would give notice that he intended to keep out all others or some act amounting to a disclaimer of the rights of the other tenants. *Anders v. Anders*, 9 Ired. (N. Car.) L. 214.

In a suit to foreclose a mortgage of one undivided half of land against one who had been in possession more than twenty years as the tenant of the owner of the other half, the fact that the tenant had made permanent improvements on the premises without any acts of interference on the part of the mortgagor or the mortgagee is not sufficient evidence of adverse possession as against the plaintiff. *Perkins v. Eaton* (N. H.), 10 Atl. Rep. 704.

Payment of rents by the collector to one tenant in common is not evidence that the latter holds adversely to his cotenant. *Rodney v. McLaughlin* (Mo.), 9 S. W. Rep. 726.

4. *Northrop v. Marquam* (Oreg.), 18 Pac. Rep. 449.

5. *Springer v. Young* (Oreg.), 12 Pac. Rep. 400.

6. *Hoffstetter v. Blattner*, 8 Mo. 276; *Parker v. Locks & Canals*, 3 Metc. (Mass.) 91.

nature as an ouster by a stranger, though acts which, if done by a stranger, would amount to a disseisin are not necessarily so if performed by a cotenant, the effect in such case being governed largely by the notoriety and intent of the act.¹ An ouster will not be presumed.²

(a) *What Constitutes Disseisin or Ouster.*—The conveyance by one joint tenant or tenant in common of the whole property to a third person who enters under the conveyance constitutes a disseisin or ouster of the other tenants,³ and the purchase by one

1. Stronger evidence is required to show an adverse holding by a tenant in common than by a stranger. *Barret v. Coburn*, 3 Metc. (Ky.) 510.

One tenant in common may disseise another. The only difference between that and the other cases is that acts which, if done by a stranger, would be *per se* a disseisin, are, in the case of tenancy in common, susceptible of explanation consistently with the real title. Acts of ownership in tenancies in common are not necessarily acts of disseisin; it depends upon the intent with which they are done and their notoriety. *Parker v. Locks & Canals*, 3 Metc. (Mass.) 91.

An ouster by a tenant in common of his cotenant does not differ in its nature from any other ouster and in no respect except in the degree of evidence required. Acts which are decisive in one case are equivocal in the other. An actual intent to exclude the cotenant from the enjoyment of the property must be shown, and no evidence on this point is so satisfactory as a refusal to admit him to possession or to account for profits received on a demand made. *Newell v. Woodruff*, 30 Conn. 492.

2. *Odum v. Weathersbee* (S. Car.), 1 S. E. Rep. 890.

3. *Burgett v. Taliaferro* (Ill.), 9 N. E. 334; *Kinney v. Slatery*, 51 Iowa 353; *Rutter v. Small* (Md.), 11 Atl. Rep. 698; *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 178; *Town v. Needham*, 3 Paige (N. Y.) 546; *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Burton v. Murphy*, 2 Tayl. (N. Car.) 259.

Where one tenant in common of land conveys the whole estate in fee, with covenants of seisin and warranty, and the grantee enters and holds exclusive possession thereof, such entry and possession is a disseisin of the cotenants. *Kittredge v. Locks & Canals*, 17 Pick. (Mass.) 246.

A deed of warranty given by one tenant in common in possession to a

stranger whose deed is recorded and who enters and occupies a part thereof, the residue remaining vacant, ousts the cotenant of the grantor and puts the grantee in possession of the whole. *Thomas v. Pickering*, 13 Me. 337.

Possession of one tenant in common is the possession of all. So where one is in possession of land, claiming only three sevenths, and recognizing the title of others as tenants in common to the remaining four sevenths, his possession is not to be regarded as adverse. But where he subsequently conveys the entire tract and his vendee enters, claiming openly and continuously under the deed, the vendee's possession becomes adverse to the other tenants in common from the date of his entry, although they may have no actual notice that he is claiming adversely to them. *Greenhill v. Briggs* (Ky.), 2 S. W. Rep. 774.

Quit Claim Deed.—The execution by some tenants in common of quit claim deeds of their interest in certain land, and by one of their grantees of a warranty deed of a small portion thereof, will not constitute an ouster of their cotenants who are not in possession. *Hume v. Long*, 53 Iowa 299.

Purchase and Use.—Where a piece of land is owned in common by five different persons and S, a stranger to the title, purchases the entire estate from four of such owners, taking a deed from them purporting to convey the entire estate and takes immediate possession of the entire estate, and takes all the rents and profits of the entire estate for several years, and twice mortgages the entire estate and makes alterations and improvements upon the land without consulting A, the other tenant in common, and without his consent, *held*, that such action by S is an ouster of A, the other tenant in common. *Scantlin v. Allison*, 32 Kan. 376.

Levy by Creditor.—Where the owners of an undivided part of a parcel of land

tenant of an outstanding title, while it ordinarily enures to the benefit of all, will be an ouster when accompanied by a hostile claim, and acts of possession inconsistent with the rights of the cotenants, of which they have knowledge,¹ but it cannot be presumed from the mere fact of sole possession or exclusive receipt

gave a deed of the whole parcel and the grantee entered under the deed, and afterwards a creditor of the grantee levied upon the whole parcel and entered under his levy, claiming to be sole owner of the land, it was *held* that the cotenant of the maker of the deed was disseised. *Bigelow v. Jones*, 10 Pick. (Mass.) 161.

Where the owner of an undivided part of a parcel of land gave a deed of the whole parcel and the grantee entered under the deed, and afterwards a creditor of the grantee levied upon the whole parcel and entered under his levy, claiming to be the sole owner of the land, the cotenant of the maker of the deed was thereby disseised. *Nichols v. Smith*, 22 Pick. (Mass.) 316.

Coparceners.—A feoffment by one parcener, who occupies alone under a general entry, operates as a conveyance of her own purpart and as a defeasement of her coparceners. *Dord. Read, or Reed v. Taylor*, 2 N. & M. (Eng.) 508; 5 B. & Ad. 575.

Conveyance of One's Interest by Motes and Bounds.—A conveyance by one joint tenant or tenant in common of all his interest in real estate, though the land is described in such a manner as to pass the whole under the deed, if the grantor has owned the whole, is not notice of itself to the other joint owner or tenant in common of any such exclusive claim to the land on the part of the grantor as to oust the other tenant of his legal seisin in the land. *Roberts v. Morgan*, 30 Vt. 319.

Refusal to Give Up Moiety.—Where one of two tenants in common of land conveyed the whole estate to A by a deed with warranty and A entered, claiming title to the whole, and on being requested by the cotenant to give up a moiety thereof, refused to do so, and declared that he would stand a law suit before he would give it up, it was *held* that there was an ouster of the cotenant, which entitled him to maintain a writ of entry against A. *Marcy v. Marcy*, 6 Metc. (Mass.) 360.

1. *Holley v. Hawley*, 39 Vt. 525; *Cook v. Clinton* (Mich.), 31 N. W. Rep. 317.

Where land was demised to certain persons as tenants in common and it was agreed verbally between them that one should give up his share for an agreed compensation to the others, who thereupon entered on it and excluded him from the possession, this was *held* a disseisin of such devisee. *Leonard v. Leonard*, 10 Mass. 281.

Where one of several remainder men who was living with the tenant for life upon the land accepted a deed of a portion thereof without warranty and for a nominal consideration and thereafter occupied, claiming to hold the premises conveyed adversely under the deed, but there was no apparent change of possession or occupation and no notice of a hostile claim given to the cotenants, *held*, that the giving and receiving of the deed was not in itself an act hostile to the rights of the cotenants, but that both the deed and the possession under it were consistent therewith, as the grantor could convey the life estate so that it gave no notice or intimation of a hostile claim; and that, therefore, there was no adverse possession, such as would defeat an action for partition. *Culver v. Rhodes*, 87 N. Y. 348.

One tenant may oust his cotenants and, by long continued exclusive possession, with claim of title under a recorded deed, may bar the claims of his cotenants. *Dexter v. Arnold*, 3 Sumn. (U. S.) 152; *Harpending v. Dutch Church*, 16 Pet. (U. S.) 455.

A tenant in common of land, after demand and possession in common by a cotenant, took a conveyance of the entire premises from a hostile source and claimed under it as sole owner. *Held*, that these facts were sufficient to warrant a jury in finding an ouster. *Clark v. Crego*, 47 Barb. (N. Y.) 599.

Failure to Record Deeds.—Defendant in a bill for partition was in possession of the land in question, claiming that he had held it adversely to his cotenant, under a deed from the deceased owner's widow, during the statutory period, but it appeared that such deed had never been recorded, and there was no proof

of rents and profits,¹ unless they are accompanied by some notorious and unequivocal act of exclusion,² or continued for a

that plaintiff ever had notice of it. *Held*, that the defendant's possession was not adverse to plaintiff, and partition should be decreed. *Hignite v. Hignite* (Miss.), 4 So. Rep. 345.

Knowledge of Dispossessed Tenant.—A tenant in common is ousted by his cotenant only when he is aware that his cotenant in possession claims the land as exclusively his own, or when, as a prudent man reasonably attentive to his own interests, he ought to have known that his cotenant asserted an exclusive right to the land. *Packard v. Johnson*, 57 Cal. 180.

Defective Title.—One tenant in common may disseise another, and if a person enter into possession claiming title which turns out to be defective as to a moiety, it is a disseisin of the parties entitled to that moiety. *Prescott v. Nevers*, 4 Mass. (U. S.) 326.

1. *Johnson v. Toulmin*, 18 Ala. 50; *Hudson v. Coe* (Me.), 8 Atl. Rep. 249; *Colburn v. Mason*, 25 Me. 434; *Parker v. Locks and Canals*, 3 Metc. (Mass.) 91; *Ward v. Farmer*, 92 N. Car. 93; *Caldwell v. Neely*, 81 N. Car. 114; *Higbie v. Rice*, 5 Mass. 344; *Bolton v. Hamilton*, 2 Watts & S. (Pa.) 294; *Morris v. Vanderen*, 1 Dall. (U. S.) 64.

The exclusive enjoyment by a tenant in common of the possession and of the rents and profits of lands for sixteen years is not sufficient evidence of ouster. *McGee v. Hall* (S. Car.), 1 S. E. Rep. 711.

In an action of ejectment brought by a tenant in common against a cotenant, a finding of a demand to be let into possession, and a refusal, does not amount to a finding of an ouster. *Carpentier v. Mendenhall*, 28 Cal. 484.

A tenant in common having mortgaged his interest, and being permitted by the mortgagee to remain in possession, has a right to occupy in common with his cotenants, or in severalty; and his occupation in severalty will not amount to a disseisin of the mortgagee. *Colton v. Smith*, 11 Pick. (Mass.) 311.

2. *Hudson v. Coe* (Me.), 8 Atl. Rep. 249; *Colburn v. Mason*, 25 Me. 434.

Where one of two tenants in common of land obtained the actual exclusive possession of the whole tract, claiming it as his own, and denying any right of his cotenant in the premises, and upon

ejectment being brought against his cotenant to recover his interest, the defendant, instead of entering a disclaimer as to the plaintiff's interest in the land, pleaded not guilty and set up the statute of limitations. *Held*, that these acts on the part of the defendant constituted an ouster, and relieved the plaintiff from the necessity of proving it by any other evidence. *Noble v. McFarland*, 51 Ill. 226.

If a tenant enters into the actual and exclusive possession of lands, takes the rents and profits, and makes valuable improvements, denying the title of his cotenants, it will be considered an adverse possession to and ouster of them. *Cummings v. Wyman*, 10 Mass. 464, 468; *Bigelow v. Jones*, 10 Pick. (Mass.) 161.

To effect an ouster of a cotenant there must be an actual, continued, visible, notorious, distinct and hostile possession, such that knowledge thereof is brought home to the cotenant. So *held* where a remainder man accepted a deed without warranty for part of the land and continued to occupy with the life tenants without giving any intimations of hostile claim. *Culver v. Rhodes*, 87 N. Y. 348.

Where the common property is a wharf, the possession of one tenant of the entire wharf necessarily excludes the other tenants, and amounts to an ouster by reason of the fact that such property is suited for only one purpose, and is essentially a unit and incapable of separate occupancy. *Annelly v. DeSaussure* (S. Car.), 2 S. E. Rep. 490.

Adverse possession by a joint tenant, from the commencement of the other's claim, is a disseisin. *Brock v. Eastman*, 28 Vt. 658.

Evidence of Ouster.—Where one cotenant had allowed another to be in possession, and to receive the rents and profits to his own use, without accounting for a long time, *held*, that the jury might presume an actual ouster. *Robidoux v. Cassilegi*, 10 Mo. App. 516.

A denial of the title of a tenant in common by a cotenant who is in possession of the land is a fact from which an ouster may be inferred. *Carpentier v. Gardiner*, 29 Cal. 160.

An ouster or disseisin is not to be presumed from the mere fact of sole

great length of time,¹ and, in general, any acts in relation to the common property inconsistent with and in exclusion of the rights of a cotenant with knowledge of such acts on his part will constitute an ouster.²

possession, but it may be proved by such possession, accompanied by a notorious claim of an exclusive right. *Parker v. Locks and Canals*, 3 Metc. (Mass.) 91.

Refusal to Allow Cotenant to Occupy.

—A tenant in common is ousted by a cotenant when the latter will not suffer him to enter and occupy. In such case he can maintain ejectment against the cotenant. *Norris v. Sullivan*, 47 Conn. 474.

A refusal after a proper demand by a tenant in common, in possession, to admit his cotenant is itself an ouster and dispenses with further proof on that point. *Held*, accordingly, in an action by a tenant in common against a cotenant to be let into possession, that an answer of the defendant, denying the plaintiff's title, filed in a former suit by the plaintiff against him, to be let into possession of the same land, was equivalent to an ouster. *Greer v. Tripp*, 56 Cal. 209.

In an action of trespass *quare clausum* between tenants in common, it was *held* that it is not necessary, to constitute ouster, that there should be a forcible ejectment of the plaintiff, or a forcible hindrance of his entry. Refusal of his right, attended by circumstances showing the determination of the disseisor to resort to physical force if necessary, is sufficient proof of ouster. *Jeacoat v. Knotts*, 13 Rich. (S. Car.) L. 50.

1. An ouster may be presumed in favor of a cotenant who, for many years, held the whole of the land exclusively and adversely, and who finally conveyed it. *Burns v. Headerick*, 85 Tenn. 102.

Thirty-six years' sole and uninterrupted possession by one tenant in common, without any account to, or demand made, or claim set up by his companion, is a sufficient ground for a jury to presume an actual ouster of the cotenant. *Doe d. Fisher v. Prosser*, Cowp. (Eng.) 217.

The perception of the entire profits by one tenant in common is not of itself sufficient to divest the position of his cotenant, nor are acts of ownership by one tenant in common necessarily to be construed into acts of disseisin, but

an undisturbed and peaceable occupancy of the premises by one for near thirty years, under an exclusive and notorious claim of title, without any rents and profits, or any acknowledgment of the right of the other, is sufficient. *Johnson v. Toulmin*, 18 Ala. 50.

The mere exclusive receipt of profits by one tenant in common for a period exceeding twenty-one years, is not sufficient evidence upon which to found a legal presumption of actual ouster of his cotenant, but it is evidence to go to the jury upon that point. *Bolton v. Hamilton*, 2 Watts & S. (Pa.) 294.

The North Carolina Rule.—Where B, a tenant in common, assumes to convey the entire estate to A, and A enters an ouster of the other tenant in common will not be presumed from the exclusive use of a purchaser of the interest of one tenant in common at an execution sale. *Ward v. Farmer*, 92 N. Car. 93.

The ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and appropriation of its profits to himself for a less period than twenty years, and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. *Caldwell v. Neely*, 81 N. Car. 114.

But in Massachusetts, cutting timber for fences by one tenant in common from time to time, for more than twenty years, in a cedar swamp, surrounded by cultivated lands, is no disseisin of his cotenant. *Ewer v. Lovell*, 9 Gray (Mass.) 276.

2. *Ball v. Palmer*, 81 Ill. 370; *Squires v. Clark*, 17 Kan. 84; *Chandler v. Ricker*, 49 Vt. 128.

Acts Amounting to Ouster.—As to what acts of one cotenant will amount to an ouster of the other, in view of the particular facts of each case, see *Carpentier v. Webster*, 27 Cal. 524; *Seaton v. Son*, 32 Cal. 481; *Cross v. Robinson*, 21 Conn. 379; *Goewey v. Urig*, 18 Ill. 238; *Larman v. Huey*, 13 B. Mon. (Ky.) 436; *Bracket v. Norcross*, 1 Me. (1 Greenl.) 89; *Thomas v. Pickering*, 13 Me. 337; *Small v. Clifford*, 38 Me. 213; *Thornton v. York Bank*, 45 Me. 158; *Lloyd v. Gordon*, 2 Har. & M. (Md.) 254; *Bennett v. Clemence*, 6 Allen

Acts which would amount to an ouster between landlord and tenant will have the same effect between cotenants.¹

(b) *As to Personal Property.*—As to personal property, a conversion takes place when one cotenant appropriates it altogether to his own use under a claim of exclusive right, and under circumstances which render a division practically impossible,² or when he sells or otherwise disposes of the common property as his own,³ but a refusal to make immediate partition does not constitute a conversion when it is made on the ground that such

(Mass.) 10; *Warfield v. Lindell*, 38 Mo. 561; *Hodgdon v. Shannon*, 44 N. H. 572; *Wood v. Griffin*, 46 N. H. 230; *Izard v. Bodine*, 11 N. J. Eq. (3 Stockt.) 403; *Jackson v. Whitbeck*, 6 Cow. (N. Y.) 632; *Wright v. Saddler*, 20 N. Y. 320; *Cloud v. Webb*, 4 Dev. (N. Car.) L. 290; *Meredith v. Andres*, 7 Ired. (N. Car.) L. 5; *Frederick v. Gray*, 10 Serg. & R. (Pa.) 182; *McHaffy v. Dobbs*, 9 Watts (Pa.) 363; *Phillips v. Gregg*, 10 Watts (Pa.) 158; *Law v. Patterson*, 1 Watts & S. (Pa.) 184; *Moore v. Collishaw*, 10 Pa. St. 224; *Peck v. Ward*, 18 Pa. St. 506; *Keyser v. Evans*, 30 Pa. St. 507; *Forward v. Deetz*, 32 Pa. St. 69; *Jones v. Weathersbee*, 4 Strobb. (S. Car.) 50; *Gray v. Givens*, 2 Hill (S. Car.) Ch. 511; *Cunningham v. Roberson*, 1 Swan (Tenn.), 138; *Hilton v. Duncan*, 1 Coldw. (Tenn.) 313; *Marr v. Gilliam*, 1 Coldw. (Tenn.) 488; *Leach v. Beattie*, 33 Vt. 195; *Hannon v. Hannah*, 9 Gratt. (Va.) 146.

A disseisin of one tenant in common by another may be shown by a long continued series of acts indicating a decisive intent and purpose to occupy the premises, to the exclusion and in denial of the right of the former, and such disseisin may be inferred from circumstances. *Lefavour v. Homan*, 3 Allen (Mass.), 354.

When two persons are tenants in common of a field, the merely putting a lock upon the gate by one of them, not shown to be kept locked, will not constitute an ouster so as to enable the cotenant in common to maintain trespass against the other. There must, for such a purpose, be other circumstances attending the act. *Jacobs v. Seward*, 5 L. R., H. L. (Eng.) 464; 41 L. J., C. P. 221; 27 L. T. 185.

One tenant in common of land on the sea shore enclosed a portion, and placed on it a fish house susceptible of easy removal, and a pump. He let the fish house, and paid taxes on it. The

other tenants used it as convenient. The pump was used by the neighborhood, and the land as a place of common resort. *Held*, that such use and occupation, even if continued for twenty-nine years, would not amount to an ouster of the cotenants. *Ingalls v. Newhall*, 139 Mass. 268.

In an action of ejectment against a husband and wife to recover an undivided two-thirds of a lot of land, the testimony of the husband in a trespass suit by the same plaintiff against him alone, that he entered and built a fence thereon, as agent of the wife, was *held* not proof of an ouster, so long as the wife might be presumed, from possession or otherwise, to own the other third. *Yager v. Larsen*, 22 Wis. 184.

1. *Squires v. Clark*, 17 Kan. 84; *Chandler v. Ricker*, 49 Vt. 128; *Ball v. Palmer*, 81 Ill. 370.

2. *Ripley v. Davis*, 15 Mich. 75; *Symonds v. Harris*, 51 Me. 14; *Agnew v. Johnson*, 17 Pa. St. 373; *Benedict v. Howard*, 31 Barb. (N. Y.) 569; *Lewis v. Clark* (Vt.), 8 Atl. Rep. 158; *Osborn v. Schneck*, 83 N. Y. 201.

A agreed to plant tobacco on B's land on shares. After the tobacco was ready for market, B locked it and refused to let A have any of it. *Held*, that the parties were tenants in common of the tobacco, and that the facts showed a sufficient demand and refusal to render B liable as for a conversion. *Burhs v. Winchell*, 44 Hun (N. Y.) 261.

3. *Weld v. Oliver*, 21 Pick. (Mass.) 559; *Williams v. Nolen*, 34 Ala. 167; *Van Doren v. Balty*, 11 Hun (N. Y.) 239; *Cowles v. Garrett*, 30 Ala. 341; *Smith v. Tankersley*, 20 Ala. 212; *Rains v. McNairy*, 4 Humph. (Tenn.) 356.

As respects third persons, if one tenant in common of a chattel, as here, a steamboat, sell it, it is an ouster and conversion, and his cotenant may follow it in the hands of a purchaser, or

division would be then injurious, and no claim is made to the cotenant's share.¹

(c) *Proving Ouster*.—The burden of proof rests with the tenant alleging an ouster,² and whether or not the acts of the parties amount to an ouster is a question of fact for the jury.³

(d) *Effect of Ouster*.—The rule that a conveyance of property in the adverse possession of another is inoperative and void applies between joint tenants and tenants in common after an ouster;⁴ but in *Indiana* such conveyance will not be considered

recover its value from the wrongdoer, but the proceeds of sale of a chattel by one tenant in common cannot be followed by a cotenant into any business into which the wrongdoer may invest them, and hold him to account for the profits. *Coursins' Appeal*, 79 Pa. St. 220.

1. *Shearin v. Rigsbee*, 97 N. C. 216.

Wool from a whole flock not shown to be of one grade is not property such as is readily divisible in portions absolutely alike in quality and value, and its retention, therefore, by one of two joint owners of it does not necessarily constitute a conversion. *Dear v. Reed*, 37 Hun (N. Y.) 594.

2. An ouster of one tenant in common by his cotenant is not to be presumed, but must be evidenced by some unequivocal act or acts irreconcilable with joint tenure. *White v. Williamson*, 2 Grant (Pa.) Cas. 249.

The possession of one tenant in common is the possession of both; and although the unity of possession may be destroyed by an actual ouster, that ouster must be positively proved or such circumstances must be proved as would support the presumption of an ouster. *Allen v. Hall*, 1 McCord (S. Car.) 131.

3. Whether one tenant in common entered upon the estate in hostility to and ousted his cotenant is a question of fact for the jury. *Blackmore v. Gregg*, 2 Watts & S. (Pa.) 182.

Where a cotenant has been in possession, receiving rents to his own use, which has been long acquiesced in by the other, it is for the jury to say whether, under all the circumstances, there has been an ouster and adverse possession. *Robidoux v. Cassilegi*, 10 Mo. App. 516.

Whether an entry accrues to the benefit of or is an actual ouster of the others is a question of fact, and the province of the jury to determine. *Parker v. Locks and Canals*, 3 Metc.

(Mass.) 91; *Cummings v. Wyman*, 10 Mass. 464.

4. Possession of land by a purchaser, under a deed for the entire lot, given without right in the grantees, is adverse to the rightful owners, though tenants in common with the grantor, and a subsequent deed executed by them, during such adverse possession, is inoperative and void, and subsequent releases by them to the grantor of the defendant, or the person under whom the defendant claims, enure to the benefit of the defendant. *Jackson v. Smith*, 13 Johns. (N. Y.) 406.

Where two persons entered as tenants in common into lands, under a deed which, being defectively executed, did not pass the estate, their occupancy, being open and actual, operated a disseisin of the grantor; so that a creditor of one of them, having extended his execution on a moiety of the land, the original owner could not convey the whole land by deed to the other, to defeat the extent, without first avoiding the disseisin by a re-entry or by judgment of law. *Gookin v. Whittier*, 4 Me. (4 Greenl.) 16.

A being a tenant in common of land conveyed his title to B, his cotenant, who afterwards conveyed to C, who sued to recover possession of the premises from D, who was in by disseisin, but failed to maintain the action, by reason of proof that B was disseised at the time of making the conveyance. A and B thereupon sued D; but it appeared that A had conveyed to B before D's disseisin commenced, and, on this ground, the action was defeated. B thereupon sued alone. *Held*, that the former judgments, and the grounds on which they were given, were admissible against D to show that his disseisin commenced after the conveyance from B to C, and that the action might therefore be maintained by B. *Barry v. Adams*, 14 Allen (Mass.) 208.

Personal Property.—Where one of

champertous unless the party in possession entered believing in good faith that he had title.¹

An adverse possession will not take away a right of entry between cotenants.²

3. Title by Adverse Possession.—The statute of limitations operates in favor of the adverse possession of one tenant against another after an ouster,³ and it begins to run from the time of such ouster.⁴

Where such adverse possession has been continued for the period prescribed by the statutes of limitations of the different

several tenants in common of personal chattels, has the actual adverse possession, claiming the whole title to be in himself, the rule applicable to the case of real estate, that the other claimants must recover their shares by a suit at law before they can come into a court of equity for partition, does not apply, because one tenant in common of a personal chattel cannot recover from his cotenant at law, except for the destruction of the thing, or its disposition in such way that it cannot be had for the purpose of partition. *Weeks v. Weeks*, 5 Ired. (N. Car.) Eq. 111.

1. *Elliot v. Frakes*, 90 Ind. 389.

2. *Midford v. Hardison*, 3 Murph. (N. Car.) 164.

3. *Odom v. Weathersbee* (S. Car.), 1 S. E. 890, 104; *Terrill v. Murry*, 4 Yerg. (Tenn.) 104; *Gray v. Givens*, 2 Hill (S. Car.) Ch. 511; *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 178.

Adverse possession as joint tenants is as effectual for the three years, limitation as if in severalty. *Burleson v. Burleson*, 28 Tex. 383.

If one tenant in common has sole possession for twenty years, without any acknowledgment on his part of title in his cotenants, and without any demand or claim on their part, they being under no disability, the law raises a presumption that such sole possession is rightful; and in such case it was *held* that their entry was tolled, and that they could not recover. *Black v. Lindsay*, Busb. (N. Car.) L. 467.

A joint owner, holding possession adversely to his co-owners, and in such a manner as to apprise them of the adverse nature of his possession, by lapse of twenty years, acquires a separate right, available against them, and sufficient to maintain an action for possession in his own name. *Russell v. Marks*, 3 Metc. (Ky.) 37.

4. *Northrop v. Marquam*, (Oreg.) 18 P. Pac. Rep. 449.

The deed of a cotenant purporting to convey the entire title to the tract of land recorded, and followed by the exclusive possession of the grantee, is, from the time of such recording and transfer of possession, a disseisin of the other cotenants, and the statute of limitations will begin to run against their right of action from that time. *Burgett v. Taliaferro* (Ill.), 9 N. E. Rep. 334.

Where one tenant in common enters upon land with intent to hold in severalty, the limitation of adverse possession runs against the cotenant who is out of possession. *Gillaspie v. Osburn*, 3 A. K. Marsh. (Ky.) 77.

The statute of limitations will not run against the one not in possession, unless there has been an open, notorious, exclusive, adverse possession of the other cotenant; but direct notice of the adverse possession need not be brought home to the party. The jury may presume notice from facts and circumstances. *Peeler v. Guilkey*, 27 Tex. 355.

A and B were joint owners of a chattel. C, knowing this, bought the chattel from A. C held it for five years and then sold it. *Held*, that the statute of limitations did not begin to run against B's right of action against C, to recover one half the price received by C from the time of the sale from A to C, because, until C sold the chattel, B's right was that of a co-owner. *Browning v. Cover*, 108 Pa. St. 495.

Estoppel by Recognition of Claim.—In ejectment for undivided half of certain lands, where defendants showed no documentary title, but had been put in possession by plaintiff's grantor, *held*, that if defendants lived on the land recognizing the claim of plaintiff's grantor up to the time he made deed to plaintiff of the half interest he claimed, they would be estopped from claiming the whole as against plaintiff. *Steed v. Knowles* (Ala.), 3 So. Rep. 897.

States, the other cotenants being under no disability, it will bar their right of entry and perfect the title of the tenant in possession,¹ but a husband and wife cannot ordinarily thus acquire title

1. *Black v. Lindsay*, Bush. (N. Car.) L. 467; *Russell v. Marks*, 3 Metc. (Ky.) 37.

The North Carolina Doctrine.—Under the settled law of *North Carolina*, one tenant in common of real property cannot, as against his cotenant, acquire title by adverse possession, unless such possession is continued for at least twenty years. *Hicks v. Bullock* (N. Car.), 1 S. E. Rep. 629.

A delay of two years and a few months by a married woman after the death of her husband, and of seven years after the falling in of the life estate of her father, to commence an action for the possession of lands, will not raise a presumption of an ouster by her cotenants. *Day v. Howard*, 73 N. Car. 1.

Possession for seven years under color of title by a tenant in common claiming to hold adversely to his cotenants, and applying the rents and profits to his own use, does not render his title perfect as against his cotenants. *Hampton v. Wheeler* (N. Car.) 6 S. E. Rep. 236.

Where one of several tenants in common of a tract of land conveys the whole tract, and his alienee and those claiming under him remain in possession for seven years (the adverse claimants not being under any disability), this gives a perfect title to the whole tract. *Burton v. Murphy*, 2 Tayl. (N. Car.) 259.

Texas.—A claiming half a lot under deed recorded, as tenant in common, but holding adversely to all others, afterwards purchased B's interest, continuing his possession as before of the entire lot. *Held*, that his possession, as against a third party claiming an adverse title to the half interest last purchased, was as much the possession of B as of himself, and he could add the period of possession from his entry up to the date of the deed to him from B, in an issue of limitation, registry and payment of taxes by B being shown. *Terrell v. Martin*, 64 Tex. 121.

In Iowa.—A cotenant's conveyance of the entire estate to a third person operates as a disseisin of his cotenant; and the grantee, entering and holding adversely thereunder for more than ten years, will have acquired a title barring

the cotenant of his grantor from asserting any right therein. *Kinney v. Slattery*, 51 Iowa 353.

In Georgia, where a tenant in common conveys the whole lot to a third person, who takes possession claiming the entire lot as his own, the disseisin bars the other tenants in common from asserting their right to the property after the expiration of seven years. *Horne v. Howell*, 46 Ga. 9.

In Indiana.—The possession by one as a tenant in common of lands for twenty years was *held* to be a bar to an action by a cotenant who was also in possession to recover the whole premises. *Dumont v. Dufore*, 27 Ind. 263.

In Maryland, where the owner of a fractional part of the reversionary interest in a life estate, conveyed the whole of the estate by metes and bounds to another in fee, under a general warranty, and the grantee and his successors had remained in exclusive possession for more than twenty years when the joint owner of the reversionary estate sought to recover his interest in them, it was *held* that the possession of the defendants under the deed of the whole estate in fee was adverse to the title and possession of the cotenant, and amounted to a disseisin. *Rutter v. Small* (Md.), 11 Atl. Rep. 698.

In New York, if one tenant in common, claiming title to the whole land, conveys the whole to a third person, who enters under the conveyance, such conveyance and entry are such an ouster of the other tenants in common, as to bar their right of entry after twenty years' possession under the conveyance. *Town v. Needham*, 3 Paige (N.Y.) 545.

Undivided Interest.—Deeds vesting merely an undivided interest in land will not support a plea of the statute of limitations of three and five years against the title of the owner of the other undivided interest thereof. *Kelly v. Medlin*, 26 Tex. 48.

Twelve Years' Possession in North Carolina.—One tenant had been in uninterrupted possession for twelve years, and there was nothing to show any assertion of rights by the petitioners until their suit. Defendant asked an instruction that, if he took and held possession under his deed openly, con-

against each other, as they cannot hold adversely to each other.¹

An adverse possession against two cotenants, one of whom is excepted from the operation of the statute, will operate against the other;² but in a joint demise to several persons, if the right of entry is tolled as to some, all are barred.³

IX. ACTIONS BETWEEN COTENANTS.—The fact that two or more persons are cotenants imposes no restraints upon their dealing with one another; nor does it affect their legal or equitable remedies, based upon any dealings between them independent of the subject matter of the cotenancy. They are, like copartners, at liberty to transact business with one another as individuals, and each in his individual capacity, to pursue the ordinary legal or equitable means of redress for any violation of his individual engagements with the others,⁴ but the rule is different in matters pertaining to the subject matter of the cotenancy.

1. Actions at Law.—It is the general rule that one joint tenant or tenant in common cannot maintain an action at law against his cotenant unless he has been disseised or ousted from the property to which each has the same and an equal right, or unless there has been an actual conversion or destruction of it.⁵

tinuously and adversely for twelve years without paying rent and disclaiming the right of any other person to share therein, the jury should find for him. *Held*, that under the law of *North Carolina*, one tenant in common cannot, as against a cotenant, acquire title by adverse possession, unless such possession is continuous for at least twenty years following. *Hicks v. Bullock* (N. Car.), 1 S. E. Rep. 629; *Breeden v. McLaurin* (N. Car.), 4 S. E. Rep. 136.

Personal Claim.—Where one of two tenants in common pays taxes on the shares of both, his claim to reimbursement is a mere personal claim, which, like other personal claims, is barred by the statute of limitations. *Sturgis v. Holliday*, 4 MacArthur (D. C.) 385.

1. Where land was purchased by a husband with the proceeds of other land, in which he and his wife owned an interest of one half each, and the deed was taken in his name, but they occupied the same together up to the time of the husband's death, *held*, that as neither husband nor wife can hold adversely to each other premises of which they are in joint occupancy as a family, the statute of limitations (Civil Code of *Oregon*) did not apply to bar her claim, nor was she prevented by lapse of time from attempting to enforce the same. *Springer v. Young* (Oreg.), 12 Pac. Rep. 400.

2. *Doolittle v. Blakesly*, 4 Day (Conn.) 265.

Disabilities.—The disability of one parcener does not save the right of entry to such as labored under no disability when the right accrued. *Griffith v. Huston*, 7 J. J. Marsh. (Ky.) 385.

In a joint action of ejectment against heirs, the statute may run against one heir, and not against another who is under disability, though the property has never been divided, as their rights are several, to some extent, and the destruction of the rights of some does not affect the legal title of the others. *Root v. McFerrin*, 37 Miss. 17.

3. *Dickey v. Armstrong*, 1 A. K. Marsh. (Ky.) 39.

4. *Freeman Part* 268.

5. *Jones v. Cohen*, 82 N. Car. 75; *Bishop v. Blair*, 36 Ala. 80; *Hartford v. Tethersow*, 2 Jones (N. Car.) L. 393; *Strong v. Colter*, 13 Minn. 82; *Gambhill Bridge Co. v. Newby*, 1 Oreg. 173.

A tenant in common can recover damages for an ouster by a cotenant. *Carpentier v. Mitchell*, 29 Cal. 330.

Common Law.—One tenant in common of real property cannot maintain an action against his cotenants, his remedy being by an action of account. *Thomas v. Thomas*, 5 Ex. (Eng.) 28; 1 L., M. & P. 229; 19 L. & J., Ex. 175; 14 Jur. 180.

Under the Missouri new code of 1849, one tenant in common may sue another

Thus one cotenant cannot maintain ejectment against another who has done no act inconsistent with the rights of the former in the premises,¹ but if he is ousted or wrongfully ejected he can maintain the action for his undivided share,² and if the ouster or eviction was accomplished by actual force he may maintain forcible entry and detainer.³ Nor can one of two or more joint tenants or tenants in common of a chattel maintain replevin or an action for the recovery of a specific chattel or his interest therein against his cotenant;⁴ but in *North Carolina* the action can be maintained if the chattel has been destroyed or carried out of

in the ordinary form of action. It is not necessary to resort to the action of account. *Rogers v. Penniston*, 16 Mo. 432.

The devisee of a certain number of acres of a large described tract of land may recover a judgment for the same before partition has been made. *Young v. Adams*, 14 B. Mon. (Ky.) 127.

1. *Lawton v. Adams*, 29 Ga. 273; *House v. Fuller*, 13 Vt. 165.

2. *Frakes v. Elliott*, 102 Ind. 47; *Johnson v. Swain*, Bush. (N. Car.) L. 335; *Bethell v. McCool*, 46 Ind. 303; *Morris v. Sullivan*, 47 Conn. 474; *Warren v. Hurshaw*, 2 Aik. (Vt.) 141.

One tenant in common can recover his portion, in an action of ejectment, from a cotenant upon evidence from which the jury can infer an actual ouster by such cotenant. *Corbin v. Cannon*, 31 Miss. 570.

In ejectment by one tenant in common against his cotenant, under a petition under the *Missouri* statute, a recovery may be had where the proof shows an ouster or an act amounting to a total denial of plaintiff's rights. *Falconer v. Roberts*, 88 Mo. 574.

Plaintiffs in ejectment, having failed to prove an actual ouster or a total denial of their rights, are not entitled to recover. As the *New York* Code Civil Proc., § 1515, requires such proof in ejectment between tenants in common and a general denial in the answer does not aid plaintiff's case. *Gilman v. Gilman* (N. Y.), 18 N. E. Rep. 849.

Alleging Ouster.—A tenant in common may maintain an action in ejectment against his cotenant for an undivided interest in land where there has been an actual ouster; but it is not necessary, under the *Florida* Laws, ch. 999, to allege the ouster in the declaration. *Gale v. Hines*, 17 Fla. 773.

Judgment for Common Possession.—One tenant in common may maintain ejectment against another who has de-

prived him wholly of the use and enjoyment of the premises owned in common, but judgment must be for possession subject to the rights of the other tenant. *Jones v. De Lassus*, 84 Mo. 541.

Cotenants as Witnesses.—Where tenants in common have made partition of land, they are not competent witnesses in ejectment brought by the one against the other for a part of the same land. *Patterson v. Lanning*, 10 Watts. (Pa.) 135. See *Rogers v. Mabe*, 4 Dev. (N. Car.) L. 180.

3. *Eads v. Rucker*, 2 Dana (Ky.) 111; *Mason v. Finch*, 2 Ill. (1 Scam.) 495.

A tenant in common may maintain an action against his cotenant under *Massachusetts* Gen. Stat., ch. 137, for forcible entry and detainer. *Presbrey v. Presbrey*, 13 Allen (Mass.) 281.

But in *California* one of two tenants in common, who is possessed of "one undivided half," cannot maintain an action of forcible entry and detainer against the other before their dividing line has been determined. *Lick v. O'Donnell*, 3 Cal. 59.

4. *Pulliam v. Burlingame*, 81 Mo. 111; *Balch v. Jones*, 61 Cal. 234; *Ellis v. Culver*, 2 Harr. (Del.) 129; *Bown v. Roach*, 78 Ind. 361; *Alford v. Bardeen*, 1 Nev. 228; *Hill v. Seager*, 3 Utah 379; *Strauss v. Crawford*, 89 N. Car. 149.

The purchaser of an undivided interest in land who acquires the right to cut timber only with the assent of cotenant cannot maintain replevin for timber cut and removed by him and taken possession of by his cotenant. The cotenancy precludes the suit. Nor does anything in the *Pennsylvania* act of May 15, 1871, relating to replevin affect the case, that act having no application to cotenants. *Bohlen v. Arthurs*, 115 U. S. 482.

On a bill to recover a one-third interest in certain property alleged to have

the State.¹ Neither can one tenant maintain trespass *quare clausum fregit* against his cotenant,² unless the act complained of amounts to an expulsion from, a hindrance in the enjoyment of or a destruction of the common property,³ nor trespass to try

been illegally sold at sheriff's sale for taxes and bought in by a cotenant or joint owner with complaint, the bill failing to show title, either legal or equitable in complaint, a demurrer was properly sustained. The Carver Cotton Gin Co. v. Barrett, 66 Ga. 526.

1. Strauss v. Crawford, 89 N. Car. Bonner v. Latham, 1 Ired. (N. Car.) 271; Grim v. Wicker, 80 N. Car. 343; Campbell v. Campbell, 2 Mur. (N. Car.) 65; Pitt v. Petway, 12 Ired. (N. Car.) 69.

2. Jones v. Chiles, 8 Dana (Ky.) 163; Roberts v. McGraw, 11 Bush (Ky.) 26; Anders v. Meredith, 4 Dev. & B. (N. Car.) 199.

One tenant in common cannot maintain an action of trespass against his cotenant for the removal of a fixture from land held in common. Gibson v. Vaughn, 2 Bailey (S. Car.) 389.

Tenants in common cannot maintain trespass against each other, even after they have made a partition by parol. McPherson v. Segguine, 3 Dev. (N. Car.) L. 153.

Where one tenant in common of a field leased the whole of it, and the other tenant ploughed up the crop of the lessee which was growing on the part of the field he had cultivated the year before, *held*, the lessee had no right of action for this trespass. Harman v. Gartman, Harp. (S. Car.) 430.

Trespass *quare clausum fregit* cannot be maintained by one tenant in common of land against another, for entering upon the common property under a claim of exclusive ownership of the whole, and cutting and carrying away all the timber thereon. Wait v. Richardson, 33 Vt. 190.

Whether or not the possession of the plaintiff under a tax deed was sufficient to maintain trespass against a stranger, he could not recover against the defendant, who was a tenant in common, having the legal title to an undivided interest, and hence entitled to possession. Todd v. Lunt (Mass.), 19 N. E. Rep. 522.

A tenant in common of land who removes, without doing any unnecessary damage thereto, a structure placed upon the land by his cotenant without his assent, which excludes him from

that portion of the land, is not liable to an action in the nature of trespass by his cotenant; nor can an action be maintained against him under the *Massachusetts* Pub. Stat., ch. 179, §§ 6, 7; *Byan v. Bickford*, 140 Mass. 31.

3. Maddox v. Goddard, 15 Me. 218; McClure v. Thrope (Mich.), 35 N. W. 829; *Erwin v. Olmsted*, 7 Cow. (N. Y.) 229; *Filbert v. Hoff*, 42 Pa. St. 97; *McGill v. Ash*, 7 Pa. St. 397; *Booth v. Adams*, 11 Vt. 156; *Murray v. Hall*, 7 C. B. (Eng.) 441; 18 L. J., C. P. 161.

One tenant in common cannot maintain an action of trespass against his cotenant, except where mesne profits are sued for, or there has been a total destruction of the property. *Bennett v. Bullock*, 35 Pa. St. 364; *Critchfield v. Humbert*, 39 Pa. St. 427.

The dis severance and removal of machinery from a mill, which was attached to it by spokes, bolts and screws, and worked by belts running from the permanent shafting driven by the water wheel and its incorporation with another mill, by one of the cotenants without the assent of the other, is such a practical destruction of the common property, that an action of trespass may be maintained by the latter against the former. *Symonds v. Harris*, 51 Me. 14.

Trespass *quare clausum fregit* may be maintained by a cotenant in possession, for an injury to the freehold. *Jewett v. Whitney*, 43 Me. 242.

Where the members of two societies occupied a field of land adjoining their common house of worship, for the fastening of their horses, during seventy years, and a member of one society directed his executors to sell all the land, of which he was "lawfully seised at his death," the societies having been then in possession for more than twenty years, under which power a part of the common land was sold, and the purchaser erected a wall, cutting it off, *held*, that the long possession had given the societies a good title to the land occupied, as tenants in common, and that one of them had a right to bring an action of trespass after there had been an ouster, which was the case here, as the testator was not lawfully

title to the land unless disseised or dispossessed,¹ and detinue will not lie.²

But one tenant may usually maintain an action upon the case against his cotenant for an injury to or deprivation or destruction of his rights in the common property,³ and waste will lie for a

seised of the part which had been sold. As it was claimed that this was sold for a graveyard, the plaintiffs in trespass were allowed to prove that they had offered to give a lot of land for that purpose, to show that there was no necessity for the encroachment. *Trauger v. Sassaman*, 14 Pa. St. 514.

After Partition.—One of two equal tenants in common, who has been ousted by the other, may, after obtaining judgment for partition, and for the possession of the half of the premises set off to him in severalty, recover from his cotenant the value of the use and occupation of his undivided half of the premises for the period that the latter has occupied the entire premises and has excluded him therefrom; the action being in the nature of the common law action of trespass for mesne profits. *Cook v. Webb*, 21 Minn. 428.

1. *Lord v. Tyler*, 14 Pick. (Mass.) 156; *Martin v. Quattlebam*, 3 McCord (S. Car.) 205.

Trespass to try title will not lie by a cotenant, against one claiming under the other cotenant. *Taylor v. Stockdale*, 3 McCord (S. Car.) 302.

A purchaser of the wife's land from the husband is, after her death, a tenant in common with her distributees; and where the latter have not been in possession they cannot maintain an action of trespass to try title, either against such purchaser, or one holding under him by a conveyance of part of the land in dispute. *Harvin v. Hodge*, *Dudley* (S. Car.) 23.

California.—But under section 254 of the Practice act, one tenant in common of real estate in the actual possession thereof, may maintain an action to determine the validity of an adverse claim of title by a cotenant. *Ross v. Heintzen*, 36 Cal. 313.

Texas.—One tenant in common may maintain trespass to try title without joining his cotenant. *May v. Slade*, 24 Tex. 205; *Croft v. Rains*, 10 Tex. 520.

2. *Carlyle v. Patterson*, 3 Bibb (Ky.) 93; *Lewis v. Night*, 3 Litt. (Ky.) 223; *Chinn v. Respass*, 1 T. B. Mon. (Ky.) 25.

3. *Anders v. Meredith*, 4 Dev. & B. (N. Car.) L. 199.

Where the plaintiff and defendant were tenants in common of a salmon fishery, *held*, that the plaintiff was entitled to recover damages in an action on the case for a continued deprivation of the enjoyment of his rights in being kept out of the occupation of any part of the fishery after he was deprived of it by the defendant without having first regained possession by entry or otherwise. *Duncan v. Sylvester*, 24 Me. 482.

Where five were seized of a mill as tenants in common and the mill was burned through the negligence of one of them, *held*, that the other four might jointly maintain an action on the case against the one by whose negligence the mill was burned. *Chesley v. Thompson*, 3 N. H. 9.

If one tenant in common of land upon which a mill is situated erects a dam below on the same stream upon his several estate and thereby flows the common property to the injury of his cotenant, the latter may maintain an action on the case against him. *Odiorne v. Lyford*, 9 N. H. 502.

Tenants in common constructed a basin communicating with a public canal and laid out lots facing upon one side of the basin. They then, by a partition deed, divided the lots between them, giving to each proprietor the privilege of erecting warehouses upon his lots extending the same to the basin, and declaring that the basin "should be the common property of the parties, their heirs and assigns forever." *Held*, that the grantee of one of the proprietors, who built a pier in the basin in front of his own lot, on the line between it and the lot of a grantee of another original proprietor, whereby the latter was obstructed in the convenient use of the waters of the basin, was liable to an action on the case for such obstruction. *Beach v. Child*, 13 Wend. (N. Y.) 343.

The remedy of one tenant in common against another for allowing animals to run at large and damage crops is by an action on the case and not by trespass

misuse of it,¹ while trover cannot be maintained for the mere detention or exclusive use of the common property,² if it is destroyed or so converted and appropriated as to render any future enjoyment impossible, trover,³ or an action for damages for its

quare clausum fregit. McGehee v. Peterson, 57 Ala. 333.

Rents and Profits.—If one tenant in common in lands take the whole profits thereof, the other cannot maintain case for his part. Chambers v. Chambers, 3 Hawks (N. Car.) 232.

1. An action on the case sounding in tort may be maintained by one tenant in common against his cotenant for a misuse of the common property; as for wasting the water of an aqueduct over and above his proper share, though not amounting to a total destruction thereof. McLellan v. Jenness, 43 Vt. 183.

A tenant in common of unimproved timber lands, who cuts and removes timber and converts it to his own use, is liable for waste to his cotenant under the statute giving the action of waste to one tenant in common against another. Elwell v. Burnside, 44 Barb. (N. Y.) 447.

Where an action is brought by one tenant in common of premises against another for damages resulting from an overflow of water caused by leaving open a faucet in a water closet, it is incumbent on the plaintiff to show that the mischief was caused by the defendant's negligence, as there is no presumption that it was so caused, the defendant's possession not being exclusive. Moore v. Goedel, 34 N. Y. 527.

Defence.—In an action under the *Maine Stat.* 1821, ch. 35, to prevent tenants in common, etc., from committing waste brought by one heir against another as tenant in common to recover damages for injury to land descended from the intestate, it is no defence that the whole of the land will be required to satisfy the claims of the creditors of the intestate. Moody v. Moody, 15 Me. 205.

Proof as to Who Cotenants Are.—In an action for cutting timber brought by a tenant in common against a cotenant under the *Maine Stat.* 1821, to prevent tenants in common, etc., from committing waste, the plaintiff need not prove who the other cotenants are. Hubbard v. Hubbard, 15 Me. 198.

2. Webb v. Danforth, 1 Day (Conn.) 301; Leonard v. Scarborough, 2 Ga. 73; Fightmaster v. Beasley, 7 J. J. Marsh. (Ky.) 410; Hinds v. Terry, 1 Miss. (Walk.) 80; Ballou v. Hale, 47 N. H.

347; Tyler v. Taylor, 8 Barb. (N. Y.) 585; Farr v. Smith, 9 Wend. (N. Y.) 338; Gilbert v. Dickerson, 7 Wend. (N. Y.) 449; Campbell v. Campbell, 2 Murph. (N. Car.) 65; Heller v. Hufsmith, 102 Pa. St. 533.

The owner farming with the tenant on shares cannot maintain trover for his share of the products against the former without proof that the latter has sold or destroyed them. Williams v. Nolen, 34 Ala. 167.

A tenant in common of a chattel cannot maintain trover against his cotenant or his vender, claiming sole ownership, so long as he remains in possession of the chattel. Dain v. Cowing, 22 Me. 347.

In *Vermont* one tenant in common cannot maintain trover against his cotenant of the same, for any act less than the destruction of his interest therein. Hurd v. Darling, 14 Vt. 214; Tubbs v. Richardson, 6 Vt. 442.

Before Severance.—One tenant in common cannot maintain trover against his cotenant for crops in which they have a joint interest until a separation or severance by the parties, or until such a conversion shall exist as goes to the destruction of the crop or the entire exclusion of the cotenant from the enjoyment of his right and interest therein. Carr v. Dodge, 40 N. H. 403.

Common Law.—Although by the common law one tenant in common of a chattel cannot maintain trover against a cotenant, even though the latter obtains possession of the article and excludes the former from all participation in its use, the statute has so far modified this rule as to allow one tenant in common to maintain trover against a cotenant who assumes exclusive control over the property. Benjamin v. Stremple, 13 Ill. 466.

But the sale of an entire chattel by one tenant in common will not support trover by his cotenant. Barton v. Burton, 27 Vt. 93; Sanborn v. Morrill, 15 Vt. 700.

3. Russell v. Russell, 62 Ala. 48; Needham v. Hill, 127 Mass. 133; Weld v. Oliver, 21 Pick. (Mass.) 559; Perry v. Granger, 21 Neb. 579; Hyde v. Stone, 7 Wend. (N. Y.) 354; s. c. 9 Cow. (N. Y.) 230.

conversion or destruction may be maintained,¹ but a conversion to sustain such action must amount to a total destruction of the

A tenant in commor. may maintain trover against his cotenant for using hay owned by them as such tenants, but not for selling it. *Lewis v. Clark*, 59 Vt. 363.

Trover lies by one tenant in common of a personal chattel against his cotenant, for the appropriation of the chattel to his exclusive use, where the chattel is of such a nature as to be necessarily destroyed by the use thereof. *Lowe v. Miller*, 3 Gratt. (Va.) 205.

Where one of two joint owners of personal property misuse the joint property by appropriating it to uses for which it was not designed, and refuses to apply it to the purposes for which it was held by both, or if one delivers the property wrongfully to a stranger, for purposes inconsistent with the uses for which it was designed, and such stranger denies the title of the other, and claims exclusive possession and ownership, trover may be maintained. *Agnew v. Johnson*, 17 Pa. St. 373.

In order to enable one tenant in common to maintain trover against another there must not merely be a carrying away of the property, but such a carrying away of it as will disable the party complaining from having the lawful use or benefit of the property; or there must be the destruction of it. *Jacobs v. Seward*, 5 L. R., H. L. (Eng.) 464; 41 L. J., C. P. 221; 27 L. T. 185.

If a tenant in common wrongfully sells and converts the common property, and the purchaser again sells it for money, the other tenant in common may bring his sole action of trover against such first purchaser, for the conversion, or he may waive the tort, and bring his action for money had and received, for the money received by such first purchaser from his vendee for the plaintiff's interest in such property. *White v. Brooks*, 43 N. H. 402.

The Recovery.—One tenant in common of a chattel may recover in trover or trespass from another tenant in common his aliquot share of such chattel. *Dailey v. Grimes*, 27 Md. 440.

One tenant in common of personal property may maintain trover against his cotenant for his undivided half of such property. *Potter v. Neal*, 62 How. (N. Y.) Pr. 158.

1. *Guyther v. Pettijohn*, 6 Ired. (N. Car.) L. 388; *Grim v. Wicker*, 80 N. Car. 343; *Alderson v. Schulze*, 64 Wis. 460; *Benedict v. Howard*, 31 Barb. (N. Y.) 569.

A tenant in common of a mill may maintain an action against his cotenant for diverting the water from the mill for his separate use. *Pillsbury v. Moore*, 44 Me. 154.

Trees cut by one cotenant of land without the consent of the other belong, after being cut, to both; and if the one cutting them sells them as his own without the consent of the other, the latter may maintain an action for the conversion. *Shepard v. Pettit*, 30 Minn. 119.

One tenant of a personal chattel may maintain an action against his cotenant for the loss or destruction of the chattel, while in the possession of such cotenant as a common carrier, through his negligence or carelessness. *Herrin v. Eaton*, 13 Me. 193.

Taking Possession with Notice.—Where the holder of a chattel mortgage on the interest of one tenant in common sells the whole chattel at a public sale under his mortgage, a purchaser at such sale who takes possession with notice of the rights of the other tenant in common, is liable to the latter in an action for the conversion of his interest in the chattel. *Van Doren v. Baety*, 11 Hun (N. Y.) 239.

Measure of Damages.—One who has an undivided interest in a stock of goods seized and sold under a mortgage given by the other owner is damaged by the conversion to the extent of his interest, for he is not bound to take back what is left after the mortgagees have sold as much as they see fit. *Keables v. Christie*, 47 Mich. 594.

Where a joint owner assumes, without authority, to sell the interest of his cotenant, the latter may repudiate the sale and sue for the conversion of the property, or he may ratify it and sue for his share of the money received. *Perry v. Granger*, 21 Neb. 579.

Where, in such case, the crop was subsequently destroyed while wrongfully detained, but without negligence on the part of the tenant in possession, the cotenant is entitled to some, if no more than nominal, damages, but not to the full extent of the value of his

common property, or something equivalent to it, through the fault of the cotenant thus converting it.¹

Assumpsit is a proper action for a joint tenant or tenant in common to bring against his cotenant for his share of the proceeds of the common property sold by them.²

It may also be maintained by one against another when the latter has received the whole, or a greater part of the rents and profits,³ and such

share. *Shearins v. Rigsbee* (N. Car.), 1 S. E. Rep. 770.

1. *Alderson v. Schulze*, 64 Wis. 460.

One tenant in common of a chattel cannot sue another for a conversion, unless the common property is destroyed, carried beyond the limits of the State; or, when perishable, so disposed of as to prevent the other from recovering it. *Grim v. Wicker*, 80 N. C. 343.

Where a tenant in common of shingle machines, and other like personal property, removes it to a building of his own in another town, and uses it there to manufacture his own lumber, this is such a destruction of the property as will support an action by the cotenant for the conversion. *Benedict v. Howard*, 31 Barb. (N. Y.) 569.

Plaintiff and P. owned a planing machine, which, with the building in which it stood, they leased for a term of years. P. being indebted to defendants, gave them as security a chattel mortgage upon the whole machine; he informed them, however, at the time, that he owned only half and plaintiff the other half. The payments stipulated in the mortgage were fixed so as to correspond in amount and dates with the rents reserved in the lease, which was looked to to discharge the mortgage debt. In an action for conversion of plaintiff's interest, held, that the taking of the mortgage did not amount to a conversion by defendants, conceding that the giving of it was a conversion by P.; that the effect of the mortgage was simply to vest the interest of P. upon default in defendants. *Osborn v. Schenck*, 83 N. Y. 201.

Sales.—If personal property held in common is sold by one of the tenants as exclusively his own, such a sale is a conversion, and the cotenant may maintain trover therefor against him. *Weld v. Oliver*, 21 Pick. (Mass.) 559.

Where one joint owner of a chattel sells the entire chattel and delivers possession to the purchaser, it is con-

version for which trover lies. *Rains v. McNairy*, 4 Humph. (Tenn.) 356.

Evidence.—In an action to recover damages for the conversion of a chattel, if the plaintiff is the several owner, he would be entitled to recover upon proof of a demand or refusal; but if his interest had never been separated, he could not recover against a co-owner without proving also that the conversion went to the destruction of the chattel or the exclusion of his right. *Allen v. Harper*, 26 Ala. 686.

2. *Cowles v. Garrett*, 30 Ala. 341; *Smith v. Tankersley*, 20 Ala. 212; *Richmond v. Connell* (Conn.), 11 A. 852; *Haven v. Foster*, 9 Pick. (Mass.) 112; *Dickinson v. Williams*, 11 Cush. (Mass.) 258; *Brinkerhoff v. Wemple*, 1 Wend. (N. Y.) 470; *Wright v. Searles*, 59 How. (N. Y.) Pr. 176.

If one tenant in common of a chattel converts it wholly to his own use by a sale, his companion may maintain trover against him; and one tenant by agreement, express or implied, with the other, may be entitled to contribution for services rendered or expenditures made; and the share which the other tenant ought to contribute would be recoverable in assumpsit, and would be matter of set-off in an action *ex contractu*, but not in defence to trover which is in tort. *Russell v. Russell*, 62 Ala. 48.

Joinder of Parties.—The share of a tenant in common of property separable by weight or measure may be demanded of his cotenant having possession of the whole, and, on refusal, or conversion by the latter, the former may sue in his own name without joining all the other cotenants. *Stall v. Wilbur*, 77 N. Y. 158.

Tenants in common cannot join in actions of assumpsit brought under *New Hampshire Revised Statutes* for a share of the value of timber cut by a cotenant. *Mooers v. Bunker*, 29 N. H. (9 Fost.) 420.

3. *Abel v. Love*, 17 Cal. 233; *Scant-*

action will not bar his right to an equitable adjustment and lien.¹

This is also the proper form of action for one cotenant to recover a contributive share from another when the former has incurred expense for repairs or improvements,² or has made advances to remove a joint encumbrance,³ or to recover for waste,⁴

lin et al. v. Allison, 32 Kan. 376; *Gowen v. Shaw*, 40 Me. 56; *Brinley v. Kupfer*, 6 Pick. (Mass.) 179; *Johnson v. Ames*, 6 Pick. (Mass.) 330; *Haskell v. Adams*, 7 Pick. (Mass.) 59; *Fanning v. Chadwick*, 3 Pick. (Mass.) 420; *Haven v. Foster*, 9 Pick. (Mass.) 112; *Lazell v. Miller*, 15 Mass. 207; *Thayer v. Brewer*, 15 Pick. (Mass.) 217; *Brigham v. Eveleth*, 9 Mass. 538; *Jones v. Harraden*, 9 Mass. 540; *Sargent v. Parsons*, 12 Mass. 149; *Chapman v. Gray*, 15 Mass. 439; *Hudson v. Coe* (Me.), 8 Atl. Rep. 249; *Wright v. Searles*, 59 How. (N. Y.) Pr. 176; *Cochran v. Carrington*, 25 Wend. (N. Y.) 409; *Borrell v. Borrell*, 33 Pa. St. 492.

A tenant in common may maintain assumpsit, independently of *Maine*, Rev. St. ch. 95, § 16, against a cotenant who has received from subtenants more than his share of the rents and profits of the common estate, unless plaintiff had been disseised by such cotenant when the rents and profits were received. By said section this right of recovery in assumpsit is extended to cases of personal occupancy by the cotenant of the whole, or more than his proportion of the common estate. *Richardson v. Richardson*, 72 Me. 403.

Under *Maine* Stat. 1848, ch. 61, § 1, an action of special assumpsit against a cotenant, for a share of the profits of the joint estate, cannot be sustained unless the plaintiff proves that the estate has yielded "rents, profits or income," and allege in his declaration that the defendant has taken more than his share of such rents, profits, or income, "without the consent of his cotenant." *Moses v. Ross*, 41 Me. 360.

Use and Occupation.—A tenant in common who uses the property of his cotenant may be held liable to him for rent in an action for use and occupation, where the conduct of the tenants towards each other in relation to the occupancy of the premises has been such that an agreement to use each a particular part of the premises can be reasonably implied. *Boley v. Barutio*, 120 Ill. 192.

Such action will not be defeated on account of a dispute raised by the de-

fendant concerning the title, provided the plaintiff was owner of the estate, and was not disseised at the date when the income was received in money by the defendant. *Hudson v. Coe* (Me.), 8 Atl. Rep. 249.

1. *Wright v. Searles*, 59 How. (N. Y.) Pr. 176.

2. *Jordan v. Soule* (Me.), 12 Atl. Rep. 786.

If tenants in common of a mill-dam repair it together, and one pays more than his proportion of the expense, he may recover the excess from his cotenant by an action of assumpsit. *Gwineth v. Thompson*, 9 Pick. (Mass.) 31.

Any one of certain parties, tenants in common by virtue of an act of the legislature granting them the right to run a ferry, etc., being on the spot where the property is situated, may maintain *indebitatus assumpsit* against another or his heirs, for repairs to the common property. *Haven v. Mehlgarten*, 19 Ill. 91.

Previous to the adoption of the practice act, assumpsit would have lain for his share where a tenant in common had made necessary repairs upon the common property, and a recovery can now be had in an ordinary civil action under that act. *Fowler v. Fowler*, 55 Conn. 256.

3. *Dickinson v. Williams*, 11 Cush (Mass.) 258.

A and B owned and occupied, as tenants in common, land subject to the payment of annual rent, and divided the payments between them from year to year. Subsequently they sold the land and divided the avails between them, and promised the vendee that they would pay all rent in arrear. A, being subsequently, called upon to pay such rent, paid it, and B afterwards died. *Held*, that A might recover one half the amount so paid against his estate in *indebitatus assumpsit* for money paid. *Fisher v. Kinaston*, 18 Vt. 489.

4. A tenant of land may maintain an action of assumpsit against a cotenant, under *New Hampshire* St. July 5th, 1834 (entitled "an act relating to copartners," etc.) for his proportion of

or for a balance due from one cotenant to another after the joint interest is determined.¹

(a) *Procedure*.—The procedure in actions at law between joint tenants and tenants in common differs from that in ordinary action only as affected by the peculiar relations of the parties to each other.²

2. Actions in Equity.—When the several interests of cotenants have become complicated and incapable of being definitely ascertained and set apart at law, equity will entertain jurisdiction to

damage caused by cutting timber, although, the plaintiff has alienated his interest in the land after the cutting, but before the action was commenced. *Blake v. Milliken*, 14 N. H. 213.

1. Though a tenant in common may now have relief in equity against his cotenant, under *Massachusetts St.* 1823, ch. 140, yet if the joint interest is determined, all accounts and liabilities being settled and discharged, and a balance remains due from one cotenant to another, it may be recovered in an action of assumpsit, and without any express promise. *Fanning v. Chadwick*, 3 Pick. (Mass.) 420.

2. Joinder of Causes of Action.—In an action by one tenant in common against another, a cause of action arising from contract cannot be joined with another arising from injuries to property and for torts; nor causes of action arising from negligence, with a claim for an account of profits of real estate. *Hall v. Fisher*, 20 Barb. (N. Y.) 441.

Pleading.—Where one tenant in common sues his cotenant to recover land, if the defendant controvert the plaintiff's title he thereby admits the ouster. If he does not dispute the title, he should admit it in the pleadings and deny the ouster. *Withrow v. Biggerstaff*, 82 N. C. 82.

Where three defendants are sued as joint tenants in a writ of entry, and two of them plead severally sole tenure of the whole demanded premises, the third pleads sole tenure of all but forty acres, and as to the forty acres says nothing; if issue is joined on all the pleas and found for the defendants, the plaintiff cannot have judgment against the third defendant for the forty acres. *Tappan v. Tappan*, 36 N. H. 98.

In a real action by one of two cotenants against the other, if the latter plead *nul disseisin*, the defendant shall prevail, if he show title to an individual part of the land. *Lyford v. Thurston*, 16 N. H. 399.

Evidence.—Where a tenant in common, having possession of the joint property, makes an entry in a book, indicating that he no longer holds for his cotenant, such entry is admissible in his favor, on a plea of the statute of limitations, if notice of it be brought home to the cotenants; but without such notice it is not admissible. *Haral v. Wright*, 57 Ga. 484.

In an action by a tenant in common against his cotenant to be let into possession, plaintiff offered in evidence to prove an ouster, defendant's answer in a former suit by plaintiff to be let into possession of the same land. Held admissible. *Greer v. Tripp*, 56 Cal. 209.

In an action of disseisin by one tenant in common, who grounds his claim on the common title, his cotenants are incompetent witnesses for him. *Barrett v. French*, 1 Conn. 354.

Verdict.—If the title be admitted in a controversy and can be seen with reasonable certainty, the verdict should set forth the undivided share to which the title is apparent, and the effect of a judgment thereon would be to put plaintiff in possession with defendant. *Withrow v. Biggerstaff*, 82 N. Car. 82.

Measure of Recovery.—One of five tenants in common, in an action for partition, and to recover for rents and profits, may recover the value of one fifth of the rents and profits, less a proportionate share of the value of necessary improvements made and taxes paid by the occupying tenant. *Scantlin v. Allison*, 32 Kan. 376.

Double and Treble Damages.—Under *Maine Rev. Stat.*, ch. 95, § 5, a tenant in common of a life estate cannot recover treble damages for an injury to the common property. *Richardson v. Richardson*, 64 Me. 62.

Pub. St. Massachusetts, ch. 179, §§ 6, 7, giving a right of action with threefold damages to a tenant in common or joint tenant, against his cotenant, who, with

adjust, by one decree, the rights of all.¹ Thus an action in equity for an accounting is a proper remedy where one tenant has taken the rents and profits or had the use and occupation of the common property to the exclusion of the others,² and to enforce

notice, cuts timber, commits waste, etc., applies only to cases of known and recognized tenancies in common or joint tenancies, and not to those where a party enters on land and cuts timber under an honest claim that he owns the whole of the land in fee; whereas, in fact, he has title to an undivided portion only. *Jenkins v. Wood*, (Mass.) 14 N. H. Rep. 512.

In England, one tenant in common may bring an action for the double value of his moiety, under 4 Geo. II, ch. 28. *Cutling v. Derby*, 2 W. Bl. (Eng.) 1075.

1. *Smith v. King*, 50 Ga. 192.

Where one tenant in common has purchased title under encumbrance, and prays decree for transfer, etc., the others will be allowed on cross bill to protect their interests, by contributing their share of the purchase money. *Smith v. Osborne*, 86 Ill. 606.

If a tenant in common convey, with covenant of general warranty, a part of the common subject by metes and bounds, and, upon partition afterwards made, a material part of the land so conveyed is allotted to other tenants in common, so that the purchaser does not obtain the substantial inducement to his contract of purchase, a court of equity will, upon the prayer of such purchaser, cancel and annul such deeds and place the parties *in statu quo*. *Worthington v. Staunton*, 16 W. Va., 208.

2. One tenant in common of realty cannot maintain an action of assumpsit against his cotenant in Illinois for his proportion of the rents, the latter having had exclusive possession. His only remedy is by an action of account under the statute, or by a bill in chancery. *Crow v. Mark*, 52 Ill. 332.

There can be no ouster between tenants in common in possession; and, therefore, if one takes more than his share of the rents, the only remedy is account, either by action under the 4 Anne, ch. 16, § 27, or by a bill in equity. *Dens v. Shuckburgh*, 4 Y. & C. (Eng.) 42; 5 Jur. 21.

One tenant in common may maintain a bill in equity against his cotenants, some of whom are infants, who

have occupied the whole of the common property for an account of rents and profits. *Early v. Friend*, 16 Gratt. (Va.) 21.

Where there are more than two tenants in common, one cannot recover rents and profits in an action of account against another. It is a case for chancery. *Wiswell v. Wilkins*, 4 Vt. 137.

One tenant in common has no remedy against his cotenant; or a guardian for a portion of the rents received by either, or for repairs, except an action of account, or bill in equity. *Sherman v. Ballou*, 8 Cow. (N. Y.) 304; *DeMott v. Hagerman*, 8 Cow. (N. Y.) 220.

A court of chancery has jurisdiction to take the account between tenants in common, when one of them is a married woman, notwithstanding the statute of Vermont, R. L. § 1202, allowing the action of account between such tenants. *Paine v. Slocum*, 56 Vt. 504.

Where one of two tenants of common land, being in the sole possession, proceeded to clear all the arable land, and by a succession of crops wore it out, and left no timber to repair fences, *held*, that these injuries were not such as the law would remedy by an action on the case in the nature of waste, but that the proper mode of redress was by an action of account, or a bill in equity for an account. *Darden v. Cowper*, 7 Jones (N. Car.), L. 210.

Where one's estate in lands was, by the terms of his father's will, which gave him a certain life estate, determined by his death without issue, *held*, that a conveyance from the son to his wife was no bar to her will against cotenants to account for rents and profit. *Swallow v. Swallow*, 31 N. J. Eq. 390.

An action of account is in its nature equitable, although given by statute. It involves the idea of agency and an implied trust, and whatever remedy is appropriate to such an idea can be invoked by one devisee against another to recover an excess of rents received. *Wright v. Searles*, 59 How. (N. Y.) Pr. 176.

Evidence.—In an action of account between the administrator of a tenant

contribution for repairs, improvements, or the payment of a common charge.¹

Equity may also decree a partition of the common property, or a sale and distribution of the proceeds in case it cannot be divided,² and both a partition of the land and an accounting may be decreed.³

On such accounting a just proportion of expenses disbursed for the estate will be allowed,⁴ and any increase of the rents and pro-

in common and his cotenant, brought under *Illinois Rev. St. 1874, ch. 2, § 3*, as the issue is whether there should be an account, the adjusting of balances being left to auditors, evidence that one of the cotenants had made no profit is inadmissible. *Hawley v. Burd*, 6 Ill. App. 454.

Patent Rights.—One joint owner of a patent right is not bound to account to the other for its use, but if both agree to divide equally all moneys received by either for licence fees, a bill for an account and contribution can be maintained. *Gates v. Fraser*, 9 Ill. App. 634.

Estoppel.—In an action for an account, the tenant must allege that the defendant excluded him, or else agreed to act as agent as to the plaintiff's interest; for if one tenant lie by and suffer his cotenant to work and improve and enjoy the premises, as he would not be liable for any losses, so he is not entitled to any of the profits. *Pico v. Columbet*, 12 Cal. 414.

1. *McDearman v. McClure*, 31 Ark. 559.

A complaint in action by one cotenant against the other, alleging that plaintiff has been compelled to pay all the taxes on a tract of land owned in common, and to redeem it from tax sales, and asking that plaintiff have a lien on the land for such taxes and interest, and that his lien be foreclosed, states a cause of action; a tenant who pays an encumbrance having the right to compel contribution from cotenants. *Eads v. Retherford*, 114 Ind. 273.

2. Tenants in common of personal property cannot have partition at law; equity, therefore, has jurisdiction for that purpose. *Smith v. Smith*, 4 Rand. (Va.) 95.

In *Kentucky* equity has no power to decree a sale under doctrine of partitions, but must decree alternate holding between tenants in common. *Coleman v. Hutchenson*, 3 Bibb. (Ky.) 209.

The act which authorizes the superior court as a court of equity to order a sale of any real estate, and of any rights existing in or issuing out of the same, held in joint tenancy, tenancy in common, or coparcenary, and to distribute the proceeds (*Connecticut Stat. 1853, ch. 58*), is a constitutional act. *Richardson v. Monson*, 23 Conn. 94.

A tenant in common having a right to improve the land without the consent and against the will of his cotenant, but having no lien upon it for his improvements, can only be indemnified therefor by partition in equity, so as to have the improvements allowed to him, or to have compensation for them, if thrown into the common mass. *Drennen v. Walker*, 21 Ark. 539.

After G had conveyed land to D and D's father jointly, D becoming desirous on account of a certain bastardy proceeding, to quit the State, consented to a surrender of the joint deed, and to a conveyance by G to D's father alone, which was accordingly done. Many years afterwards D filed a bill against the coheirs of his father, claiming a half interest in the land, but not praying a partition. *Held*, that the bill was properly dismissed, even if D was a tenant in common, the bill could not be retained for a partition. *Dinwiddie v. Bell*, 95 Ill. 360.

3. Where matter of account against an insolvent cotenant for past profits of the land is involved, and where partition of the premises cannot be made without a sale, equity has jurisdiction to decree partition and account. *Lowe v. Burke* (Ga.), 3 S. E. Rep. 449.

4. *Anderson v. Greble*, 1 Ashm. (Pa.) 136.

On a suit for an accounting brought by a tenant in common against his cotenant in possession, the expense of necessary repairs made by the latter which have materially increased the value of the property, may be allowed him. *Pickering v. Pickering*, 63 N. H. 468.

Where one tenant in common ex-

fits caused by improvements is, as a general rule, allowed to the tenant making the improvements.¹ The amount he has actually received beyond his just proportionate share of the net amount being usually the measure of the accountability of one cotenant to another.²

A court of equity has power also, upon application of one tenant, to enjoin acts injurious to the common property on the part

pende money in making improvements upon land, although such expenditures do not strictly constitute a lien upon the land, yet a court of equity, in making partition, will first direct an account and suitable compensation, or assign to such tenants the portion on which the improvements have been made. *Green v. Putman*, 1 Barb. (N. Y.) 500.

1. *Annelly v. DeSaus*. (S. Car.), 2 S. E. Rep. 490; *Green v. Putman*, 1 Barb. (N. Y.) 500.

In an action for mesne profits by one cotenant against another, rent paid in permanent improvements on the land is not chargeable as profits received by the cotenant. Improvements may be defalked against a claim for mesne profits. *Walker v. Humbert*, 55 Pa. St. 407.

In an action in *Pennsylvania* by one cotenant against the others for the value of oil produced and sold by the latter while in the possession of the common property, by which they had deprived the former of wrongful means, defendants cannot set off the costs of producing the oil. *Foster v. Weaver* (Pa.), 12 Atl. Rep. 313.

2. *Joslyn v. Joslyn*, 9 Hun (N. Y.) 388; and see *Newman v. Newman*, 27 Gratt. (Va.) 714.

In an account between tenants in common of land used for getting timber, the value of the timber while growing is to be taken as the rule of valuation. *Walling v. Burroughs*, 8 Ired. (N. Car.) Eq. 60.

A was indebted to B for his share of the price of land conveyed to them jointly, and B took exclusive possession. *Held*, that in accounting for the income it would be treated as payments by A, and would be first applied to the interest of his debt. *Valentine v. Johnson*, 1 Hill (S. Car.) ch. 49.

Period Covered By Accounting.—The cotenancy of a purchaser at a sale on foreclosure of the interest of a tenant in common commences, for the purpose of an accounting between them, from the date of the deed, and does not re-

late back to the date of the mortgage, and the accounting should embrace no charge for repairs or improvements made or taxes paid by either tenant before the date of the deed. *Davis v. Chapman*, 36 Fed. Rep. 42.

Where one tenant in common is in possession of the premises, the right of his cotenant to an account of the rents and profits is barred by the statute of limitations, except for the last four years before the filing of the bill. *Corbett v. Laurens*, 5 Rich. (S. Car.) Eq. 301.

A and B held a lease, fixtures, stock, etc., in common, and A carried on the business of a refectory. C and D held mortgages on A's interest, and, not feeling secure, agreed to pay the arrears of rent if immediate possession were given, which was done, and they also agreed to protect the interests of B. They did not pay the rent, but suffered a sale under a distress, purchased the fixtures, stock, etc., at the sale, and continued the business. It having been arranged that C should procure a renewal of the case, for the common benefit of B, C and D, C procured the renewal in his own name, and then he and D separately sold their interests in the whole and kept B out of possession. *Held*, in a suit by B, that C and D were bound to account to him for his share of the profits previous to the sale to E, and for his share of the purchase money, deducting his share of what they had paid. *Bunell v. Bull*, 3 Sandf. (N. Y.) ch. 15.

In an action to set aside deeds for plaintiff's interest in realty, of which she and defendant were tenants in common, on the ground of fraud and undue influence, plaintiff may recover rent from the time of delivery of the deeds, she having then left the premises in defendant's possession, and defendant cannot charge plaintiff with taxes on the property paid by him during the continuance of a precedent life estate for the benefit of the life tenant. *Zapp v. Miller*, 109 N. Y. 51.

What May Be Shown.—Where one

of another,¹ or to appoint a receiver,² but this jurisdiction is sparingly used,³ and will, as a general rule, be exercised only in cases of waste and when the acts practically amount to a destruction of cotenant's interest in the property.⁴

The general rule, however, that an equitable action cannot be maintained where the remedy at law is adequate and complete,

tenant in common of a vessel, after having bargained for the sale of the whole vessel at a fixed price, purchased of one of his cotenants his share at a less rate, and the cotenant brought an action to recover damages, alleging false representations, *held*, that the tenant might show that he gave his cotenant as much for his share as it was worth. *Matthews v. Bliss*, 22 Pick. (Mass.) 48.

The cotenant in possession of land rented a portion of it, and occupied the remainder himself. *Held*, that it rested upon the plaintiff to show the net amount of rent received by defendant from his tenant, and, in the absence of proof on the subject, no presumption arose that the amount was equal to the whole annual value of the premises held in common. *Joslyn v. Joslyn*, 9 Hun (N. Y.) 388.

1. See *Hihn v. Peck*, 18 Cal. 640; *Obert v. Obert*, 5 N. J. Eq. (1 Hals.) 397; *Bailey v. Hobson*, 5 Ch. (Eng.) 180.

A tenant in common out of possession may maintain an injunction against his cotenant who is in possession to restrain him from committing waste by cutting down growing timber, where it is shown that the tenant in possession is insolvent, and where it appears that the growing timber constitutes the chief value of the land. *Stout v. Curry*, 110 Ind. 514.

Where a tenant in common has mortgaged the entire estate, and the mortgage is foreclosed, equity may enjoin a sale before partition, especially where the mortgagor is insolvent. A claim against the cotenant for profits arising from the exclusive use will enter into the decree for partition and account, and will take precedence of the mortgage made by him. *Arnett v. Munnerlyn*, 71 Ga. 14.

A and B owned a building in severalty, A having the north half and B the south half. It has a common entrance and stairway to the second floor; but above the first story a partition wall divided it. A having leased his portion to B for a term of years, cut doors for lessee's convenience through the parti-

tion, and ran a stairway from the second to the third floor on his own premises. The only hallway on the second floor was on B's side. When the lease expired B plastered up the doors in the partition wall and refused to allow A to use the hallway on his side. There was no satisfactory showing that the arrangements made for B's convenience were intended to survive the lease, or that B had estopped himself from objecting to A's use of his part of the premises thereafter. *Held*, that A could not claim any easement in B's premises after the termination of the lease, and could maintain a bill for injunction to restrain B from obstructing his use of the hallway. *Weinmeister v. Ingersoll*, 47 Mich. 31.

2. *Williams v. Jenkins*, 11 Ga. 595.

3. *Obert v. Obert*, 5 N. J. Eq. (1 Hals.) 397.

Bill for partition and injunction against cutting timber trees by defendants on land owned by plaintiffs and defendants as tenants in common. *Held*, that without an averment of the insolvency of defendants, or that they had cut or disposed of timber to an extent exceeding their share of the estate, the bill showed no ground for the relief asked. *Hihn v. Peck*, 18 Cal. 640.

4. *Billinghurst ex parte*, Amb. (Eng.) 104; *Radcliffe ex parte*, Jac. & W. (Eng.) 619.

After a decree has been made in a partition suit, the court has jurisdiction to grant an injunction to restrain a defendant from destroying or wasting the property.

But where, after a decree for sale in a partition suit, a defendant who was in the occupation of the property, but bound by no contract of tenancy, proposed to sell the hay and turnips from off the land, contrary to the custom of the country, as between landlord and tenant, *held* (reversing the decision of *STUART, V. C.*), that this was not such a destruction of the property as the court would restrain, and a motion for an injunction was refused. *Bailey v. Hobson*, 5 Ch. Eng. 180.

applies to cases of joint tenancy and tenancy in common.¹ All parties in interest must be joined in an equitable action between the cotenants,² and the rule in ordinary cases applies to the joinder of causes of action.³ The bill or complaint must allege facts, showing title either legal or equitable in the complainant, and clearly set forth all the facts upon which his recovery depends.⁴

X. ACTIONS BETWEEN TENANTS AND THIRD PARTIES—1. Actions by Tenants.—Joint tenants must, as a general rule, join in an action for the possession of land jointly held, and a failure to do so is fatal to a recovery,⁵ so they must join in actions for the recovery of a chattel or for its value,⁶ or for the rental of real

1. An action at law, praying for relief in equity, under *Massachusetts Stat.* 1853, ch. 371, cannot be maintained by one tenant in common against another for rent of the common land, and for cutting off the trees; the remedy at law, with the right to apply for an injunction pending the action, being adequate and complete. *Adams v. Palmer*, 6 Gray (Mass.) 336.

2. Where a tenant in common mortgages his interest to secure a debt, the mortgagee is a necessary party as well as the mortgagor, to an action between the cotenants for an accounting. *Howard v. Throckmorton*, 59 Cal. 79.

Where one of several tenants in common is in the use and occupation of land, all his cotenants must join in an action against him to recover rent; one cannot sue alone for his interest. *Blanton v. Van Zant*, 2 Swan (Tenn.) 276.

Benefit of One Only.—B, a tenant in common of land, agreed with the other tenants that, if they would join in a sale of the land, he would pay them certain amounts out of the proceeds, and retain only the surplus. A purchaser at the sale, who had made an overpayment, brought a bill in equity against B to recover the amount thereof. *Held*, that if such amount, by increasing the surplus, enured only to the benefit of B, the other tenants in common were not necessary parties. *Tarbell v. Bowman*, 103 Mass. 341.

3. In an action of account, by two tenants in common against a third, for receiving more than his share of the common property, it is improper to join a claim for loss sustained by the two, by their cotenant having, by false pretences, obtained an injunction against them, that not being matter of account, even if the injunction related to the common property. *Hall v. Fisher*, 20 Barb. (N. Y.) 441.

4. *Carver etc. Co. v. Barrett*, 66 Ga. 526.

To a bill charging that the defendant is cotenant with the plaintiffs, and praying an account, a plea that the land is situated in a foreign country, and that the title can be tried there only, and suggesting exclusive title in himself, must show what that title is. *Livingston v. Columbian Ins. Co.*, 3 Johns. (N. Y.) 51.

A petition, under code *Alabama*, 1886, section 3263 *et seq.*, for partition of crops, alleged that cotton, corn and cotton seed, grown and cultivated on petitioner's land, in 1887, was in the actual possession of, and owned jointly by, petitioner and defendant; that part of the crops had been gathered, and that petitioner had a lien, by law or contract, on defendant's share. *Held*, that a demurrer to the petition should be sustained, the facts, showing that the crop was raised under a contract constituting the parties tenants in common, not being stated. *Mooney v. Hough* (Ala.), 4 So. Rep. 19.

5. *Dewey v. Lambier*, 7 Cal. 347; 4 Wait's Act. & Def. (1885 ed.) 481.

One having joint interest in personal property may proceed alone to recover possession from a mere trespasser. *Lannes v. Courege*, 3 La. An. 74.

6. *Little v. Harrington*, 71 Mo. 390; *Haskell v. Jones*, 24 Me. 222; *Smoot v. Wathen*, 8 Mo. 522; *Hill v. Gibbs*, 5 Hill (N. Y.) 56.

If two or more tenants in common of a chattel unite in the sale of it, their right of action for the consideration money is joint, and they cannot sue the purchaser in separate actions for their respective portions of the money, unless it be upon an agreement by the purchaser to pay each of them his particular share. *Suydam v. Combs*, 15 N. J. L. (3 Green) 133.

property.¹ But in *South Carolina* one joint tenant may recover that portion of the common property to which he may show himself entitled.²

The possession of one, however, being the possession of all, one joint tenant may alone maintain a merely possessory action for the land owned jointly.³

As to tenants in common, the general rule is that they must join in actions to recover damages for an injury to the common property, but where there is no joint injury, and they are not jointly interested in the damages, the remedy may be by a several action.⁴ In real actions, their interests being several, separate

But where two joint owners of merchandise consigned it to a merchant for sale, and informed him that each owned a moiety, and gave separate instructions each for his own moiety, *held*, that one of the consignors might alone maintain a separate action against the consignee for a violation of his separate instructions. *Hall v. Leigh*, 8 Cranch (U. S.) 50.

1. *Weinsteine v. Harrison*, 66 Tex. 546.

A parcener is not entitled to a decree for rents, unless his coparceners are before the court. *Webb v. Conn.*, 1 Litt. (Ky.) 83.

2. *Boyleston v. Cordes*, 4 McCord (S. Car.) 144; *Watson v. Hill*, 1 McCord (S. Car.) 161.

3. *Rabe v. Fayler*, 18 Miss. (10 Smeed & M.) 440.

4. *Lothorp v. Arnold*, 25 Me. 136; *Lee v. Turner* (Tex.), 9 S. W. 149.

Damages for Injuries.—Tenants in common must join in all actions for injuries to the common estate. *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; *May v. Parker*, 12 Pick. (Mass.) 34; *Daniels v. Daniels*, 7 Mass. 135; *Tucker v. Campbell*, 36 Me. 346; *Bullock v. Hayward*, 10 Allen (Mass.) 460; *Lane v. Dobyns*, 11 Mo. 105; *De Puy v. Strong*, 37 N. Y. 372; *Winters v. McGhee*, 3 Smeed (Tenn.) 128.

In an action for a nuisance to land, all the cotenants must join as plaintiffs. *Low v. Mumford*, 14 Johns. (N. Y.) 426.

Diversion of water from ditches is in the nature of a nuisance, and tenants in common may join in an action concerning it. *Parke v. Kilham*, 8 Cal. 77.

One proprietor of common lands cannot maintain an action in his own name for an injury to the common property, nor can he discharge the

claim of the proprietary. *Allen v. Woodward*, 22 N. H. (2 Fost.) 544.

Waiver of Tort.—The agent of three tenants in common of a tract of wood land, wrongfully cut down and sold the timber, and applied the proceeds to his own use. *Held*, that one of the owners could not waive this tort and maintain a separate action of assumpsit for a share of the proceeds; the wrongdoer's legal liability being to all the tenants in common jointly, their action must be a joint one, whether sounding in tort or in contract. *Irwin v. Brown*, 35 Pa. St. 331.

Refusal to Join.—One tenant in common of personal property may separately maintain an action against a stranger for a wrong done to it, if his cotenants refuse to join with him as plaintiffs, and they are nonresidents of, and are out of, the estate. *Peck v. McLean* (Minn.), 30 N. W. Rep. 759.

Agreement for Several Occupation.—If, by agreement between tenants in common, one is permitted to have the exclusive use and possession of a tract of the land which they together own, while the other has such use and possession of other lands so owned, then each may recover for any injury done to that tract which he has the right exclusively to use or possess. *Gulf C. & S. F. R. Co. v. Wheat* (Tex.), 3 S. W. 455.

Several Interests.—Where the interests of each is separate and distinct, each party can only recover his undivided moiety. *Throckmorton v. Burr*, 5 Cal. 400; *De Johnson v. Sepulbeda*, 5 Cal. 149; *Covilland v. Tanner*, 7 Cal. 38.

Tenants in common of land cannot bring a joint action of account rendered, to recover the proceeds of it from one who is liable on an implied contract to account with them; each must sue for himself. *McCreary v. Ross*, 7 Watts (Pa.) 483.

actions should be brought by each for their recovery,¹ and in such case each is entitled to recover his undivided share or interest in the common property,² though in some States the rule is that one tenant may recover the whole property against a tres-

A tenant in common, without joining his cotenant in the action, may recover of a purchaser the price of his undivided part of the common property. *Lyman v. Boston & M. R. Co.*, 58 N. H. 384.

Under *Massachusetts* Rev. Stat., ch. 24, § 48, one tenant in common of land, over which the county commissioners have laid out a highway, may apply for a jury to assess his damages without the joinder of his cotenants. *Dwight v. Hampden*, 7 Cush. (Mass.) 533.

One joint owner of a vessel may sue alone for his share of the surplus proceeds of a sale on execution against him and the other owners. *Hopkins v. Forsyth*, 14 Pa. St. 34.

1. *French v. Edwards*, 5 Sawy. (U. S.) 266; *Covillard v. Tanner*, 7 Cal. 38; *Edwards v. Mix*, 1 Root (Conn.) 246; *Daniel v. Bratton*, 1 Dana (Ky.) 209; *May v. Parker*, 12 Pick. (Mass.) 34; *Brown v. Warren*, 16 Nev. 228; *Stevenson v. Cofferin*, 20 N. H. 150; *Rand v. Dodge*, 12 N. H. 67; *Overcash v. Ritchie*, 89 N. Car. 384; *Dawson v. Mills*, 32 Pa. St. 302; *McFadden v. Haley*, 2 Bay (S. Car.) 457; *Perry v. Walker*, 2 Bay (S. Car.) 461; *Perry v. Middleton*, 2 Bay (S. Car.) 462; *Middleton v. Perry*, 2 Bay (S. Car.) 539; *Watson v. Hill*, 1 McCord (S. Car.) 161; *Contreras v. Haynes*, 61 Tex. 103; *McFarland v. Stone*, 17 Vt. 165.

Tenants in common cannot maintain a joint action in *Kentucky*. *Briscoe v. McGee*, 2 J. J. Marsh. (Ky.) 370.

In *Tennessee*, each tenant in common, as heir, may sue for his own share. *Johnson v. Harris*, 5 Hayw. (Tenn.) 113.

One tenant in common may sue one in possession by adverse claim, and recover the premises if the plaintiff represents the better title. *Collier v. Corbett*, 15 Cal. 183.

Towns, claiming as tenants in common, cannot join in a writ of entry. *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224.

Against a Trespasser.—One tenant in common can recover the entire premises as against a mere trespasser, without joining his cotenants as plaintiffs. *Treat v. Reilley*, 35 Cal. 129; *Sharon v. Davidson*, 4 Nev. 416.

One tenant in common may bring a writ of unlawful detainer, under *Virginia* St., 1814, for the whole land, against a party having no right whatever, without joining his cotenant. *Allen v. Gibson*, 4 Rand. (Va.) 468.

The Common Title.—Any one of several joint tenants or tenants in common may, unless the others prohibit it, maintain an ejectment for all, and the exhibition of the common title is *prima facie* a sufficient answer to the rule on him to show his authority for prosecuting the suit. *King v. Bullock*, 9 Dana (Ky.) 41.

Summary Proceedings.—Where two owners let jointly, and one buys out the other's interest in the property and the rent, he may demand the whole rent, and, upon refusal to pay, may obtain possession by summary process in his own name. *Griffin v. Clark*, 33 Barb. (N. Y.) 46.

Competency as Witnesses.—A tenant in common is a competent witness for his cotenant in ejectment brought by the latter. *Bennett v. Hethington*, 16 Serg. & R. (Pa.) 193.

Tenants in common may sue separately in ejectment, and be witnesses for each other, as a judgment in favor of one cannot be used by the other. *Hammitt v. Blount*, 1 Swan (Tenn.) 385.

2. *Edwards v. Mix*, 1 Root (Conn.) 246; *Overcash v. Ritchie*, 89 N. Car. 384; *Watson v. Hill*, 1 McCord (S. Car.) 161; *Johnson v. Harris*, 5 Hayw. (Tenn.) 113.

A tenant in common who, when in sole possession, is ousted by a trespasser, can recover only his individual share or interest in the land. *Dawson v. Mills*, 32 Pa. St. 302.

Lessees of tenants in common, suing for the whole tract, may recover for as much as they show title in, and demises by any of the cotenants. But a judgment for the whole, when there are cotenants on whose title there is no demise, is erroneous. *Daniel v. Bratton*, 1 Dana (Ky.) 209.

Where a joint tenant or tenant in common, sues for the whole of a tract of land, he shall not be nonsuited on that account, but shall have judgment

passer.¹ But in most of the States tenants in common are not compelled to sue separately, and may bring a joint action if they so elect.² Such an action by one tenant in common is not affected by the running of the statute of limitations against the rights of a cotenant.³

So tenants in common may maintain separate actions of trespass to try titles for their respective interests,⁴ and one may recover the whole as against a mere stranger who does not connect himself with the title.⁵

In actions for the recovery of personal property, all tenants in common must join,⁶ and this is the general rule in regard to ac-

for that part to which he is entitled. *M'Fadden v. Haley*, 2 Bay (S. Car.) 457; *Perry v. Walker*, 2 Bay (S. Car.) 461; *Perry v. Middleton*, 2 Bay (S. Car.) 462; *Middleton v. Perry*, 2 Bay (S. Car.) 539.

1. *Contreras v. Haynes*, 61 Tex. 103; *French v. Edwards*, 5 Sawy. (U. S.) 266; *Brown v. Warren*, 16 Nev. 228; *Sharon v. Davidson*, 4 Nev. 416; *Allen v. Gibson*, 4 Rand. (Va.) 468.

2. *Edwards v. Mix*, 1 Root (Conn.) 246; *Alford v. Deewin*, 1 Nev. 207.

Under *Mississippi St.*, 1850, for regulating the forms of pleading, tenants in common may sue jointly for the recovery of land. *Corbin v. Cannon*, 31 Miss. 570.

Tenants in common in a mine, acquiring their undivided interests at different times, may sue jointly under *California St.*, 1857, to recover the whole of such interests. *Goller v. Fett*, 30 Cal. 481.

Joint owners of a single tract of land cannot be required to bring separate actions for the recovery of possession against each person in possession, where there are several of them, merely because they hold and claim separate parcels thereof, and have no joint possession but may bring an action against them all jointly. *Woolfolk v. Ashby*, 2 Metc. (Ky.) 288.

Where the children and certain grandchildren of a devisee under a will passing certain land to the devisee for life, and at her death to her children, bring ejectment, as tenants in common, to recover the land, there is misjoinder, as the grandchildren took by inheritance from their parents, and not by purchase under the will, and are not tenants in common with the children of the devisee, their coplaintiffs. *Echols v. Sparks* (Ga.), 5 S. E. Rep. 132.

3. *McFarland v. Stone*, 17 Vt. 165.

4. *Hines v. Trantham*, 27 Ala. 359; *Grassmeyer v. Beeson*, 18 Tex. 753.

A tenant in common with others of a meeting house may maintain trespass for injuring one of the pews, against a person having no title either in the pew or in the house. *Murray v. Cargill*, 32 Me. 517.

Several tenants in common brought a joint action of trespass to try title; one of them died. *Held*, to be unnecessary to make his heirs parties; the right of the survivors was not affected by his death. *Watrous v. McGrew*, 16 Tex. 506.

Where one of two tenants in common deeded the right of way through their premises to a railroad company upon certain conditions, and the company entered, but without observing the conditions, *held*, that the granting tenant could recover for breach of contract, and the other, the entry being without his consent, for trespass. *Rush v. Burlington etc. Ry. Co.*, 57 Iowa 201.

But one tenant in common will not be allowed to maintain in his own name an action of trespass to try title for the benefit of all, if it appear that the action is speculative merely. *Cromwell v. Holliday*, 34 Tex. 463.

5. *Moore v. Stewart* (Tex.), 7 S. W. Rep. 771.

A tenant in common, not being in actual exclusive possession of land, who sets forth in his petition the extent of his interest, may, in trespass to try title, recover, as against a naked trespasser, the entire property. Nor does a different rule prevail since the adoption of *Texas Rev. St.* *Sowers v. Peterson*, 59 Tex. 216.

6. *Ellis v. Culver*, 2 Harr. (Del.) 129; *Haskell v. Jones*, 24 Me. 222; *Smoot v. Wathen*, 8 Mo. 522; *Hill v. Gibbs*, 5 Hill (N. Y.) 56.

tions for the recovery of its value for its conversion or appropriation;¹ but this rule does not seem to apply where the property was seized and sold under execution or other encumbrance,² or where the tenant suing was entitled to sole possession,³ and such tenants must be legal owners of the goods, and entitled to the possession of them in order to maintain the action.⁴ They must also join in trespass *quare clausum fregit*,⁵ but if one is entitled

1. *Haskell v. Jones*, 24 Me. 222; *Little v. Harrington*, 71 Mo. 390.

When certain heirs, claiming as tenants in common, bring an action of detinue, and it appears on the trial that one of the plaintiffs has been divested of his interest before suit, no recovery can be had. *Lewis v. Night*, 3 Litt. (Ky.) 223.

If one, having no interest in, or possession or control of a chattel, owned by two others in common, sell an undivided half of it to one of the owners, who thereupon carries it out of the state, the other tenant in common cannot maintain trover against such third person in consequence of such sale. *Bates v. Marsh*, 33 Vt. 122.

Surplus Moneys.—One tenant in common cannot sue separately from his cotenants for his separate share of the surplus in the hands of a mortgagee, after a sale by him, under a power in the mortgage. *Clapp v. Pawtucket Institution* (R. I.) 8 Atl. Rep. 697.

Release of Action.—Where two tenants in common of chattels join in an action for the conversion of the property, one cannot release or settle the action so as to deprive his cotenant of his remedy for the action. *Gock v. Keneda*, 29 Barb. (N. Y.) 120.

2. One tenant in common of personal property may maintain trover against an officer for his undivided moiety of the property, when the officer has sold the whole property upon execution against the cotenant. *White v. Morton*, 22 Vt. 15; and see *Keatles v. Christie*, 47 Mich. 594.

3. The joint owner of a chattel entitled to the sole possession, which a stranger obtains, may maintain detinue for it, without his coproprietors joining in the action. *Kirk v. Kirk*, 3 Dana (Ky.) 53.

If two persons own chattels as tenants in common, one of them may maintain an action against a third person who appropriates the whole. *Boobier v. Boobier*, 39 Me. 406.

The bailee of property delivered to him by a joint owner rightfully in pos-

session, will recover the whole value of the property, where the other joint owner has taken the whole property from him in an action of replevin. *Russell v. Allen*, 13 N. Y. 173.

Damages.—A tenant in common of a chattel, who sues for a conversion of the same, is entitled to recover damages for his share or interest only. *Rolette v. Parker*, 1 Ill. (Breese) 275.

One who has an undivided interest in a stock of goods seized and sold under a mortgage given by the other owner is damaged by the conversion to the extent of his interest. *Keatles v. Christie*, 47 Mich. 594.

It being by statute unlawful for an owner of an undivided interest in timber land to cut down or remove from the land any timber trees, without having first obtained consent of his cotenants, and, as against his non-consenting cotenants, his sale of lumber manufactured out of timber so cut or removed, passing no title to his vendee, *held*, in an action of trover against such vendee by a nonconsenting part owner, that the plaintiff was entitled to recover the value of his interest in the lumber, as of the date of the defendant's conversion, with no allowance for the expense and labor of the trespassing vendor. *Duff v. Bindley*, 16 Fed. Rep. 178.

Defences.—Where a person bought standing grass from a tenant in common of the land who was in occupation of it, and cut and harvested the grass, *held*, that the fact that the co-tenant had forbidden payment was no defence for not paying the full contract price of the grass. *Brown v. Wellington*, 106 Mass. 318.

4. *Haskill v. Jones*, 24 Me. 222.

5. *Austin v. Hall*, 13 Johns. (N. Y.) 286; *Decker v. Livingston*, 15 Johns. (N. Y.) 479.

A and B were tenants in common of a horse, and while it was in possession of B it was attached by the creditors of B as his sole property, and while in the keeping of the agent of the officer who served the writ it was again at-

to sole possession by agreement or otherwise, he may sue alone.¹

One joint tenant or tenant in common cannot maintain a suit for the recovery of the rent of the common property where the contract of rental was joint, unless his cotenants are joined with him,² but in *New York* and *Minnesota* the rule seems to be different;³ a tenant in common in possession may, however, let his share of the common property and bring an action for the recovery of the rent without joining his cotenant,⁴ and a lease of the

tached by the same officer at the suit of C, who was also a creditor of B, by his express direction. *Held*, that A was not thereby enabled to maintain trespass against C. *Welch v. Clark*, 12 Vt. 681.

A separate possession by several tenants in common of the common property, but without the intention of entirely severing the tenancy, will not prevent their joining in an action for a trespass upon one divided portion. *Johnson v. Goodwin*, 27 Vt. 288.

1. A part owner of goods in possession of them, may recover all the damages resulting from a trespass upon the goods committed by a stranger. *Hasbrouck v. Winkler*, 48 N. J. L. 431.

One of several tenants in common of real estate, who is in exclusive possession, under an agreement by which the others release their interests and agree to convey to him, may maintain an action against a trespasser on the premises and recover for the whole of the damages done. *Sparks v. Leavy*, 1 Robt. (N. Y.) 530; 19 Abb. (N. Y.) Pr. 364.

Where the agents of the plaintiffs, who were tenants in common with others of certain lands, having no authority from the other tenants, sold to the defendant a quantity of timber standing upon the lands, which he cut and converted to his use, it was *held*, that an action of *general indebitatus assumpsit* would lie to recover the value of their interest in the timber. *Kenniston v. Ham*, 29 N. H. (9 Fost.) 501.

A *coparcener* holds *per my and per tout*; and any entry by a stranger is a trespass for which a *coparcener* may recover damages and costs. *Roach v. Williams*, 2 Treadw. (S. Car.) Const. 202.

2. *Weinsteine v. Harrison*, 66 Tex. 546; *Gaines v. Buford*, 1 Dana (Ky.) 481.

Tenants in common of land may sue

jointly in *assumpsit* for money had and received to recover the rents. *Price v. Pickett*, 21 Ala. 741.

Where there is no express demise of land by tenants in common, they may join an action for use and occupation, and on the death of one of them after suit brought, the survivor may recover the entire damages for the use. *Cobb v. Kidd*, 19 Blatchf. (U. S.) 560.

Tenants in common may maintain a joint action for the rent due under a sealed lease of the joint estate, all the covenants in which are with them jointly, although by an agreement annexed to the lease, and made part thereof, it is stipulated that half of the rent shall be paid to each. *Wall v. Hinds*, 4 Gray (Mass.) 256.

To a declaration for arrears of rent, stating that the plaintiff and S, deceased were seised in fee and demised to the defendant from year to year, rendering a certain rent to the plaintiff and S, which had fallen into arrears since the death of S, it is a good plea that the plaintiff and S were tenants in common. *Burn v. Cambridge*, 1 M. & Rob. (Eng.) 539.

Earnings of Vessel.—Where one of several tenants in common is bankrupt, his assignee must be joined with the other tenants in an action to recover the earnings of their vessel. If the assignee has not been appointed, the action may be in the name of the bankrupt and other owners till the assignee comes in. *Stinson v. Fernald*, 77 Me. 576.

3. In an *avowry* for rent which savors of the realty tenants in common ought not to join. *Decker v. Livingston*, 15 Johns. (N. Y.) 479.

Tenants in common should distrain severally, but their joinder is a mere irregularity. *Dutcher v. Culver*, 24 Minn. 584.

4. *Hayden v. Patterson*, 51 Pa. St. 261.

The owner of an undivided portion of

whole from one tenant in common who is in possession and payment of the rent to him is a bar to an action for the rent by the other tenants.¹

A misjoinder can usually be cured by amendment.² Such misjoinder or nonjoinder should be taken advantage of by a plea in abatement,³ and if not so pleaded the tenant may recover,⁴ but he can have judgment only for his share.⁵

2. Actions Against Tenants.—It is the rule of the common law that for matters respecting the common property, joint tenants and tenants in common should be sued jointly in trespass, trover or case, and if only one be sued he may plead the cotenancy in abatement;⁶ but it would be otherwise in a mere personal action of tort,⁷ or an action for a personal claim,⁸ and proceedings to

a ground rent may maintain a separate action of covenant for his portion of the arrears. *Cook v. Brightly*, 46 Pa. St. 439.

Possession Under a Co-tenant.—A party put in possession or allowed to occupy a portion of premises by one tenant in common cannot be sued as a trespasser by another tenant in common without notice to quit or other act showing the termination of the licence or tenancy. *Ord v. Chester*, 18 Cal. 77.

In a suit by a joint owner of a flume to recover damages to it caused by opening a ditch above it, evidence of the consent of another joint owner to the opening of the ditch is relevant, and it is error to reject it. *Crary v. Campbell*, 24 Cal. 634.

1. *Grossman v. Lauber*, 29 Ind. 618.

2. See *Weinsteine v. Harrison*, 66 Tex. 546.

3. If a defendant neglects to avail himself of the nonjoinder of one or more joint tenants in an action of tort he cannot give it in evidence in reduction of damages. *Zabriskie v. Smith*, 13 N. Y. 322.

One of several tenants in common may sue separately in trover and the defendant may plead the nonjoinder in abatement; but if he fail so to plead he cannot take advantage of it on the trial nor by motion in arrest, but will be confined to giving in evidence the interest of the other tenants in common in mitigation of damages, and the plaintiff may proceed to recover his proportion or an aliquot interest in the common property. *Starnes v. Quin*, 6 Ga. 84.

4. *Tripp v. Riley*, 15 Barb. (N. Y.) 333; *Holmes v. Sprowl*, 31 Me. 73.

But in *North Carolina* an action of

detinue cannot be maintained by one of several tenants in common of a chattel, even though the defendant should fail to plead the nonjoinder of the others in abatement. The objection may be taken on the general issue or by demurrer or by motion in arrest of judgment. *Cain v. Wright*, 5 Jones (N. Car.) L. 282.

5. *Tripp v. Riley*, 15 Barb. (N. Y.) 333.

If one joint tenant or tenant in common sues alone for a chattel and the defendant does not plead in abatement, the plaintiff may have judgment for his part, but not for the whole. *Frazier v. Spear*, 2 Bibb. (Ky.) 385.

If one tenant in common sue alone in trespass *quare clausum fregit*, and the defendant, instead of pleading the nonjoinder of the other tenant in abatement, plead to the action, the plaintiff will recover for his share of the damages. *Webber v. Merrill*, 34 N. H. 202.

In an action of tort by a tenant in common of personal property, when the injury is joint, unless the nonjoinder of the cotenants is pleaded in abatement, the objections can be taken only by way of an apportionment of damages. *Holmes v. Sprowl*, 31 Me. 73.

While all the tenants in common should be plaintiffs in an action for injuries to real estate, the non-joinder of one will not require a dismissal of the action, as the damages may be apportioned according to the respective interests of the plaintiffs and judgment rendered accordingly. *Lee v. Turner* (Tex.) 9 S. W. Rep. 149.

6. 4 Wait's Act. & Def. 182.

7. 4 Wait's Act. & Def. 182; *Mitchell v. Tarbutt*, 5 Term R. (Eng.) 649, 651.

8. Joint purchasers cannot be con-

acquire the lands of cotenants for public use must be against them severally, and personal notice must be given to each.¹

Costs upon a judgment rendered in an action *ex contractu* against tenants in common are to be apportioned among the several judgment debtors in proportion to the shares which as amongst themselves they are respectively bound to contribute towards the debt,² and the joint or common property may, of course, be sold under an execution against all of the cotenants,³ but such a sale of the interest of one tenant does not divest the estate of the others.⁴

The property of joint tenants and tenants in common is, as a general rule, subject to levy under execution against one cotenant and the share of the execution debtor may be sold;⁵ but in *Massachusetts* and *New Hampshire* a different rule seems to have been adopted;⁶ a levy, however, by metes and bounds upon lands owned by the execution debtor as tenant in common with others, is void as to his cotenant,⁷ but is held good as to his undivided interest within such boundaries.⁸

XI. SEVERANCE OF THE RELATION.—The relation of joint tenants or tenants in common may be severed by the agreement of the cotenants, by acts on the part of the cotenants which amount to a destruction of the common ownership whether or not such acts may have been performed with an intent to sever the relation, and by the court in an action brought for that purpose.

demned *in solido* for the payment of the price of real estate. *Lallande v. Wentz*, 18 La. Ann. 289.

No action by firm creditors will lie against the representatives of a deceased tenant in common until the inability of the survivor to pay has been legally ascertained or clearly shown. *Tracy v. Snyder*, 30 Barb. (N. Y.) 110.

1. *Dyckman v. New York*, 5 N. Y. (Seld.) 434.

2. *Hayes v. Morrison*, 38 N. H. 90.

3. See *Southerland v. Cox*, 3 Dev. (N. Car.) L. 394.

4. *Southerland v. Cox*, 3 Dev. (N. Car.) L. 394.

5. *Blevins v. Baker*, 11 Ired. (N. Car.) L. 291.

The sheriff has a right to seize and levy on personal property in which the debtor has a joint interest. *Waldman v. Broder*, 10 Cal. 378.

Levy How Made.—A levy against a tenant in common should be upon such an undivided part of the whole premises as the amount of the execution bore to the whole. *Galusha v. Sinclear*, 3 Vt. 394.

A and B, tenants in common of a lot of land, mortgaged the same to C to secure two promissory notes. Upon a

judgment of foreclosure against B a *fieri facias* issued commanding the proper officers to levy on "the undivided half of the interest of B" in said land. Held, that this was sufficient although it did not show what the interest of B was as the presumption of law was that the shares of A and B were equal. *Baker v. Shepherd*, 37 Ga. 12.

6. A levy of execution on the undivided interest of a tenant in common in part of the land held in common is invalid. *Melville v. Brown*, 15 Mass. 82; *Bartlet v. Harlow*, 12 Mass. 348; *Baldwin v. Whiting*, 13 Mass. 57; *Atkins v. Bean*, 14 Mass. 404; *Blossom v. Brightman*, 21 Pick. (Mass.) 283; *Peabody v. Minot*, 24 Pick. (Mass.) 329.

As against his cotenant a levy upon the interest of a tenant in common in a part of the land held in common is void. *Whitton v. Whitton*, 38 N. H. 127.

7. *Stamford v. Fullerton*, 18 Me. 229.

An execution against a tenant in common cannot be extended upon the land so held by metes and bounds. *Smith v. Knight*, 20 N. H. 9.

8. *Treon v. Emerick*, 6 Ohio 391.

1. **Severance by Agreement.**—Cotenants may, of course, sever the relations existing between them by agreement at any time, and such severance is effected in cases of joint tenancy by mutual releases between them, while in cases of tenancy in common, words of inheritance are necessary to pass a fee,¹ a verbal division of lands cannot produce a severance of a joint tenancy created by grant,² but such a partition by tenants in common followed by possession in accordance with it and acts of exclusive ownership is, in some States, valid and binding.³

2. **By Acts of the Parties.**—A covenant to sell by a joint tenant severs the tenancy in equity, though not in law,⁴ and it is severed by a mortgage executed by a part of the cotenants,⁵ so a tenancy in common is severed by a sale by the one to the other,⁶ or by exclusive possession by one tenant of a part for the period fixed by the statute of limitations,⁷ and generally any acts or circumstances which evince an intention to abandon, or which effect a destruction of the common ownership will constitute a severance either of a joint tenancy or a tenancy in common.⁸

1. *Rector v. Waugh*, 17 Mo. 13.

A release to a tenant in common from his cotenants of their interests in a specific part of the land held in common confirms a conveyance previously made by him of that part of the land. *Johnson v. Stevens*, 7 Cush. (Mass.) 431.

2. *Lacy v. Overton*, 2 A. K. Marsh. (Ky.) 440.

3. *Wood v. Fleet*, 36 N. Y. 499; *Conklin v. Brown*, 57 Barb. (N. Y.) 265; s. c., 8 Abb. Pr. (U. S.) 345.

Where one tenant in common occupies a particular part of the common property by the agreement of the other tenants in common. It is so far a severance in fact as to permit him to maintain trespass against them for the same acts which would constitute trespass in a stranger, even though the length of such occupation would be insufficient to mature an absolute legal title in severalty. *O'Hear v. De Goesbriand*, 33 Vt. 593.

Words of Conveyance.—An agreement between tenants in common that each "shall have, collect, receive and enjoy" the ground rents of certain lots held in common "to him, his heirs and assigns forever, and clear from the other," was held not to sever the tenancy in common, there being no words of conveyance. *Burton v. Morris*, 3 Harr. (Del.) 269.

4. *Hinds v. Terry*, 1 Miss. (Walk.) 80; *Brown v. Raindle*, 3 Ves. Jr. (Eng.) 256.

5. *Simpson v. Ammons*, 1 Binn. (Pa.) 175.

6. See *Earles v. Meaders*, 1 Baxt. (Tenn.) 248.

Where it was held that the sale by a tenant in common of one half of a tract of land by metes and bounds to the cotenant operates as a partition of the land, but does not divest the party so conveying of interest in the remaining half and a levy of an execution against one tenant in common upon the whole tract, so held, and a sale thereunder conveys to the purchaser a good title to the undivided interest of the execution debtor.

7. *Gregg v. Blackmore*, 10 Watts (Pa.) 192.

Where there is a severance in fact of a joint tenancy, and possession held for twenty years under it, the title will be a title of severalty to the extent of such separate possession. *Drane v. Gregory*, 3 B. Mon. (Ky.) 619.

8. See *Gillett v. Gaffney*, 3 Colo. 351; *Davidson v. Heydon*, 2 Yeates (Pa.) 459.

A last will does not, under the *Pennsylvania* act of 1705, sever a joint tenancy. *Duncan v. Foorer*, 6 Binn. (Pa.) 193.

Where two tenants in common together used the common property as a landing place for steamboats, and one made a deed of quitclaim of his interest therein to the other, "saving and excepting" to himself, his wife and their descendants, the use and privileges in

3. By Action.—At common law no common owner of property, except parceners, had a right to have partition thereof made against the will of his cotenant, and the right to have partition in that case gave rise to the name of parcenary,¹ but through the medium of equity, and by means of statutory enactment, the right to have partition made has become an incident to ownership in joint tenancy and tenancy in common in all of the *United States* and in *England*.² Such actions are local in their nature,

the land which they then enjoyed, so long as the same should remain a steamboat landing. The fee was thereby conveyed to the grantee, and he could maintain ejectment, but the grantor and his descendants are entitled to the use of the property in common with the grantee and those holding under him for the purposes reserved in the deed. *Jones v. De Lassus*, 84 Mo. 541.

Recovery in trover by one joint tenant against the other has the effect of a partition of the whole of the joint property, if the defendant so desire; and in that case, if the plaintiff has exclusive possession of more than his share of the property, he cannot recover; though the defendant has exclusive possession of another portion amounts to an ouster of his cotenant and a conversion. *Roddy v. Cox*, 29 Ga. 298.

By the marriage settlement the intended husband and wife each covenanted to settle any personal estate which should, during the coverture, vest in the wife or in the husband in her right. At that time the wife was entitled, as one of two joint tenants, to personal estate in the expectancy on the death of a person who died during the coverture. *Held*, that the marriage and the covenant to settle each operated to sever the joint tenancy. *Baillie v. Treharne*, 17 Ch. D. (Eng.) 388; 50 L. J. Ch. 295; 44 (N. S.) L. T. 247; 29 W. R. 729.

Leasehold property was given by will to two sisters as joint tenants, and they mutually agreed to bequeath it in trust for each other for life, and for their nieces after the death of the survivor. One sister having died, the survivor made a will giving the property in a different manner. *Held*, that the agreement between the sisters, carried out by the making of the wills, severed the joint tenancy, and that the property must be administered on the footing of a tenancy in common. *Wilford's Estate, in re Taylor v. Taylor*, 11 Ch.

D. (Eng.) 267; 48 L. J., Ch. 243; 27 W. R. 455.

Personal Property—Sale.—The sale of the share of a joint owner of a cargo severs the tenancy, and the vendee may maintain trover against the other partners. *Selden v. Hickock*, 2 Cal. (N. Y.) 166.

The share of a tenant in common of chattels naturally severable, as grain, may be severed and seized by his creditor on attachment or execution, but if the property is exempt the debtor may recover the possession, or the value, as in other cases. [Following 15 Barb. (N. Y.) 333]. *Newton v. Howe*, 29 Wis. 531.

Income.—A joint tenancy in income is severed as to each instalment as it becomes payable, without actual payment. *Walmsley v. Foxhall*, 40 L. J., Ch. (Eng.) 28.

Division Between Tenants.—Tenants in common of a growing crop may make a partial division of it among themselves as it is gathered; and, when this is done, each holds in severalty the part allotted to him, while they remain tenants in common of the undivided residue. *Gafford v. Stearns*, 51 Ala. 434. Compare *McKeithen v. Pratt*, 53 Ala. 116.

Where personal property, severable in nature, in common bulk of the same quality, is owned by several as tenants in common, each tenant may sever and appropriate his share, if it can be determined by measurement or weight without the consent of the others, and sell or destroy it without being liable to them in an action for the conversion of the common property. *Fobes v. Shatlock*, 22 Barb. (N. Y.) 568.

1. 1 Washb. Real Prop. (5th ed.) 426.

2. The statute 31 Hen. VIII., ch. 1, and 32 Hen. VIII., ch. 32, provided for a compulsory process of partition by a writ or action at common law. This form of proceeding continued in *England* to be one of the forms by which partition could be affected until

and must be brought in the county in which the land lies,¹ and can ordinarily be maintained only by a cotenant in possession or entitled to immediate possession,² who owns a freehold interest in his own right;³ and where the property cannot be divided it

the statute of 3 & 4 Wm. IV, ch. 27, by which it was abolished and the statutes by which it was created have been re-enacted in most of the States. But in England and this country it has become practically obsolete many years ago. But there still is a power to compel partition which may be readily applied in both countries. In England it is done through chancery, and in some form or other the right of having partition made is incident to an ownership in joint tenancy as well as to estates in common. 1 Washb. Real Prop. (5th ed.) 426.

For a compilation of the statutes or the several States relating to partition of joint estates and estates in common, see 1 Washb. Real Prop. (5th ed.) 433, note.

A joint tenancy is severed by an order from the court for a division. *Postell v. Skirving*, 1 Dessaus. (S. Car.) 158.

Where there were several tenants in common, and one died leaving a will which was contested by his heirs, an act of assembly authorizing partition to be made, and directing all persons and corporations claiming under him, whether as heirs or devisees, to be made parties, and their purparks to be set out and conveyed to trustees, or such of them as may be entitled, or the proceeds, if sold, paid to such trustee giving security, was *held* to be constitutional; and the adverse claimants under the deceased cotenant were properly joined in the proceedings. *Biddle v. Starr*, 9 Pa. St. 461.

1. 1 Washb. Real Prop. (5th ed.) 426.

2. 1 Washb. Real Prop. (5th ed.) 428.

A tenant in common in reversion cannot maintain a suit for partition. If a plaintiff has no title to maintain his suit at the time when the bill is filed he cannot carry on the suit by subsequently acquiring a title and amending the bill accordingly. Decree of the master of rolls affirmed. *Evans v. Bageshaw*, 8 Eq. 469; (Eng.) 5 Ch. 340.

A tenant in common, who has not been actually ousted, can maintain a petition for partition, although he may, for the sake of a remedy, have elected to consider himself disseised, and brought a writ of entry against his co-

tenants, counting on a disseisin by him. *Fisher v. Dewerson*, 3 Metc. (Mass.) 544.

Where a tenant in common devised his half interest in the land to his son, appointed the cotenant executor, and directed that the personal property should remain on the land until the son became of age, to be used by the executor as before. *Held*, that this did not prevent the executor, as a cotenant, from selling his half of the land, or from obtaining a partition. *Hunter v. Stoneburner*, 92 Ill. 75.

By Purchaser at Execution Sale.—If one, shown to be owner of one ninth part of certain real estate, as tenant in common, be in possession, claiming also an additional eighteenth part, and his claim be acquiesced in by the other tenants in common, those facts are evidence that he was seised as tenant in common of three-eighteenths part; and a levy of execution on a judgment against him upon those three-eighteenths parts, will vest the seisin thereon in the judgment creditor, so as to entitle him to maintain a petition for partition, as against a tenant in common who has so admitted his interest. *Smith v. Knight*, 20 N. H. 9.

3. A father devised to his three sons certain lands as tenants in common during their natural lives, and after the death of either of them his share to go to his lawful issue, and if any of said sons should die without issue his share to go to the survivor of them, or if any of them have deceased, their lawful issue to have the share that would have gone to their father if living. *Held*, that no partition could be made among the sons except of their present interest or estate in the lands. *Reeves v. Reeves*, 6 N. J. Eq. (2 Hals.) 156.

Illegal Consideration.—Where one of two tenants in common conveyed his interest, and his vendee filed a petition for partition, *held*, that the cotenant could not resist on the ground that the consideration of the deed was in part an agreement to compound a felony, *Sewell v. Holland*, 61 Ga. 608.

Trust Estates.—Land purchased for the purpose of a parsonage and glebe, for the joint benefit of five congregations, is devoted to a charitable use

may be sold under direction of the court and a division made of the proceeds.¹

and one of the congregations cannot sue for partition without the consent of the others, especially where the property is vested in trustees for the benefit of the "ministerial charge," such a trust being an active one. Appeal of Latshaw *et al.* (Pa.), 15 Atl. Rep. 676.

Personal Property.—The relation of joint purchasers of plantation, live stock and farming utensils, whereon the vendor retains a lien for unpaid instalments, is that of tenants in common rather than partners; but each is not entitled to a partition for his portion in severalty until completion of the contract of purchase. *Abernathy v. Smith*, 57 Ala. 359.

But in *Illinois* one tenant in common may sue out a writ of partition, even though there be a subsisting life estate in another in the premises, notwithstanding the objection of the owner of the life estate; and in case partition cannot be made, he may obtain an order for the sale of the whole of the premises, subject to the life estate. *Hilliard v. Scoville*, 52 Ill. 449.

1. Where a joint tenancy in a tract of land has been created by deed, the

ordinary has the power, under the *South Carolina* act of 1824, to order the sale of the share of the deceased tenant for the purpose of division among those interested. *Brennan v. Hill, Dudley* (S. Car.) 342.

Whenever the estate of tenants in common is practically incapable of division by assigning to each owner thereof his equal portion in severalty, he cannot be compelled by force of the provisions of § 25, ch. 228, Gen. Stat. *New Hampshire*, either to sell his own share or purchase that of his cotenant; but, in such a case, resort may be had to a court of equity, which has power to compel a sale of the entire estate, and order distribution of its proceeds upon equitable principles. *Barney v. Leeds*, 54 N. H. 128.

Under *Virginia* Stat. 1819, authorizing the sale of lands jointly, *held*, where the interest of each owner is less than \$300, if the value of each interest in the land divided is less than that sum, the court may order a sale thereof, though the estimated value of the whole land would give to each joint owner more than \$300. *Parker v. McCoy*, 10 Gratt. (Va.) 594.

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